DECISIONS OF THE

FEDERAL MARITIME COMMISSION

VOLUME 25

JULY 1982 TO JUNE 1983

U.S. GOVERNMENT PRINTING OFFICE
WASHINGTON, D.C., 1994

For sale by the U.S. Government Printing Office
Superintendent of Documents, Mail Stop: SSOP, Washington, DC 20402-9328
ISBN 0-16-045395-X

ISBN 0-16-045395-X

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FEDERAL MARITIME COMMISSION

WASHINGTON, D.C.

June 30, 1983

Alan Green, Jr., Chairman
James J. Carey, Member
James V. Day, Member
Thomas F. Moakley, Member
Robert Setrakian, Member

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FEDERAL MARITIME COMMISSION

[46 C.F.R. PART 536]

[GENERAL ORDER 13, AMENDMENT 12; DOCKET NO. 80-54]

TIME/VOLUME RATE CONTRACTS - TARIFF FILING REGULATIONS APPLICABLE TO CARRIERS AND CONFERENCES IN THE FOREIGN COMMERCE OF THE UNITED STATES

July 2, 1982

ACTION: Final Rule

SUMMARY: This prescribes uniform rules and regulations governing the filing of time/volume rates. It will eliminate the present confusion and imprecision surrounding existing time/volume rates and their related tariff provisions. It will also enable the Commission to monitor the use of time/volume rates to ensure that they comply with the terms of their related contracts and the Shipping Act, 1916.

DATE: Effective August 9, 1982.

SUPPLEMENTARY INFORMATION:

On November 2, 1981, the Commission issued a notice of proposed rulemaking (46 F.R. 54390) requesting comments on a rule which would govern the filing of time/volume rates. Forty-four comments have been received by or on behalf of shippers, carriers, conferences of carriers, ocean freight forwarders, and other interested parties (*See* Attachment A). In light of these comments, a number of changes have been made to the rule as proposed. However, before discussing these changes, certain threshold issues must be addressed.

Some commentators challenge the Commission's previous finding that this rulemaking is exempt from the Regulatory Flexibility Act (RFA) (5 U.S.C. § 601 *et seq.*). They believe that this finding is incorrect and that the Commission is required to conduct an initial regulatory flexibility analysis before continuing this rulemaking. The Commission has considered these arguments but continues of the view that the requirements of the RFA do not apply. This proceeding clearly relates to the particular applicability of rates and practices exempt under section 601(2) of the Act (5 U.S.C. § 601(2)).

Several commentators question whether a non-vessel operating common carrier by water (NVOCC) is entitled to use time/volume rates. They contend that an NVOCC is not a true shipper in that it has neither title nor beneficial interest in the shipments it handles. They further submit that conferring shipper status on NVOCCs and permitting them to gain the benefits of the underlying carriers' time/volume rates will disrupt the United States oceanborne foreign commerce. They fear that the use of time/volume rates by NVOCCs will enable them to consolidate small shipments which would otherwise not qualify for a volume rate and thereby erode the underlying carriers' revenues. Commentators are also concerned that an NVOCC will be able to secure for its customers an undue advantage over other shippers who prefer to deal directly with a carrier. Some commenting parties believe that because of the NVOCCs ability to consolidate small shipments and qualify for lower volume rates, they will eventually use their increased market power to obtain unlawful rebates, unjustly discriminatory arrangements, and other illegal favors.

The Commission has historically considered an NVOCC as a shipper in relation to the underlying vessel operating carrier. Nothing presented herein convinces the Commission otherwise. Moreover, the time/volume tariff rules contain sufficient safeguards to prevent the alleged potential abuses, as does the Shipping Act itself. It should also be noted that freight consolidators have been using time/volume rates for many years without adverse consequences. Therefore, there appears to be no valid regulatory reason to deny to the NVOCC class of shippers the benefits which may accrue from time/volume rates.

Finally, there is the question of whether conferences, and dual rate conferences in particular, should be authorized to participate in time/volume ratemaking. Certain commentators argue that time/volume rates are not conventional or routine ratemaking and that contracts for such rates contravene section 14b of the Act (46 U.S.C. § 813a). The Commission disagrees. Time/volume rates are a routine form of ratemaking, interstitial to agreements approved pursuant to the Shipping Act, 1916. Contracts providing for such rates are not exclusive patronage contracts subject to section 14b, but rather are contracts based on the volume of freight offered.

The Commission will now address individual sections of the proposed rule and the comments addressed thereto.

Section 536.2, as proposed, included separate definitions for time/volume rate and time/volume contract. One commentator suggested that two separate definitions are unnecessary. The Commission agrees. These two interrelated definitions can be combined to form a more concise and exact definition and the final rule has been amended accordingly.

Several commentators opposed proposed section 536.______ (a), which requires the publication of time/volume rates and contracts 30 days *prior* to their taking effect and their being made available to all shippers during that period. They noted that, if a contract rate accomplishes a reduction, it should be permitted to take effect upon filing, consistent with existing requirements for rate reductions.

The Commission understands the need to accommodate those instances when market conditions necessitate fast transactions while preserving the need to make all contracts available to all shippers. Moreover, the Commission does not wish to preclude the use of renewable contracts. Therefore, the final rule has been amended to permit new time/volume rates to become effective upon filing. They must, however, be made available to all shippers or consignees under the same terms and conditions for a period of at least thirty (30) days subsequent to the commencement of a new or renewal contract period.

At the suggestion of some commentators, proposed section 536.______ (b)(1) is being amended to make clear that time/volume contracts may cover more than one commodity. This change will permit a single time/volume rate and/or contract to apply to several commodities, thereby eliminating the additional time and expense of maintaining several different contracts.

Several commentators suggested that the recordkeeping requirements of proposed sections 536.______ (b)(5), (b)(8), and (f) be combined or eliminated. Other commentators more particularly objected to section 536.______ (b)(8), which required that a shipper/consignee furnish written notice to the designated record-keeper of any shipment under a contract. The contention is that the carrier's bill of lading is a sufficient written record of time/volume shipments, because both carrier and shipper receive copies for each shipment, and no useful purpose would be served by requiring additional written notification. The Commission concurs. Proposed section 536.______ (b)(8) has been deleted from the final rule. However, it is the Commission's opinion that section 536.______ (f) more closely relates to section 536.______ (g) and therefore they have been combined in section 536.7(e) of the final rule.

Also, with respect to written notifications, several shippers have expressed a desire that our regulations provide that carriers be required to inform shippers as to the number of tons shipped under a particular time/volume contract at various times during the contract period. While there are advantages to such a procedure, the Commission views this as a commercial problem, the details of which should be worked out between the parties. Therefore, it is unnecessary to address this matter in the final rule.

Some reservations were expressed concerning proposed section 536.______ (b)(6), because of its use of the words "precise" and "disabling circumstances." Commentators contend it would be difficult, if not impossible, to precisely describe some "disabling circumstances" and that, moreover, the term "disabling circumstances" is not specific enough to prevent its use as an easy escape from the contract. This point is well taken. This section has therefore been amended to clarify its terms and to prevent "commercial" contingencies (*e.g.*, changing markets, poor management decisions, business declines, etc.) from being labeled "disabling circumstances" to contravene otherwise binding time/volume contracts.

This final rule has also been revised to address the concern of many commentators that the Commission was precluding all but one time/volume rate scheme. Accordingly, proposed sections 536.______ (b)(9) and (c) have been revised and combined to reflect the fact that contracting parties are free to develop their own time/volume schemes within the strictures of the rule.

Proposed section 536.______ (d), which prohibits the filing of time/volume rates in terms of a percentage, fraction, decimal, or multiple of any other rate, was challenged by one commentator. It will nonetheless remain unchanged. Numerous problems could arise if a change in a non-time/volume rate automatically triggers a like percentage, fraction, decimal, or multiple change in a time/volume rate. For instance, if a time/volume rate were stated as a percentage of a non-time/volume rate, and the non-time/volume rate had numerous changes, the time/volume rate would never be clearly and explicitly stated, since it could require numerous comparisons and calculations involving several tariff pages.

Finally, some commentators urge that the record retention period be limited to two years rather than the proposed five-year requirement. The five-year requirement was established to conform with the statute of limitations applicable to rebating violations and it will be retained.

The Commission requested estimates of the financial and man-hour burdens anticipated in complying with the proposed time/volume rule. Only two commentators replied, expressing financial and man-hour burdens of $1,000/40 hours and $30,000/600 hours, respectively. The Commission believes that even these two estimates are no longer relevant in light of the elimination of the reporting requirement for each shipment, as originally proposed. The remaining record-keeping requirement is to simply maintain copies of bills of lading and related documents, accessible within the United States, to substantiate the proper application of time/volume rates as required by section 18(b) of the Shipping Act, 1916. Additionally, there is the potential that some reports will be prepared pursuant to section 536.7(d), concerning disabling circumstances. However, the Commission believes that they will be of a *de minimis* nature.

Information collection requirements contained in this regulation (sections 536.7(a), (b), (d), and (e)) have been approved by the Office of Management and Budget under the provisions of the Paperwork Reduction Act of 1980 (44 U.S.C. § 3504) and have been assigned OMB control number 3072-0042.

As a result of the above changes, the Commission has renumbered and rearranged certain sections of the rule.

List of subjects in 46 C.F.R., Rates, Maritime Carriers.

THEREFORE, IT IS ORDERED, That pursuant to 5 U.S.C. § 553 and sections 18(b) and 43 of the Shipping Act, 1916 (46 U.S.C. §§ 817(b) and 841(a)), Part 536 of 46 C.F.R. is amended as follows:

I. Section 536.2 is amended by the addition of the following: (p) *Time/Volume Rate* - A rate conditioned upon the shipment of a specific or minimum quantity of cargo over a set period of time, implementation of which is accomplished pursuant to the terms of a time/volume contract set forth in the appropriate tariff and complying with the terms and conditions of section 536.7.

II. A new section is added to 46 C.F.R. Part 536, as follows:

§ 536.7 Time/Volume Rates

Time/volume rates may be offered by common carriers by water in the United States foreign commerce or conferences of such carriers, subject to the following terms and conditions:

(a) Time/volume rates and related contracts shall be published in tariffs on file with the Commission and made available to all shippers or consignees under the same terms and conditions upon filing and for a period of at least thirty (30) days subsequent to the commencement of a new or renewal contract period;

(b) A time/volume contract shall clearly state:

(1) The commodity or commodities to which it applies;

(2) the minimum quantity of cargo necessary to obtain the time/volume rate;

(3) the effective time period of the contract;

(4) the origin and destination ports/points involved;

(5) the manner in which shipment records supporting the time/volume rate are to be maintained.

(6) a clear description of any disabling circumstances, not commercial contingencies (*e.g.*, changing markets, poor management decisions, business declines, etc.), which will permit (i) a reduction in the quantity of cargo required for the contract period, (ii) an extension of the contract period without any change in the contract rate, (iii) a discontinuance of the contract, or (iv) other options not contemplated above;

(7) whether reductions in quantity will be permitted for Saturdays, Sundays, or legal holidays occurring during a disability period;

(8) in situations, other than those described in § 536.7(b)(6), where the volume requirement will not be met during the contract period, (and due to carriers' rate structure undercharges result therefrom) whether a shipper/consignee will be permitted to pay the deficit between the actual quantity shipped and the minimum volume requirement or whether the entire amount shipped during the contract period will be rerated at the applicable non-time/volume rates in effect for the commodity on the date that each particular shipment sailed;

(9) whether or not any surcharges shall apply to the time/volume contract rate;

(c) No time/volume rate may be stated in terms of a percentage, fraction, decimal, or multiple of any other rate;

(d) If a specific reduction in the quantity required for the contract period is stated in the contract for situations when a shipment cannot be made due to specified disabling occurrences, the party encountering disability days shall, within five days of the date of disability, provide written notice to the person designated to maintain records of the nature of disability, and, of its termination, when that event occurs;

(e) Every carrier and conference shall designate a resident representative in the United States for the maintenance of time/volume shipment records. Shipment records concerning each time/volume contract shall be maintained by the designated recordkeeper for a period of five years from the completion of each contract.

IT IS FURTHER ORDERED, That any existing contracts which would otherwise fall under the provisions of this Order shall be permitted to remain in effect but may not be extended or renewed without compliance with this Order or upon Commission approval. In no case shall any existing contract remain in effect more than 12 months from the effective date of this Order.

By the Commission.

(S) FRANCIS C. HURNEY
Secretary

Attachment A

Shippers

1. Boise Cascade Corporation
2. E.I. duPont de Nemours and Company
3. FMC Corporation
4. Kero-Sun, Inc.

Carriers and Conferences

1. American West African Freight Conference
2. Atlantic & Gulf/West Coast of South America Conference
3. Continental North Atlantic Westbound Freight Conference
4. Continental-U.S. Gulf Freight Association
5. East Coast Colombia Conference
6. Greece/U.S. Atlantic Agreement
7. Gulf-European Freight Association
8. Gulf/Mediterranean Conference
9. Gulf-United Kingdom Conference
10. Hapag-Lloyd (America) Inc.
11. Iberian/U.S. North Atlantic Westbound Freight Conference
12. Japan/Korea Atlantic & Gulf Freight Conference
13. Japan-Puerto Rico & Virgin Islands Freight Conference
14. Marseilles/North Atlantic U.S.A. Freight Conference
15. Med-Gulf Conference
16. Mediterranean-North Pacific Coast Freight Conference
17. North Atlantic Baltic Freight Conference
18. North Atlantic Continental Freight Conference
19. North Atlantic French Atlantic Freight Conference
20. North Atlantic Mediterranean Freight Conference
21. North Atlantic United Kingdom Freight Conference
22. North Atlantic Westbound Freight Association
23. Open Bulk Carriers, Ltd.
24. Pacific Coast European Conference
25. Scandinavia Baltic/U.S. North Atlantic Westbound Freight Conference
26. Sea-Land Service, Inc.
27. The West Coast of Italy, Sicilian and Adriatic Ports/North Atlantic Range Conference

28. Trans Freight Lines, Inc.
29. Trans-Pacific Freight Conference of Japan/Korea
30. United Kingdom & U.S.A. Gulf Westbound Rate Agreement
31. United States Atlantic & Gulf-Venezuela Conference
32. U.S. North Atlantic Spain Rate Agreement
33. U.S. South Atlantic/Spanish, Portuguese, Moroccan and Mediterranean Rate Agreement
34. Westwood Shipping Lines
35. 8900 Lines
36. Inter-American Freight Conference

Other

1. Holland & Knight
2. Military Sealift Command
3. National Customs Brokers & Forwarders Association of America, Inc.
4. New York Foreign Freight Forwarders and Brokers Ass'n., Inc.
5. United States Department of Agriculture

FEDERAL MARITIME COMMISSION

DOCKET NO. 81-65

ROHDE & LIESENFELD, INC., INDEPENDENT OCEAN FREIGHT FORWARDER NO. 1832

NOTICE

July 12, 1982

Notice is given that no exceptions have been filed to the June 2, 1982 initial decision in this proceeding and the time within which the Commission could determine to review that decision has expired. No such determination has been made and accordingly, that decision has become administratively final.

(S) FRANCIS C. HURNEY
Secretary

FEDERAL MARITIME COMMISSION

DOCKET NO. 81-65

ROHDE & LIESENFELD, INC., INDEPENDENT OCEAN FREIGHT FORWARDER LICENSE NO. 1832

An investigation was begun to determine whether respondent, Rohde & Liesenfeld, Inc., a licensed ocean freight forwarder, had violated section 16, Initial Paragraph, Shipping Act, 1916, and section 510.23(d) of the Commission's General Order 4 then in effect, by misstating the port of discharge as Kiel, West Germany, instead of the true ports of Hamburg or Bremen on 48 shipments of mixed commodities and by understating cargo measurements on 11 shipments of fiberglass boats to Hamburg and 5 shipments of machinery to Paraguay, between 1976 and 1978, all for the purpose of reducing freight charges. The investigation also included the question of respondent's fitness to retain its license and the question of assessing penalties for the alleged violations. After several months of prehearing inspection and discovery, the parties formulated a settlement agreement under which respondent would pay $20,000 and institute certain controls to prevent recurrence of the conduct in question. On the basis of the substantial record developed and applicable principles of law, it is found that:

(1) The settlement agreement is fair and reasonable and comports with Commission case law and standards governing the approvability of such settlements since it considers the risks and costs of litigation and various mitigating factors and will have a deterrent effect.

(2) Although the record developed thus far does show that respondent was involved in the shipments in question as alleged, it also shows that respondent may not have been aware of the true destination of the 48 shipments, that it may not have authorized or approved of the misstatements on the 11 shipments, which misstatements may have been made by an employee no longer with respondent at the suggestion of the ocean carrier involved, and that respondent may have attempted to fashion more accurate measurement figures for the five shipments in lieu of the obviously inaccurate figures supplied by the exporter. Moreover, respondent terminated these practices voluntarily, fully cooperated with the Commission's staff and Hearing Counsel, has an otherwise unblemished record of service, and the record does not suggest that respondent harmed any shipper or significantly benefited financially from the above transactions.

(3) The record supports a finding that respondent is fit to retain its license on the basis of the mitigating factors mentioned above and evidence showing that it can be trusted to comply with law in the future.

Gerald H. Ullman for respondent Rohde & Liesenfeld, Inc.

John Robert Ewers , *Joseph B. Slunt* , and *Deana E. Rose* for the Bureau of Hearings and Field Operations, Office of Hearing Counsel.

INITIAL DECISION [1] OF NORMAN D. KLINE, ADMINISTRATIVE LAW JUDGE

Finalized July 12, 1982

This is an investigation begun by the Commission's Order of Investigation and Hearing, served October 8, 1981. According to the Order, the Commission began the proceeding because it had information which revealed that respondent Rohde & Liesenfeld, Inc. (R & L), an independent ocean freight forwarder licensed by the Commission, may have violated certain provisions of the Shipping Act, 1916, and the Commission's implementing regulation, General Order 4, in connection with three groups of shipments. More specifically, the information seemed to show that R & L had prepared or had otherwise become involved with 48 shipments of mixed commodities moving between December 15, 1976, and November 8, 1978, in which the bills of lading had incorrectly shown the ultimate port of discharge as Kiel, West Germany, rather than the true port of discharge, which was Bremen or Hamburg, in order to obtain lower freight charges applicable to shipments destined for Baltic seaports, supposedly saving $43,654 in freight charges. In addition, R & L may have declared false cubic measurements as a means of obtaining or attempting to obtain ocean transportation for less than applicable charges in connection with 11 shipments of fiberglass boats carried from Baltimore, Maryland, to Hamburg, Germany, between December 31, 1976, and June 27, 1977, saving $14,661 in freight charges, and may have done the same thing in connection with 5 shipments of cotton gin machinery carried to Paraguay between January 24, 1977, and September 8, 1977, saving $24,350 in freight charges. If any of these events occurred and could be proven, they could constitute violations of section 16, Initial Paragraph (46 U.S.C. § 815) which prohibits any forwarder from "knowingly and wilfully, 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, obtain[ing] or attempt[ing] to obtain transportation by water for property at less than the rates or charges which would otherwise be applicable." Moreover, they could violate section 510.23(d) of the Commission's General Order 4 (46 C.F.R. 510.23(d)) in effect at the time of the shipments,[2] which prohibited any forwarder from "knowingly impart[ing] to a principal or oceangoing common carrier false information relative to any [forwarding] transaction."

[1] This decision will become the decision of the Commission in the absence of review thereof by the Commission (Rule 227, Rules of Practice and Procedure, 46 C.F.R. 502.227).

[2] The provisions of section 510.23(d) forbidding forwarders from knowingly imparting false information to carriers or other persons were transferred to section 510.32(f) of General Order 4, which was revised effective May 1, 1981 (46 F.R. 24568).

Because of the above alleged misconduct, the Commission also questioned whether civil penalties should be invoked against R & L pursuant to section 32(e) of the Act, and, if so, the amount of any penalty, "taking into consideration factors in possible mitigation," and whether R & L's forwarding license should be suspended or revoked pursuant to section 44(d) of the Act for "willful violations of the Act or such conduct as the Commission finds to render R & L unfit to carry on the business of forwarding in accordance with sections 510.9(b) and 510.9(e) of General Order 4."

Following commencement of the formal proceeding, the case moved into its prehearing inspection and discovery phase in which the parties, respondent and the Commission's Office of Hearing Counsel exchanged discovery requests and participated in numerous meetings and discussions seeking either to proceed to trial or settle. After a series of such meetings and discussions interspersed with periodic reports to me concerning the progress being made and the ongoing development of a record, the parties participated in an informal prehearing conference on February 19, 1982, which I convened, which resulted in the formulation of settlement proposals which were to be transmitted to the parties' respective principals. Thereafter, these proposals were accepted by the principals and after certain difficulties relating to the furnishing of documentary materials from overseas were overcome, the parties were able to submit the text of their settlement together with a well-developed supporting record and legal memoranda, all of which materials were submitted on or before May 14, 1982.[3] On the basis of this record prepared by the parties and their persuasive arguments favoring settlement, I find that their settlement is just and reasonable and should be approved under applicable standards of law and that respondent is fit to retain its license.

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[3] The record consists of a joint stipulation of the parties setting forth the facts concerning R & L's involvement in the 48, 11, and 5 shipments and establishing that R & L did prepare bills of lading which incorrectly stated that the 48 shipments of mixed commodities were destined for Kiel, West Germany, and did understate measurement of cargo on 11 shipments of fiberglass boats to Hamburg and 5 shipments of cotton gin machinery to Paraguay, resulting in considerable freight reductions. The record also shows the ocean carriers involved, namely, Polish Ocean Lines and Baltic Shipping Company for the 48 shipments, Baltic for the 11 shipments, and Moore-McCormack Lines and a company known as Nautilus Chartering Inc. S.A. for the 5 shipments to Paraguay. The supporting materials for this stipulation consist of 78 exhibits comprising numerous basic shipping documents (bills of lading and related documents), tariffs, calculations of freight savings caused by the misstatements, etc. It also includes a sworn statement and two affidavits of Erich H. Trendel, President of R & L (Exhibit 75), Klaus Stankowitz, Vice-President of R & L (Exhibit 76), and Dieter Liesenfeld, Chief Executive Officer and sole stockholder of R & L (Exhibit 77). These affidavits, especially that of Mr. Stankowitz, provide greater details concerning the three groups of shipments and show R & L's potential defenses and factors in mitigation which are discussed later in the body of this decision. Because this case is being settled, the three officials have not, of course, been cross-examined so that the merits of these defenses and the validity of the factual details have not been fully tested. However, as with any settlement, the defenses and proffered evidence are evaluated in terms of probability of success and risks of litigation and such testing is not required.

DESCRIPTION OF THE TERMS OF THE SETTLEMENT

The proposed settlement consists of a payment by R & L of the sum of $20,000 and certain curative undertakings by R & L which are designed to prevent recurrence of the type of conduct described above.[4] Essentially R & L states that it has terminated all such practices as those described and agrees to inform all owners, officers and employees of itself and of its owners, subsidiaries, and affiliates that such practices are not company policy and must not be repeated. A notice to this effect will be submitted to such owners, officers, and employees within 30 days of final approval of the settlement and will be furnished to future owners, officers and employees for three years following approval of the settlement. Furthermore, within 30 days after approval of the settlement, all owners, officers, and employees of R & L will execute a statement under oath that they have read and understood the terms of the settlement agreement and will abide by them, and these statements will be furnished to the Commission. Similar statements of future owners, officers, or employees will be furnished to the Commission for a period of three years after the settlement is approved. R & L also agrees to institute all reasonable measures designed to prevent conduct that may be violative of section 16, Initial Paragraph of the Act, and of section 510.23(d) of the Commission's General Order 4.[5]

APPROVABILITY OF THE PROPOSED SETTLEMENT

Both respondent and Hearing Counsel, in their respective memoranda of law, strongly urge approval of their proposed settlement. Respondent cites previous decisions of the Commission which continually reiterate the principle that "both the law and Commission policy encourage settlements and engage in every presumption which favors a finding that they are fair, correct and valid." (Respondent's memorandum, p. 3, citing, among other cases, *Behring International, Inc. - Independent Ocean Freight Forwarder License No. 910*, 23 F.M.C. 974, 983 (I.D.) (adopted by the Commission, 23 F.M.C. 973 (1981)). Respondent argues that the settlement not only comports with the general policy of the law mentioned but also with specific regulations of the Commission

[4] The brief description of the settlement agreement is only an outline and is not all-inclusive. However, the complete text of the settlement agreement and of the documents mentioned in the agreement are set forth in the appendix to this decision.

[5] As mentioned above, section 510.23(d) is now section 510.31(f). Therefore, the approval of the settlement is conditioned on the understanding that the settlement will be amended to include the present, correct designation where such amendment is necessary in the context of the agreement. It appears that such amendment will be necessary in only one place in the agreement, namely, paragraph no. 4 on page 3, where R & L agrees to "maintain all reasonable measures designed to discourage, prevent, and eliminate the conduct that may be violative of . . . section 510.23(d) of the Commission's General Order 4." References to the earlier section number elsewhere in the agreement are proper in the context.

governing the settlement of civil penalties set forth in 46 C.F.R. Part 505 and the specific instruction of the Commission in its Order of Investigation and Hearing, about "taking into consideration factors in possible mitigation of such penalty." (Order, p. 4.) Respondent cites factors which the Commission's regulations establish as relevant in determining the reasonableness of payments in settlement of cases such as doubts and litigative probabilities and the deterrent effect of settlements, standards adopted by the Comptroller General and Attorney General which are published in 4 C.F.R. 103.3 and 4 C.F.R. 103.5, respectively, and incorporated by reference by the Commission in 46 C.F.R. 505.1. In this regard respondent contends that there are valid doubts concerning the ability of Hearing Counsel to prove the elements of violations of section 16, Initial Paragraph, of the Act (and presumably the corresponding portion of General Order 4) with regard to the requirement that Hearing Counsel show that the alleged misstatements on the 48 bills of lading which incorrectly showed Kiel as port of discharge and the alleged false statements of cubic measurement on the 11 shipments of boats to Hamburg and 5 shipments of cotton gin machinery to Paraguay were made "knowingly and wilfully." Respondent cites affidavits of its officials showing that respondent may not have been aware of the true destination of the 48 shipments, that it did not condone the actions of a lower level employee, no longer with R & L, who apparently understated the measurement of the 11 shipments to Hamburg at the suggestion of the ocean carrier involved, and was not aware of his action, and that R & L acted to protect its principal by preparing a more reasonable estimate of the measurement of the 5 shipments of machinery when the shipper admittedly did not submit a correct figure. Finally, respondent contends that it has cooperated fully with the Commission's investigators even to the extent of providing German consular documents which would not normally be available to the Commission, has had an unblemished record since it was licensed in 1976, and has firmly committed itself to take action to ensure compliance with all U.S. legal requirements in the future.

Hearing Counsel similarly cite some of the multitude of cases which emphasize that settlements are encouraged especially in the functioning of the administrative process. Hearing Counsel also cite General Order 30, the Commission's regulation governing the compromise and settlement of cases involving civil penalties and state that there has been full consideration of mitigating and other factors set forth in that regulation. Hearing Counsel cite respondent's full cooperation with the Commission's staff, its prior unblemished record, and its diligent remedial action as well as the absence of any indication that respondent has been guilty of fraudulent or deceitful conduct or that it has misappropriated funds or violated any position of trust or responsibility. Although Hearing Counsel do not state that they could not prove that R & L violated section 16, Initial Paragraph, of the Act and section 510.23(d) of General Order 4 by "knowingly and wilfully" misstating destination and cubic measurement on the various bills of lading, Hearing Counsel do appear to recognize the difficulties of proving such elements at a trial-type hearing in view of the evidence so far developed and in consideration of various mitigating factors. Thus, Hearing Counsel acknowledge that affidavits of an official of R & L and of its sole owner indicate that the incorrect designation of Kiel as port of discharge on the 48 shipments to Hamburg and Bremerhaven [6] was done without knowledge of R & L of the true destination and was done at the behest of R & L's parent company, R & L GMBH, a German freight forwarder located in Hamburg, which was not acting in violation of German law and did not believe that R & L, which was not a direct party to these arrangements made overseas between R & L GMBH and steamship lines, would be considered to have violated U.S. law under the circumstances. Furthermore, as to the 11 shipments of fiberglass boats to Hamburg,[7] the affidavits indicate that a "lower-level" employee no longer with R & L undertook to understate the cubic measurement at the behest of the ocean carrier involved without the knowledge or permission of the company, which, when the facts became known, stopped the practice immediately. Finally, as to the five shipments of cotton gin machinery to Paraguay, affidavits of two R & L officials indicate that R & L was attempting to ascertain a more realistic measurement figure than the one which the exporter had supplied which was obviously inaccurate and that, in the interest of the party who paid the freight, the overseas consignee, R & L made what it considered to be a more realistic estimate of the proper cubic measurement than the figure originally provided by the exporter who had little or no interest in providing an exact figure since the exporter did not pay the freight and later appeared to acknowledge that its figure might not have been correct. In the above groups of transactions, R & L does not appear to have derived direct financial benefit of any great significance although reductions in freight charges had resulted from the various misstatements on the bills of lading. Moreover, as noted, R & L has taken steps to prevent recurrence of similar conduct and in case exporters furnish uncertain or inaccurate measurement figures such as apparently occurred with respect to the five shipments of cotton gin machinery, R & L has agreed to seek correct figures diligently prior to dispatch of the shipment and, if this cannot be done, then R & L will decline to handle

[6] Although the Commission's Order mentions Bremen as one of the true ports of discharge for the 48 shipments, the record indicates the correct port was Bremerhaven.

[7] The record indicates that the port of discharge was Antwerp on 10 of the shipments and Bremen on one shipment rather than Hamburg as the Commission's Order states.

the shipment. (See "Exhibit A" to the settlement agreement, paragraph 3.)

In conclusion, Hearing Counsel mention that R & L ceased the practice of marking consolidated export shipments to Kiel on the bills of lading nearly three years before this investigation formally commenced and halted the aforementioned practices of underdeclaring cubic measurements to carriers over four years before the formal investigation began, repeat the fact that R & L cooperated fully with the Commission's staff, including Hearing Counsel, to the extent of producing critical documents located in Germany and that R & L did not realize the full benefit of the freight savings, expressly acknowledge that the requisite intent, i.e., knowledge and wilfulness, may not have been present as regards the 48 shipments mistakenly showing Kiel as port of discharge, and recommend a settlement payment of $20,000 as sufficient to act as a deterrent in view of the various factors in mitigation discussed above.

I find the settlement agreement to be fair and reasonable and to comport with previously enunciated policies and standards governing the settlement of cases before this Commission. There are now so many cases and decisions of the Commission encouraging settlements instead of expensive litigation with doubtful results that the matter is now axiomatic and no extended discussion of the reasons underlying this policy should be necessary. A discussion of these principles as applied by the Commission in virtually every type of case involving alleged violations under the Shipping Act is contained in such cases as *Behring International, Inc. - Independent Ocean Freight Forwarder License No. 910*, cited above, 23 F.M.C. at 983-985, *Kuehne & Nagel, Inc. - Independent Ocean Freight Forwarder License No. 1162*, 24 F.M.C. 315, 325-328 (I.D., administratively final, October 13, 1981); and in *Old Ben Coal Company v. Sea-Land Service, Inc.*, 21 F.M.C. 506, 511-515 (I.D., administratively final, November 29, 1978). They demonstrate that the presiding judge and Commission, although approving of the idea of settlements in general, do not become rubber stamps when settlements are proffered. See *Universal Transcontinental Corporation*, 24 F.M.C. 911, 916 (1982). Instead, settlements are scrutinized to ensure that they do not themselves violate any law or public policy and that they represent reasonable judgments by the parties of the economic worth of the case and probabilities of success compared to the cost of continued litigation. In cases in which assessment of penalties is made an issue, furthermore, the Commission will pay attention to such factors as deterrent effects and cost of recovery as well as the risks of litigation and mitigating factors.

The instant case and settlement provides an excellent example of how a combination of factors supports the proffered settlement. As both Hearing Counsel and respondent indicate, although the record thus far developed indicates that R & L did participate in the above transactions directly or indirectly and that its participation did ultimately result in reductions of freight costs for the 48 shipments to Bremerhaven and Hamburg, the 11 shipments of fiberglass boats to Hamburg (or Antwerp), and the 5 shipments of cotton gin machinery to Paraguay, the record also strongly suggests that R & L was either not the prime instigator of these transactions, was unaware of most of them, or was itself victimized by the acts of a lower level employee, no longer with the company, who acted at the behest of the ocean carrier involved. Thus it appears quite possible that on the 48 shipments which were incorrectly shown to be destined for Kiel for the purpose of obtaining lower freight charges published in the ocean carriers' tariffs applicable to Baltic Sea ports, the idea was conceived by the ocean carrier and R & L's parent company, a German forwarder known as R & L GMBH, which apparently acted properly under German law and believed that R & L, which was not a direct party and was possibly unaware of the true ports of discharge, could not be held accountable under U.S. law. As to the 11 shipments of fiberglass boats to Hamburg (or Antwerp), it appears that the ocean carrier involved suggested to an R & L employee that he understate measurement so that the carrier need not file a reduced rate in its tariff and that the employee, without the knowledge or consent of R & L, proceeded to do so. According to the affidavit of Dieter Liesenfeld, Chief Executive Officer of R & L GMBH and sole owner of R & L, R & L was trying to obtain a competitive rate from the ocean carrier but was not instructed to do so in an unlawful manner because this might jeopardize R & L's valued forwarding license. As to the five shipments of cotton gin machinery, it is quite possible that R & L acted reasonably in its effort to ascertain from the exporter a more accurate measurement figure than the suspicious-looking figures which the exporter, which may have had little or no interest in accuracy, had furnished, and that R & L's estimate of measurement was itself reasonable. All of the above facts do not mean that were the case to proceed to trial-type hearings complete with cross-examination and fully researched post-hearing briefs, R & L would not be held accountable for the misstatements of destination and measurement on the bills of lading notwithstanding these various defenses. Ignorance of the law is not a traditional defense nor is it clear that the improper acts of an employee are not imputed to the employer or a parent to a subsidiary nor that the well-meaning construction of a measurement figure in lieu of reliable supporting evidence is acceptable conduct. However, as both parties acknowledge, a critical element of violation of section 16, Initial Paragraph, is knowledge and wilfulness (and for violation of 46 C.F.R. 510.23(d), knowledge), and there are valid doubts as to whether Hearing Counsel could prove these elements for all the shipments under the circumstances so far shown by the affidavits submitted by respondent.

Furthermore, there are a number of mitigating factors which may affect both the ability to prove the offenses as well as support the idea of a settlement, for example, the fact that the events have long since terminated with no indication of recurrence, that R & L did not derive direct, significant financial benefit from freight reductions, that the "lower-level" employee has been discharged, that R & L apparently made its own estimate of the measurement of the machinery moving to Paraguay in an effort to be accurate, not to cheat the carrier, that R & L has fully cooperated with the Commission's staff and Hearing Counsel even to the extent of furnishing critical documents from Germany, that R & L has taken and will take remedial action to prevent recurrence, and that there is no indication of fraudulent conduct or harm to shippers. The Commission has often considered such mitigating factors as those present in this case when deciding the proper amounts of penalties to assess or whether to revoke or suspend licenses in full recognition of the fact that the freight forwarder law is "remedial," not punitive. For example, in *Paulssen & Guice Ltd. - Independent Ocean Freight Forwarder License No. 1166*, 24 F.M.C. 583 (1982), the Commission, among other things, granted a license to an applicant although finding that the applicant had committed 922 violations of law by forwarding that many shipments without a license, and assessed a penalty of $5,000, the statutory maximum for one violation. (Section 32(a) of the Shipping Act, 1916, as amended, 46 U.S.C. § 831.) However, the Commission found many mitigating factors such as the fact that applicant believed that it had been authorized to forward under a previously-approved branch office operation, that it curtailed the unlawful activities promptly after learning that they were unlawful, that it had not violated any law prior to this time, that it was not guilty of fraud and had not acted out of moral turpitude, that no shipper had suffered, that it had not received any improper financial gain, that it was technically well qualified and its president had operated as a qualifying officer of the previously authorized branch office since 1976, that he was committed to adhering to the requirements of law in the future, and that applicant had retained counsel familiar with the legal requirements of freight forwarding to prevent the recurrence of regulatory problems. 24 F.M.C. at 591. Such factors have often been considered by the Commission as mitigating. See, e.g., *Continental Forwarding, Inc. - Independent Ocean Forwarder Application and Possible Statutory Violations*, 23 F.M.C. 634 (I.D. partially adopted by the Commission, 23 F.M.C. 623 (1981)) (prior good behavior, cooperation with the Commission's staff, diligent remedial action); *H.K. International Forwarding, Inc., Independent Ocean Freight Forwarder License Application*, 22 F.M.C. 622 (1980) (cooperation with the Commission's staff, termination of allegedly violative activity, absence of fraud, deceit, financial misappropriation, or breach of fiduciary duty); *Eastern Forwarding International, Inc. - Inde-*

pendent Ocean Freight Forwarder Application, 23 F.M.C. 206 (1980) (prompt termination of allegedly unlawful conduct, absence of fraud, deceit or other conduct involving moral turpitude, cooperation with the Commission's staff). The Commission has also recognized that if a forwarder's conduct occurred at a time when the state of the law on the subject was unclear, the lack of clear and definitive administrative or judicial precedent will also be considered as a factor in mitigation. See *Behring International, Inc. - Independent Ocean Freight Forwarder License No. 910*, cited above, 23 F.M.C. at 991-992. This last factor has some relevance to this case with respect to the fact that apparently it was R & L's parent company, R & L GMBH, not R & L, which made arrangements for the 48 shipments to be designated as bound for Kiel, knowing that the true destinations were Bremerhaven or Hamburg, more costly ports of destination under the carriers' tariffs, and presumably R & L was not made aware of the true destinations. If so, it is not clear that R & L would be held accountable for the conduct of its parent which believed it was operating in accordance with German law and was not implicating its subsidiary company in the United States. Moreover, when considering whether the amount of payment upon which the parties have settled, $20,000, is within a zone of reasonableness, considering the need to deter future violations as well as the risks of litigation and the various mitigating factors mentioned, it would also be well to recall that R & L apparently received only a portion of benefits in the form of credits from its parent, R & L GMBH, and to consider that although there may have been 48, 11, and 5 shipments in which misstatements and misdeclarations occurred, the Commission has in at least one occasion considered far more violations (922) as essentially one for which a penalty of $5,000 was assessed because all of the violations occurred under the same mitigating circumstance, namely, the belief by the forwarder that it was authorized to perform the services. See *Paulssen & Guice Ltd. - Independent Ocean Freight Forwarder License No. 1166*, cited above, 24 F.M.C. at 591. In short, then, the proffered settlement appears to reflect fully the various factors enunciated by the Commission in previous cases of this type and the factors in mitigation which are almost identical to those present in such cases as *Paulssen & Guice*, *Continental Forwarding*, *H.K. International*, and *Eastern Forwarding*, cited above. Finally, it bears noting the particular provisions of the settlement agreement requiring notification to owners, officers, and employees of R & L of the company's strict policy against violations of U.S. law and the execution of statements under oath by such persons binding them to this policy and to the settlement agreement as well as the termination of the questionable practices and remedial measures taken to prevent recurrence. These measures, as well as the payment of $20,000, should work together to provide the necessary deterrent effect.

THE QUESTION OF FITNESS

The question of R & L's fitness to continue to operate under its license without suspension or revocation now remains for determination. This issue has been included in this investigation by specific order of the Commission which questioned whether R & L's license should be suspended or revoked for "wilful violations of the Shipping Act, 1916; or . . . such conduct as the Commission finds renders R & L unfit to carry on the business of forwarding . . ." (Order of Investigation and Hearing, issue no. 8, page 4). Under previous decisions of the Commission, it has been held that the question of fitness cannot be settled by the parties. See *Kuehne & Nagel, Inc. - Independent Ocean Freight Forwarder License No. 1162*, cited above, 24 F.M.C. at 335; *Independent Freight Forwarder's License—E. L. Mobley, Inc.*, Order, 18 SRR 451 (1978). See also *Universal Transcontinental Corporation*, cited above, 24 F.M.C. at 916 (1982) (Commission finds forwarder to be fit on the basis of the record as a whole notwithstanding presiding officer's "termination" of that issue upon approval of a settlement agreement).

Both respondent and Hearing Counsel argue persuasively that revocation or suspension of R & L's license would be a drastic sanction without justification on the record. Respondent (which has not conceded that its conduct violated law, among other reasons, because of the doubtful presence of knowledge and wilfulness) cites the numerous mitigating factors discussed above, for example, respondent's complete cooperation with the Commission's staff and with Hearing Counsel, its furnishing of critical German consular documents not ordinarily available to the Commission as well as its files in New York, its unblemished record since 1976 when it obtained its license, its able service to the American shipping public since that time, its firm commitment to abide by U.S. law, and the innocence of its 30-odd employees "virtually all of whom were not even aware of the alleged violations." (Respondent's Memorandum, p. 10.) Respondent cites previous decisions of the Commission such as *E. Allen Brown*, 22 F.M.C. 583 (I.D., adopted in relevant part, March 24, 1980); *Delmar Shipping Corporation*, 8 F.M.C. 493, 497 (1965); and *E. L. Mobley, Inc.*, cited above, 21 F.M.C. 845 (1979), in which the Commission showed great sensitivity to saving jobs of forwarders that had been in business for a number of years and in fashioning reasonable remedies short of revocation or suspension of licenses. Hearing Counsel cite similar factors in mitigation such as R & L's cooperation and voluntary termination of the allegedly unlawful conduct, cite similar case law showing that the Commission considers the freight forwarder law to be remedial, not punitive, and accordingly seeks to fashion reasonable, not draconian sanctions when such are not necessary to achieve regulatory purposes, and Hearing Counsel assert that there is "strong evidence to demonstrate that R & L intends to comply with the shipping laws and regulations and seeks to prevent the recurrence of past activities in question." (Hearing Counsel's Memorandum, p. 17.) I agree with both parties that revocation or suspension is totally unnecessary and completely unsupported by this record and, furthermore, on the basis of the record and R & L's firm commitments to prevent future violations of law, I find R & L to be fit to retain its license, as the Commission found the forwarder in *Universal Transcontinental Corporation*, cited above, 24 F.M.C. 911.

It is true, as both parties contend, that the Commission seeks to fashion reasonable remedies and does not merely issue draconian decrees of revocation or suspension when such are unnecessary to achieve regulatory purposes. Moreover, the Commission has avoided such drastic sanctions even when the record shows, as it does not here, that there have clearly been wilful violations of law. The Commission seems more concerned that it has evidence that a forwarder can be trusted in its future business behavior to adhere to all requirements of law and the Commission's regulations. These principles and supporting case citations are discussed in *Kuehne & Nagel, Inc.*, cited above, 24 F.M.C. at 355-340; see also *Behring International, Inc.*, cited above, 23 F.M.C. at 990; *E. Allen Brown*, cited above, 22 F.M.C. at 596; *E. L. Mobley*, cited above, 21 F.M.C. at 847; *Harry Kaufman D/B/A International Shippers Co. of N.Y., etc.*, 16 F.M.C. 256, 271 (1973); *Independent Ocean Freight Forwarder License Application - Guy G. Sorrentino*, 15 F.M.C. 127, 134, 136 (1972). The present record, as the parties indicate, contains virtually all of the evidence necessary to find R & L fit in cases of this type, for example, R & L's termination of the questionable practices long before this case began, its cooperation with the Commission's staff, its unblemished record, and its firm commitment to abide by U.S. law with specific remedial action and controls. To such evidence of good-faith intentions to comply with law coupled with specific remedial action, the Commission has previously responded with restraint and has refrained from invoking the extreme sanction of revocation or suspension. See, e.g., *Kuehne & Nagel, Inc.*, cited above, 24 F.M.C. at 340-341; *Universal Transcontinental Corporation*, cited above, 24 F.M.C. at 915-916. In the last cited case, furthermore, the Commission found the forwarder to be fit after considering a record which showed no clear-cut violations, no harm to shippers, voluntary termination of the questionable practices some time before the proceeding began, and the forwarder's commitment to prevent recurrence of such practices. In these regards, the Commission stated:

> Finally, there is no evidence in the record of this proceeding which would call into question Respondent's continued fitness to be licensed as an ocean freight forwarder. The compensation practices at issue have not, in this case, been held to constitute a violation of the Shipping Act, 1916 or any Commission rule. Moreover, there is no indication that UTC other-

> wise violated the Act by passing on any compensation received to its shipper-clients or by entering into any unapproved section 15 agreements with the involved carriers. Nor does the record indicate that Respondent engaged in any conduct inconsistent with its fiduciary responsibility to its shipper-clients. On the other hand, Respondent did terminate the practices prior to the institution of this proceeding and agreed to implement certain internal controls to preclude their recurrence. Accordingly, the Commission finds that UTC remains fit to be licensed as an independent ocean freight forwarder.

Similarly, I find on this record that R & L is fit to retain its license.

ULTIMATE CONCLUSIONS

I find that the proposed settlement agreement which respondent and Hearing Counsel have negotiated is fair and reasonable, comports with previously enunciated standards of law, and should be approved. The record does show that during the period 1976-1978, R & L was involved in forwarding 48 shipments of mixed commodities to Hamburg and Bremerhaven, Germany, which were mistakenly shown as bound for Kiel on the bills of lading, and in understating measurements of cargo for 11 shipments of fiberglass boats to Hamburg (or Antwerp) and for 5 shipments of cotton gin machinery to Paraguay, and that as a result of these misstatements and misdeclarations considerable reductions in freight were realized. However, the record also shows that R & L may not have been aware of the true routing in Europe, i.e., that the 48 shipments were actually to be discharged at Bremerhaven and Hamburg without transshipment to Kiel, since its parent, R & L GMBH, located in Germany, had arranged for the discharge in cooperation with the ocean carrier involved as permitted by German law. Furthermore, the understatements on the 11 shipments of boats appear to have been made by a lower-level employee no longer with R & L at the behest of the ocean carrier involved without the knowledge or permission of R & L's management. Finally, R & L appears to have changed the measurement figures furnished by the exporter for the 5 shipments of machinery in an effort to correct obviously inaccurate figures rather than to cheat the ocean carriers involved. Although R & L might still have been found to have violated section 16, Initial Paragraph, of the Shipping Act, 1916, and 46 C.F.R. 510.23(d), notwithstanding the above facts and defenses, it is not clear that it would be so found after a full trial-type hearing nor that all these defenses are invalid under the present state of the law. Rather than consume time and money in litigation with significant risks and doubts, the parties have formulated a settlement agreement which would deter recurrence of the questionable practices and which fully considers not only the risks of litigation but various mitigating factors.

This record will not support the drastic sanction of revocation or suspension of R & L's license. The record rather supports the finding that R & L is fit to retain its license since it shows such facts as R & L's termination of the questionable practices long before this proceeding began, full cooperation with the Commission's staff and Hearing Counsel, firm commitments to prevent recurrence of such practices, and shows an otherwise unblemished record of service since 1976 when R & L obtained its license. Furthermore, there is no evidence of harm to shippers, of direct and substantial financial benefit to R & L as a result of the questionable conduct, or of fraudulent conduct or behavior stemming from moral turpitude on the part of R & L. In similar cases with similar records, the Commission has found that such factors warrant a finding of fitness.

(S) NORMAN D. KLINE
Administrative Law Judge

APPENDIX

BEFORE THE FEDERAL MARITIME COMMISSION

ROHDE, & LIESENFELD, INC.
INDEPENDENT OCEAN FREIGHT
FORWARDER NO. 1832

DOCKET NO. 81-65

PROPOSED SETTLEMENT OF CIVIL PENALTIES

The Proposed Settlement has been entered into between the Bureau of Hearings and Field Operations (Hearing Counsel) and Respondent Rohde & Liesenfeld Inc. (Rohde & Liesenfeld). It is submitted to the presiding Administrative Law Judge for approval pursuant to Rule 162 of the Commission's Rules of Practice and Procedure (46 C.F.R. § 502.162) and section 505.3 of the Commission's General Order 30 (46 C.F.R. § 505.3).

WHEREAS, by Order of Investigation and Hearing served October 8, 1981, the Commission instituted the present Investigation to determine whether Rohde & Liesenfeld has violated section 16, Initial Paragraph, of the Shipping Act, 1916 (46 U.S.C. § 815) and section 510.23(d) of the Commission's General Order 4 (46 C.F.R. § 510.23(d)) during the period December 5, 1976 to November 8, 1978 and whereas, that Order includes the issue of whether civil penalties should be assessed for any violations of section 16, Initial Paragraph of the Shipping Act, 1916 and section 510.23(d) of the Commission's General Order 4 so found;

WHEREAS, the Order of Investigation and Hearing alleges that Rohde & Liesenfeld may have violated section 16, Initial Paragraph of the Shipping Act, 1916 and section 510.23(d) of the Commission's General Order 4;

WHEREAS, Rohde & Liesenfeld has admitted that it has engaged in specified conduct which may be violative of section 16 of the Shipping Act, 1916 and section 510.23(d) of the Commission's General Order 4;

WHEREAS, Rohde & Liesenfeld has terminated the allegedly violative conduct and has indicated its willingness and commitment to cooperate with the Commission and maintain measures designed to eliminate, discourage, and prevent such conduct in the future;

WHEREAS, the parties, in order to avoid the delays and expense that would be occasioned by further litigation of the issues specified in the Order of Investigation and Hearing, are desirous of settling expeditiously the issues of alleged violations and civil penalties in accordance with the terms and conditions of this Agreement; and

WHEREAS, section 32(e) of the Shipping Act, 1916 (46 U.S.C. § 831(e)), authorizes the Commission to assess or compromise all civil penalty claims under the Shipping Act, 1916;

NOW, THEREFORE, in consideration of the premises set forth herein, and in compromise of all civil penalty claims arising from violations of the Act and General Order 4 as set forth in the factual record submitted in the present proceeding and as set forth and described in the October 8, 1982 Order of Investigation and Hearing, that the Commission believes may have been committed during the period December 5, 1976 through November 8, 1978, Rohde & Liesenfeld agrees, as a condition of this Agreement, to comply with all requirements set forth hereinafter, subject to the stipulations, conditions and terms of settlement contained herein:

1. Rohde & Liesenfeld hereby agrees, as a condition of this Agreement, to pay to the Federal Maritime Commission the monetary amount of Twenty Thousand Dollars ($20,000) within thirty (30) days following approval by the Commission of this Proposed Settlement of Civil Penalties.

2. Rohde & Liesenfeld has terminated all practices such as those described in the Commission's October 8, 1981 Order of Investigation and Hearing, and has informed all of its owners, officers and employees and the owners, officers and employees of all of its parents, subsidiaries, and affiliates in writing, that such practices, and all practices not in accordance with the provisions of the Shipping Act, 1916, and the Commission's Rules and Regulations now in force or that may be adopted, are contrary to Rohde & Liesenfeld's company policy, must be terminated immediately and must not be engaged in at any time.

3. Respondent will, within thirty (30) days following final approval of this Proposed Settlement, furnish a copy of Exhibit "A," attached thereto, to all its owners, officers and employees, and to all the owners, officers and employees of its parents, subsidiaries, and affiliates. Respondent will furnish a copy hereof to all future such owners, officers and employees for a period of three years following final Commission approval of this Settlement.

4. Rohde & Liesenfeld will institute and has indicated its willingness to maintain all reasonable measures designed to discourage, prevent, and eliminate the conduct that may be violative of section 16, Initial Paragraph of the Shipping Act, 1916 and section 510.23(d) of the Commission's General Order 4.

5. Within thirty (30) days following final approval of this Proposed Settlement, each of Rohde & Liesenfeld's owners, officers, and qualifying officer will execute a statement under oath that he/she has read and

understood this Agreement, and that he/she will abide by all of its terms and conditions with respect to the termination of the practices set forth and described in the factual record submitted in the present proceeding. For a period of three years following Commission approval of this Settlement, all future such officers, owners, and qualifying officers will execute such statement under oath. These statements will be submitted promptly to the Secretary, Federal Maritime Commission. The form of this statement is attached hereto as Exhibit "B".

6. Rohde & Liesenfeld hereby agrees, as a condition of this Agreement, that, if it breaches this Agreement, it will not interpose the Statute of Limitations as a bar or a defense in any action or proceeding instituted prior to August 1, 1985 by or on behalf of the Commission, to recover civil penalties for violations of section 16, Initial Paragraph of the Shipping Act, 1916 and of violations of the Commission's General Order 4, arising out of the conduct set forth in the factual record submitted in the instant proceeding. In the event of such a breach by Rohde & Liesenfeld, if such noncompliance shall not have been cured or explained to the Commission's satisfaction within thirty (30) days after written notice to Rohde & Liesenfeld by the Commission, the Commission shall have the option to seek enforcement of all terms and conditions of this Agreement, or to declare this Agreement null and void; provided, however, that Rohde & Liesenfeld's waiver of the Statute of Limitations under this paragraph shall remain in full force and effect. In the event the Commission declares this Agreement null and void and such determination is not reversed by a court of competent jurisdiction, any monies paid to the Commission shall remain the property of the United States, and Rohde & Liesenfeld will not interpose any defense based on the Statute of Limitations in any action which the Commission may institute to recover civil penalties arising out of the conduct set forth in the factual record submitted in the present proceeding.

7. It is expressly understood and agreed that this Agreement and final approval hereof is not to be construed as an admission by Rohde & Liesenfeld or its owners, officers, directors, employees or affiliates of the violations alleged in the Order of Investigation and Hearing by which this proceeding was instituted.

8. Rohde & Liesenfeld acknowledges that it has voluntarily signed this Agreement and states that no promises or representations have been made to it, other than the agreements and consideration herein expressed.

9. Insofar as this Proposed Settlement may be inconsistent with Commission procedures for compromise and settlement of violations as set out at 46 C.F.R. § 505, the parties hereby waive application of such procedures.

10. The undersigned represents that he/she is properly authorized and empowered to execute this Agreement on behalf of Rohde & Liesenfeld and to fully bind Rohde & Liesenfeld to all of the terms and conditions set forth herein.

Rohde & Liesenfeld, Inc.

By: (S) Klaus Stankowitz
Title: Vice President

(S) JOHN ROBERT EWERS
Director
Bureau of Hearings and Field Operations

(S) JOSEPH B. SLUNT
Chief
Office of Hearing Counsel

(S) DEANA E. ROSE
Hearing Counsel

April 23, 1982

EXHIBIT "A" to Proposed Settlement Agreement in Docket No. 81-65

ROHDE & LIESENFELD, INC.

NOTICE

This is to notify you that it is the policy of this company to strictly adhere to the duties and obligations of a licensed freight forwarder as prescribed by the U.S. Federal Maritime Commission.

This means that this company, its owners, officers and employees will familiarize themselves with applicable provisions of the U.S. Shipping Act, 1916 (46 U.S.C. § 801, *et seq.*), and any subsequent amendments thereto, and Federal Maritime Commission General Order 4 (46 C.F.R. Title 510), and will abide completely by these provisions. Your attention is directed to the following particular provisions to which strict adherence is required:

1. Give correct information to ocean carriers regarding the weight, measurement and destination of shipments in connection with forwarding transactions.
2. Do not obtain transportation at other than applicable rates.
3. Seek diligently to ascertain from the supplier, before exportation, accurate information as to the actual measurement of each shipment where a question has arisen as to the actual measurement and decline from handling such shipment if Rohde & Liesenfeld is unable to confirm the correct measurement prior to the ocean transportation.
4. Do not seek a freight rate which is not provided in the carrier's tariff.

The foregoing list of freight forwarder duties and obligations is for example only, and you are directed to adhere to all other obligations of the Shipping Act, 1916, and General Order 4.

Please sign the attached copy of this notice in the space provided, and return it within two days to Rohde & Liesenfeld, Inc., One World Trade Center, New York, New York.

I, ____________________ , hereby acknowledge that I have read the foregoing notice and agree to adhere to it completely.

(S) ____
Signature

____
Title:

____
Office:

____
Date

EXHIBIT "B" to Proposed Settlement Agreement in Docket No. 81-65

AFFIDAVIT

I, ____________________, hereby depose and state as follows:

1. I am the ______________________________ of Rohde & Liesenfeld, Inc. with offices at ____.

2. I have read and understood the settlement agreement entered into between Rohde & Liesenfeld, Inc, and Federal Maritime Commission Bureau of Hearings and Field Operations in Commission Docket No. 81-65.

3. I will not engage in, and will instruct those under my supervision to not engage in any practices which would violate the U.S. Shipping Act, 1916 (46 U.S.C. § 801, *et seq.*), and Federal Maritime Commission General Order 4 (46 C.F.R. Title 510), both of which I have read and with which I have become familiar.

4. I will strictly abide by all provisions of the Shipping Act, 1916, and General Order 4, and will instruct those under my supervision to do the same.

5. I understand that I am signing this affidavit under oath, and that any false statement herein could subject me to possible criminal penalties.

(S) ____

Sworn to before me, a Notary Public,
this __________ day of ____________________, 19______.

(S)____
Notary Public
My Commission Expires:

[Seal]

FEDERAL MARITIME COMMISSION

DOCKET NO. 82-11

JOHNSON & JOHNSON INTERNATIONAL

v.

ECUADORIAN LINE, INC.

NOTICE

July 19, 1982

Notice is given that no exceptions have been filed to the June 7, 1982 initial decision in this proceeding and that the time within which the Commission could determine to review has expired. No such determination has been made and accordingly, that decision has become administratively final.

(S) FRANCIS C. HURNEY
Secretary

FEDERAL MARITIME COMMISSION

DOCKET NO. 82-11

JOHNSON & JOHNSON INTERNATIONAL

v.

ECUADORIAN LINE, INC.

Five shipments of polyethylene film improperly classified as Cargo N.O.S. Reparation awarded.

Axel O. Velden and *Harold Clevett* for complainant.

Paul G. Kirchner for respondent.

INITIAL DECISION [1] OF JOHN E. COGRAVE, ADMINISTRATIVE LAW JUDGE

Finalized July 19, 1982

Johnson & Johnson International accuses Ecuadorian Line of improperly classifying five shipments of polyethylene film as Cargo N.O.S. and seeks $20,822.64 in reparation for the overcharges resulting from the alleged misclassification.

Johnson & Johnson asked that the case be handled under the shortened procedure of Subpart K of the Commission's Rules of Practice and Procedure and attached to its complaint a brief and supporting documents. The use of the shortened procedure is conditioned upon the consent of the respondent. However Ecuadorian Line in its answer to the complaint stated that ". . . Ecuadorian Line does not at this time consent to the shortened procedure." In response to an order calling upon respondent to either consent to the shortened procedure or state its unqualified refusal to do so, respondent agreed to the shortened procedure and filed its answering memorandum pursuant to the schedule established by my order of March 12, 1982. On April 27, 1982, Johnson & Johnson filed a "Reply of Johnson & Johnson International to the Motion of Ecuadorian Line dated April 9, 1982." The document to which Johnson & Johnson's Reply was addressed was actually the respondent's Answering Memorandum of Fact and Argument which ended with a more or less pro forma motion to dismiss. Ecuadorian Line has now filed a motion to strike the reply and dismiss the proceeding. Under the schedule mentioned above, Johnson & Johnson's reply

[1] This decision will become the decision of the Commission in the absence of review thereof by the Commission (Rule 227, Rules of Practice and Procedure, 46 C.F.R. 502.227).

should have been filed on April 19, 1982, but was not served until April 26, 1982. Respondent, while recognizing that "reparation proceedings should not be overburdened with legal technicalities or procedural niceties," urges that the "gross failure" of Johnson & Johnson to comply with my order "cannot reasonably be considered to involve a mere legal technicality." According to Ecuadorian Line "The integrity of the Commission's decision-making process would be significantly impaired if such orders could be disregarded at the whim of the parties involved in these proceedings." Johnson & Johnson by telex expresses its regret at filing its reply seven days late and asks that the motion to dismiss be denied and the matter settled on its merits.

While the delay in filing the reply may not be a mere legal technicality (whatever that may mean), I do not find that excusing it will significantly impair the Commission's decision-making processes. The motion to dismiss is denied.

The facts giving rise to Johnson & Johnson's claim for reparation are few and undisputed. The bills of lading covering the five shipments described the commodity shipped as "polyethylene film." Ecuadorian Line rated the shipments as Cargo N.O.S. because the tariff [2] contained no rate for polyethylene film.

Subsequently Ocean Freight Consultants on behalf of the complainant filed claims for overcharges with respondent on the basis that the shipments should have been classified as Film, viz: Cellulose (Cellophane) or Resinous Film Products, viz: in sheets, sheeting or rolls (not adhesive or gummed). The claims were rejected on the ground that the N.O.S. classification was the correct one and ultimately this complaint was filed.

The single issue presented [3] is whether polyethylene film is included within the description "Film, viz: Cellulose (Cellophane) or Resinous Film Products. . . ." Complainant asserts that polyethylene and resinous film are synonymous while respondent says that they are separate and distinct articles. Both rely on dictionary definitions to support their disparate conclusions.

In its opening memorandum, complainant's argument consisted of reliance upon a "dictionary definition on page 759" which stated, "Polyethylene is a semi-transparent film and the white leathery resinous form are [sic] by far the most common." [4] To complainant this makes polyethylene film and resinous film synonymous and dictates the application of the "Film" classification to the five shipments.

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[2] Freight Tariff FMC No. 2, Atlantic & Gulf/West Coast of South America Conference.

[3] The issue of whether Johnson & Johnson had actually paid the freight and thus had standing was rendered moot by the submission of cancelled checks showing payment of the freight.

[4] The dictionary was unidentified in the opening memorandum; it was identified in complainant's reply as the *Condensed Chemical Dictionary, Eighth Edition.*

The respondent, however, relies upon the *New Webster's Encyclopedic Dictionary of the English Language* which at page 716 defines resin as "[a] flammable substance of sundry varieties found in most plants, and often obtained by spontaneous exudation." From this and other definitions,[5] respondent feels that "it is clear that resin, in its usual and ordinary meaning, refers to a substance derived from plants." Respondent then offers a string of definitions which it says shows the difference between resinous film products and polyethylene film. Polyethylene is defined as a "polymer of ethylene" (*New Webster's Encyclopedic Dictionary*, page 643) and "polymerization" is defined by the *Condensed Chemical Dictionary* at page 710 as "a chemical reaction usually carried out with a catalyst, heat, or light in which two or more relatively simple molecules (monomers) combine to form a chainlike macromolecule or polymer." Finally ethylene is defined as a "colorless, highly flammable gas found in coal gas" (*Condensed Chemical Dictionary*, page 301, note 4). From all of this, respondent concludes that far from being synonymous, polyethylene and resinous film are distinct and cannot be covered by the same classification, i.e., polyethylene is not derived from plant exudation and, therefore, it cannot be described as a resinous product. Complainant finds respondent's reliance on resin's origin from plant exudation as misplaced because resin is also synthetically produced.[6]

The arguments would end here were it not for respondent's contention that this "battle of the dictionaries" is "both unnecessary and of questionable relevance" because ". . . tariff terms and commodity descriptions are to be construed in the sense in which they are generally understood and commercially available." Having said this, however, respondent's entire support for its idea of the "generally understood" meaning of polyethylene is found in the following:

> In this case, even complainant must admit that polyethylene is commonly known, identified, and described simply as polyethylene. It is extremely doubtful that anyone even remotely familiar with polyethylene would ever describe it as a resinous film. Indeed, complainant refused to identify it as resinous film on the bills of lading subsequent to being put on notice that Ecuadorian would not accept the assertion of OFC [Ocean Freight Consultants] that polyethylene should be interpreted

[5] Respondent also cites the following: "Any of various solid or semisolid amorphous, fusible, flammable, natural organic substances that are usually transparent or translucent and yellowish to brown, are formed especially in plant secretions. . . ." *Webster's New Collegiate Dictionary*, 8th Edition (1980) at 977. "Any of various solid or semisolid, viscous, usually clear or translucent, yellowish or brownish, organic, substances exuded from various plants and trees." *Webster's New World Dictionary of the American Language* 2nd Edition (1970) at 1210.

[6] Complainant also alludes to the fact that other carriers have classified polyethylene as resinous film. This, however, neither proves nor disproves the validity of those classifications and certainly does not resolve the dispute here.

> and considered a resinous film product so as to receive the lower freight rate for that classification.[7] Complainant must have been uncomfortable with the idea of describing a commodity that is universally recognized as polyethylene as something else in order to get a lower rate.

Unfortunately this falls considerably short of establishing that the relevant segment of the commercial population calls polyethylene simply polyethylene and nothing else. Complainant seems to feel that respondent may be biased and not really conversant with the many and varied facets of polyethylene because it is clear to complainant that "not only those remotely familiar with polyethylene and with an objective mind" can see that polyethylene and resinous film are the same, but this is "widely recognized by other steamship conferences." Complainant uses several commodity classifications from other tariffs to show that other conferences share its views on polyethylene.

One example offered by complainant is that of Inter-American Freight Conference, the tariff of which contains the classification "Film, Transparent Cellulose or Resinous." Another is found in the Atlantic & Gulf West Coast of South America Conference tariff which lists "Film, viz.: Cellulose (Cellophane) or Resinous Film Products, viz.: . . . Moving Picture, Photographic or X-Ray." Complainant also offers the tariff of the North Atlantic Baltic Freight Conference which has a commodity description "Sheets or Film . . . Plastic or Resinous. . . ."

From these examples, complainant argues that, "It can be seen . . . that film cellulose, resinous, plastic and polyethylene are treated, so far as tariff classification and construction are concerned, on the same rate level. Hence, it goes without saying that they must be synonymous." Complainant's "hence" is ill-used here for it simply does not follow from the stated "facts" that resinous film and polyethylene film are synonymous, i.e., that they have the same or nearly the same meaning. The reasoning is circular at best. None of the cited examples contains "polyethylene," so complainant must necessarily begin with the very proposition it wants to establish—that polyethylene and resinous are synonymous. More importantly complainant simply states that polyethylene, cellulose and resinous film are treated the same for classification or rate purposes. It offers not a single instance of an actual shipment which was treated this way. A degree of emphasis is placed on the North Atlantic Baltic Freight Conference Tariff which includes "plastic" film in its classification. About this complainant says that:

[7] There is some dispute as to the sequence of events and, in view of this, respondent's "refusal" to change its description of the commodity on the bill of lading is irrelevant to the issue of the proper classification.

> Polyethylene is a kind of plastic is plainly defined in the condensed chemical dictionary, page 690.[1]
>
> ---
>
> [1] "Plastic in general (including all forms) are sensitive to high temperatures, among the more resistant being fluorcarben resins, nylon, phenolics, polyamides, and silicones, though even these soften or melt above 500°F. Other types are combustible which [sic] exposed to flame for a short time (*polyethylene*, acrylic . . .)—" [Emphasis complainant's.]

Unfortunately for complainant, the ground for the inclusion of polyethylene in this description is found in the presence of the word "plastic," a word notable in respondent's tariff only for its absence.

Complainant has shown only that other conferences have commodity classifications the same as or similar to respondent's. It has not shown that these conferences routinely include polyethylene film within those commodity descriptions. Complainant has simply failed to establish that those "remotely familiar with polyethylene" can see that polyethylene film and resinous film are synonymous—that this is the way polyethylene is commonly known in the commercial world. From all this, it seems that resort to the "battle of the dictionaries" is indeed necessary.

In the final analysis, complainant's case rests upon the seemingly slender thread of *Condensed Chemical Dictionary's* discussion of the characteristics of polyethylene, and here complainant does not do itself justice in presenting its case. Its entire argument on this head consists of two statements:

> As per dictionary definition on page 759 (copy attached) "Polyethylene is a semi-transparent film and the white leathery resinous form are [sic] by far the most common. The definition goes on to say that polyethylene is the high molecular weight materials [sic], are tough, white leathery resinous materials. *The term polyethylene usually refers to the latter.*" (Emphasis complainant's.) (Opening memorandum, "Brief".)

> As stated in our complaint, the dictionary clearly defines: "polyethylene as a semi-transparent film and the white leathery resinous form are [sic] by far the most common. The definition goes on to say that polyethylene is the high molecular weight materials [sic], are tough white leathery, resinous materials. *The term polyethylene usually refers to the latter.*" (Emphasis complainant's.) (Reply, page 1.)

Aside from playing fast and loose with quotation marks, complainant has the disconcerting habit of combining or reordering various portions of the definition without any real indication that it is doing so.

The opening definition of polyethylene, as found on page 759 of the *Condensed Chemical Dictionary*, is:

> Polymerized ethylene, available in various forms, but the semi-transparent films and the white leathery resinous form are by far the most common.

The definition then deals with the three weights of polyethylene, low, medium and high and as to the latter it states, "The high molecular weight materials (molecular weight greater than 6000) are tough, white leathery, resinous materials. The term polyethylene usually refers to the latter," i.e., the high weight molecular materials as distinguished from the low weight polymers, which are high grade lubricating oils, and the medium weight polymers, which are waxy materials miscible with paraffin.

The immediate difficulty with the precise definition in *Condensed Chemical Dictionary* is the distinction it seems to make between the two most common forms of polyethylene—"the semi-transparent film" and the "white leathery resinous form." The inference to be drawn from this would seem to be that whatever the "semi-transparent film" may be, it is not "resinous." However, having made this distinction, the definition later seems to abolish it when under the heading "Properties," the author of the definition uses the term "these resins" to refer to all of the low and medium weight polymers and the high weight molecular materials. From this it would appear that all polyethylene contain "resins," albeit synthetic, and, therefore, polyethylene can be deemed "resinous."

The respondent would, as already noted, restrict "Resinous Film Products" to substances "derived from plants," and would exclude polyethylene from various resinous products in that it "*inter alia*, is not derived from plant secretions." Respondent, however, conveniently excludes a portion of the standard definition of resin:

> Resin—1 a: any of various hard brittle solid to soft semi-solid amorphous fusible flammable substances (as amber, copals, dammars, mastic, guaiacum) that are usu. transparent or translucent and yellowish to brown in color with a characteristic luster, that are formed esp. in plant secretions . . . 2 a: any of a large class of synthetic products (as alkyd resins or phenolic resins) usu. of high molecular weight that have some of the physical properties of natural resins but typically are very different chemically, that may be thermoplastic or thermosetting, that are made by polymerization or condensation, and that are used chiefly as plastics . . . (*Webster's Third International Dictionary*.)

Thus, "resin" can be prepared synthetically [8] and its meaning is not confined to plant secretions. Moreover, in its attempt to exclude poly-

[8] The *World Book Dictionary* defines resin as including "any of a large group of resinlike substances that are made artificially and are used especially in making plastics."

ethylene, respondent states that *New Webster's Encyclopedic Dictionary of the English Language* defines polyethylene as a "polymer of ethylene" and then launches into a description of "polymerization" to show that polyethylene is the result of a chemical process not plant exudation, all of which is true as far as it goes. Polyethylene, however, is further defined as "a polymer of ethylene, one of a group of partially crystalline light weight *thermoplastics* . . . ." (Emphasis mine.)

From the foregoing, it is my conclusion that the five shipments should have been classified as Film, Cellulose (Cellophane) or Resinous Film Products, etc. "Resin" must be read as including resins produced synthetically. Synthetic resins include "thermoplastics" and polyethylene is a thermoplastic. "Resinous" means "having the nature or characteristic of or like resin" and should be read to cover the synthetic resin polyethylene. The application of the classification Cargo N.O.S. to the five shipments of polyethylene film was improper under section 18(b)(3) of the Shipping Act, 1916 (46 U.S.C. 817(b)(3)). Complainant is awarded reparation in the amount of $20,822.64 with interest to be computed under Rule 253 of the Commission's Rules of Practice and Procedure, 46 C.F.R. 502.253.

(S) JOHN E. COGRAVE
Administrative Law Judge

FEDERAL MARITIME COMMISSION

DOCKET NO. 81-42

RAMON ARGUELLES AND RAMON E. ARGUELLES D/B/A MIAMI CARGO SERVICES - FMC INDEPENDENT OCEAN FREIGHT FORWARDER LICENSE NO. 1464

NOTICE

July 29, 1982

Notice is given that no exceptions have been filed to the June 21, 1982 initial decision in this proceeding and the time within which the Commission could determine to review that decision has expired. No such determination has been made and accordingly, that decision has become administratively final.

(S) FRANCIS C. HURNEY
Secretary

FEDERAL MARITIME COMMISSION

DOCKET NO. 81-42

RAMON ARGUELLES AND RAMON E. ARGUELLES D/B/A MIAMI CARGO SERVICES - FMC INDEPENDENT OCEAN FREIGHT FORWARDER LICENSE NO. 1464

Held:

(1) Where the respondent improperly acted as an ocean freight forwarder while its license was revoked for failing to file a required security bond; and where the respondent issued invoices to its customers billing them for cartage and local insurance without performing any services or placing any insurance; and where the respondent issued invoices which co-mingled various components of insurance and accessorial charges and invoiced clients for more than the actual cost of the insurance and added other expenses to the insurance charges; and where the respondent entered into a scheme with a carrier whereby it overcharged the shipper and then paid the overcharge to selected individuals in the form of "kickbacks," after the carrier made an "overcharge correction" in a like amount, a settlement of $35,000.00 is just and proper. Such a penalty recognizes the seriousness of the possible violations of the Shipping Act and the Commission's Rules and Regulations, and gives due consideration to mitigating circumstances. It is within that reasonable area of settlement and compromise which lends itself to the deterrence of future similar conduct by the respondent and others so inclined, and which will secure compliance with the law and the Commission's rules and policies.

(2) Where the respondent freight forwarder engaged in various practices not knowing or believing they were serious violations, and where he now recognizes their seriousness, and where the respondent has demonstrated he is able and willing to carry on the business in accordance with the pertinent law and regulations and has sworn to do so in the future, it is held he is "fit" to carry on such a business and his license need not now be suspended or revoked.

Irving Schulman for respondent.

Alan Jacobson as Hearing Counsel.

INITIAL DECISION [1] OF JOSEPH N. INGOLIA, ADMINISTRATIVE LAW JUDGE

Finalized July 29, 1982

PRELIMINARY MATTERS

By Order of Investigation dated July 1, 1981, the Commission ordered that pursuant to sections 22, 32 and 44 of the Shipping Act, 1916, a proceeding be instituted to determine:

[1] This decision will become the decision of the Commission in the absence of review thereof by the Commission (Rule 227, Rules of Practice and Procedure, 46 C.F.R. 502.227).

1. Whether Ramon Arguelles and Ramon E. Arguelles, d/b/a Miami Cargo Services, violated section 44(a) of the Shipping Act, 1916, and section 510.3 of the Commission's General Order 4 (46 C.F.R. 510.3), by carrying on the business of forwarding without a license;

2. Whether Ramon Arguelles and Ramon E. Arguelles d/b/a Miami Cargo Services violated sections 510.23(d), 510.23(e) and 510.23(j) of General Order 4 by incorrectly invoicing shippers for the cost of cargo insurance and accessorial services during the months of October and November, 1978 and April, 1979;

3. Whether Ramon Arguelles and Ramon E. Arguelles d/b/a Miami Cargo Services violated section 510.23(f) of General Order 4 by failing to account to its principals for overpayments, reductions in rates, insurance refunds and other sums in April and May, 1979;

4. Whether civil penalties should be assessed against Ramon Arguelles and Ramon E. Arguelles d/b/a Miami Cargo Services, pursuant to section 32(e) of the Shipping Act, 1916, for violations of section 44 of the Shipping Act, 1916, or sections 510.23(d), 510.23(e), 510.23(f), and 510.23(j) of the Commission's General Order 4 and, if so, the amount of such penalty; and

5. Whether the independent ocean freight forwarder license of Ramon Arguelles and Ramon E. Arguelles d/b/a Miami Cargo Services should be suspended or revoked, pursuant to section 44(d) of the Shipping Act, 1916, for:

a. willful violations of section 44 of the Shipping Act, 1916, or willful violations of the Commission's General Order 4 as listed in subparagraph 4 above; or

b. such conduct as the Commission shall find renders Ramon Arguelles and Ramon E. Arguelles d/b/a Miami Cargo Services unfit to carry on the business for forwarding in accordance with section 510.9(e) of General Order 4.

As a result of the above Order the parties submitted a joint stipulation of facts and a proposed settlement of civil penalties. In addition, testimony was taken regarding the imposition of civil penalties as well as to whether or not the respondent was "fit" to continue as a licensed ocean freight forwarder.

STIPULATION OF FACTS

1. Miami Cargo Services, hereinafter referred to as MCS, is located at 3050 Biscayne Boulevard, Suite 306, Miami, Florida, and is an independent ocean freight forwarder operating under FMC License No. 1464-R, which was transferred to it on May 3, 1976. (Stip., para. 1)

2. Prior to May 3, 1976, Ramon Arguelles d/b/a Miami Cargo Services, as a sole proprietor, operated as an independent ocean freight

forwarder under FMC License No. 1464, issued on March 26, 1973. (Stip., para. 2)

3. MCS is a partnership composed of Ramon and Ramon E. Arguelles, both of whom are certified as qualifying officers. Ramon has not been active in MCS for several years, and Ramon E., as senior partner, has been running the firm. (Stip., para. 3)

4. In the latter part of 1978 the FMC increased the surety bond needed by a licensed independent ocean freight forwarder from \$10,000.00 to \$30,000.00. MCS failed to file the necessary surety bond and on December 2, 1978, its license was revoked. (Stip., para. 4)

5. MCS obtained the required surety bond on January 24, 1979, so notified the Commission, and was reissued License No. 1464-R, effective April 12, 1979. (Stip., para. 5)

6. From December 2, 1978 through April 11, 1979, MCS dispatched 584 shipments on behalf of others by oceangoing common carriers in the foreign commerce of the United States. During this period MCS's senior partner believed that all shipments were covered by the surety bond issued on January 24, 1979, and that the license had been reinstated. (Stip., para. 6; Tr., pp. 18, 19)

7. Prior to October, 1979, MCS issued invoices to customers which did not state separately the insured value, insurance rate and premium cost, the charge for each accessorial service including terminal charges, and the fee for arranging for insurance and/or accessorial services. The senior officer of MCS was not then aware that such separate statements were required (Stip., para. 7; Tr. 23-25)

8. On at least 55 shipments made during the months of October and November, 1978, and April, 1979, MCS invoiced its clients for "insurance and placement" charges in an amount totalling \$3,912.77 more than the actual cost of the marine insurance. MCS, through its senior officer, was unaware that such a collective charge, even though disclosed, was improper because it did not distinguish between insurance policy premiums and handling charges. (Stip., para. 8)

9. On 144 shipments made during the months of October and November, 1978, and April, 1979, MCS invoiced its clients for insurance charges which were never reported or paid to the insurance carrier. In one instance, when a claim occurred for goods valued at \$13,000.00, MCS reimbursed the shipper in full, even though it did not receive an insurance reimbursement itself. When the "irregularities in reporting proper insurance premiums" were called to the attention of MCS, they were immediately corrected. (Stip., para. 10; Tr. 22-27)

10. On 108 shipments dispatched during the months of October and November, 1978, and April, 1979, MCS invoiced its clients for "cartage and local insurance" totalling at least \$3,397.50. The money was used by MCS to pay fees to various persons referring business to MCS and not to pay cartage and insurance costs. (Stip., para. 11)

11. On April 12, 1979, MCS remitted the sum of $4,000.00 to Jose Mora, a partner of V & E Inter-American Sales (V&E). The money was actually a freight overcharge correction given MCS by the carrier, Maritimas Del Caribe (Maritimas) which was due MCS's principal, V&E. It was paid to Mr. Mora instead of V&E because "he wanted some cash in Miami that would not show up in his Venezuelan company." (Stip., para. 12; Tr. 15, 16)

12. On May 31, 1979, MCS received a credit from Marine Agency, Inc., agents for Maritimas, in the amount of $2,128.60, representing a reduction in monies owed on a shipment made by MCS on behalf of V&E. MCS applied this money as an insurance discount, paid it to an unidentified third party, and failed to notify V&E. (Stip., para. 13; Tr. 16, 17, 29, 30, 31)

13. On a shipment of 16 vehicles dispatched by MCS for Orlando Auto Square, moved by Maritimas in 1979, MCS collected the full charges of $12,334.90 from the shipper. In paying Maritimas, through its agent, Marine Agency, MCS paid the full charges less $1,600.00. On May 11, 1979, MCS paid the $1,600 to Jose Carillo, who was an officer of the consignee of the shipment. (Stip., para. 14)

14. On April 11, 1979, MCS collected a total of $10,379.55 from J. M. Hallet New Car Brokers for a shipment made on a Maritimas vessel. Included in the bills of lading charges was the sum of $859.60 for special handling. In paying the charges to Marine Agency, acting as agent for Maritimas, MCS deducted the $859.60 and paid this amount to one L. Yanez. (Stip., para. 15)

15. In 1979 MCS collected a total of $1,571.80 from Maronne Ford Inc. for a shipment made on a Maritimas vessel. Included in the bill of lading charges was the sum of $200.00 for special handling. In paying the charges to Marine Agency, MCS deducted the $200.00 and paid it to Manuel Blanco. (Stip., para. 16)

16. With respect to the transactions described in paragraphs 11 through 15 above, the carrier, Maritimas agreed to add an unwarranted "handling charge" to the normal bill of lading so that it could later issue a "correction" for that charge which would then enable MCS to pay the monies to selected individuals. (Tr. 16, 17, 29, 30, 31, 32)

17. In September, 1979, FMC District Investigator Donald Butler conducted a field review of MCS operations. He advised Ramon E. Arguelles that MCS may have violated section 44 of the Shipping Act as well as various provisions of General Order 4. Mr. Arguelles stated he would bring MCS into full compliance with Commission regulations. Mr. Butler again reviewed MCS's operation in September of 1981. MCS no longer invoices clients for "cartage and local insurance" without performing such services. Also, it does not invoice clients for insurance placement charges without placing the insurance. (Stip., paras. 17-22)

ULTIMATE FINDINGS OF FACT

18. The record in this proceeding justifies a settlement whereby the respondent pays $35,000.00 to the Federal Maritime Commission. Such a settlement recognizes the seriousness of the alleged violations involved and takes into consideration relevant mitigating circumstances and is within the parameters of that reasonable area of settlement and compromise which lends itself to the deterrence of future similar conduct by the respondent and others so inclined, and which will secure compliance with the law and the Commission's rules and practices.

19. The respondents Ramon Arguelles and Ramon E. Arguelles d/b/a MCS are fit to continue as licensed ocean freight forwarders.

DISCUSSION AND CONCLUSIONS

1. *Settlement of Civil Penalties*

It is well settled that the law generally, as well as the Federal Maritime Commission, encourages settlements and that there is a presumption that settlements are fair, correct and valid. Section 5(b)(1) of the Administrative Procedure Act, 5 U.S.C. 554(c)(1), provides:

> The agency shall give all interested parties opportunity for--
> (1) The submission and consideration of facts, arguments, offers of settlement, or proposals of adjustments when time, the nature of the proceedings, and the public interest permit.

In *Pennsylvania Gas & Water Co. v. Federal Power Commission*, 463 F.2d 1242, 1247 (D.C. Cir. 1972), the Court, noting its legislative history,[2] referred to the above provision "as being of the 'greatest importance' to the functioning of the administrative process" and stated:

> The whole purpose of the informal settlement provision is to eliminate the need for often costly and lengthy formal hearings in those cases where the parties are able to reach a result of their own which the appropriate agency finds compatible with the public interest.

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[2] Senate Judiciary Comm., Administrative Procedure Act--Legislative History, S. Doc. No. 248, 79th Cong., 2d Sess. 203 (1945). In considering the settlement provision in S. 7, 79th Cong., 1st Sess. (1945), which ultimately became Section 554(c) of the Administrative Procedure Act (see note 5, *supra*), the Senate Judiciary Committee stated:

> Subsection (b) [now Section 554(c) of the Administrative Procedure Act] provides that, even where formal hearing and decision procedures are available to parties, the agencies and parties are authorized to undertake the informal settlement of cases in whole or in part before undertaking the more formal hearing procedure. Even courts through pretrial proceedings dispose of much of their business in that fashion. There is much more reason to do so in the administrative process, for informal procedures constitute the vast bulk of administrative adjudication and are truly the life- blood of the Administrative process. . . . The statutory recognition of such informal methods should both strengthen the administrative arm and serve to advise private parties that they may legitimately attempt to dispose of cases at least in part through conferences, agreements, or stipulations. It should be noted that the precise nature of informal procedures is left to development by the agencies themselves.

S. Doc. No. 248, *supra*, at 24.

Further, the Commission has by rule encouraged settlement [3] and has often favorably looked upon them as a matter of policy.[4]

As to the propriety of the settlement itself the parties propose that MCS will pay the FMC $35,000.00 over a five year period. In addition, MCS agrees to notify all of its owners, directors and officers of the terms of the agreement and, most importantly, has agreed to permit an independent audit of its books and records over a four year period, with or without notice to MCS. The audit will be furnished to the FMC. In determining whether or not the proposed settlement is fair and reasonable and is in the public interest, one must refer to the settlement standards set forth in 4 C.F.R. Parts 101-105 (1980), which are referred to in section 505.1 of the Commission's Rules and Regulations, 46 C.F.R. 505.1 (1980). Those standards involve such criteria as the cost of collecting the claim, enforcement policy and litigative probabilities. 4 C.F.R. 103 (1980). Embodied in these general standards are more specific factors such as:

1. The nature and seriousness of the violations alleged;
2. The amount of money generated through the allegedly violative conduct;
3. The distribution of monies generated through the violative conduct;
4. The cessation of the allegedly violative conduct; and
5. The level of cooperation provided.

When one applies the above standards to the instant case there is little question but that the alleged violations are serious. First, the respondent engaged in business as an ocean freight forwarder without a license. Second, it invoiced clients for insurance charges it never paid and failed to separately state various charges on the invoices. Third, it caused erroneous charges to be refunded from carriers so that the monies could be used to pay "kickbacks" to various third parties. All of

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[3] Rule 91 of the Commission's Rules of Practice and Procedure, 46 C.F.R. 502.91, provides in pertinent part: "Where time, the nature of the proceeding, and the public interest permit, all interested parties shall have the opportunity for the submission and consideration of facts, argument, offers of settlement, or proposal of adjustment. . . ."

See also Rule 505, 46 C.F.R. 505, where in General Order 30 the Commission provides for: "compromise, assessment, settlement and collection of civil penalties under the Shipping Act, 1916, and the Intercoastal Shipping Act, 1933"; and the criterion contained in the government-wide "Standards for the Compromise of Claims" where in section 103.5 under the heading "Enforcement Policy" (4 C.F.R. 103.5) it is stated that:

> Statutory penalties, forfeitures, or debts established as an aid to enforcement and to compel compliance may be compromised pursuant to this part if the agency's enforcement policy in terms of deterrence and securing compliance, both present and future, will be adequately served by acceptance of the sum to be agreed upon.

[4] See *Perry Crane Service v. Port of Houston Authority, of Port of Houston, Texas (Approval of Settlement),* FMC Docket No. 79-51, 22 F.M.C. 30 (1979); *Del Monte Corp. v. Matson Navigation Co. (Approval of Settlement),* FMC Docket No. 79-11, 22 F.M.C. 364 (1979); *Merck, Sharp & Dohme v. Atlantic Lines,* 17 FMC 244 (1973).

these activities violate the Shipping Act and go beyond the point of inadvertent error or indifference. Rather, they connote a purposefulness that cannot be condoned or allowed to continue.

On the other hand, in mitigation, it must be noted that even though MCS operated without a license it did so at a time when the Commission was changing its bonding requirements and actually had secured the necessary bond for most of the period involved. In addition, while the respondent engaged in prohibited activity in scores of transactions, the amounts of money involved were small. Indeed, if one counts the insurance damage claim it paid to a customer, and amounts paid to third parties the evidence does not establish any material unjust enrichment. Finally, the record is clear that once contacted by the FMC regarding possible violations the respondent cooperated fully. It made its records available and immediately undertook to correct the violative conduct. It made no attempts to conceal and has taken steps to prevent future wrongdoing.

Considering all pertinent settlement criteria we believe the proposed settlement is a fair and equitable one and is in the public interest. The $35,000.00 payment is substantial, but is neither excessive, nor inadequate.[5] It represents an amount which will further FMC's enforcement policy in that it will discourage the respondent from repeating its improper conduct and will deter others from doing the same.[6] Further, it recognizes the likelihood that even if this matter were litigated it is doubtful that a greater amount could be realized, especially when one considers the additional litigating costs. As to the other aspects of the settlement they are all positive. The fact that there will be an audit of the respondent's activities over a four year period assures a continuity of responsibility, and, together with its cooperative attitude during the investigation, demonstrates an intent on the part of the respondent that favors approval of the agreement.[7]

Without further belaboring the point, the settlement of the civil penalties proposed by the parties here is a fair and an equitable one in the light of the facts and circumstances involved, is in the public interest, and is approved. A copy of the settlement agreement is attached.

[5] *Behring International*, Initial Decision served March 17, 1981, adopted by the FMC on June 30, 1981, 23 F.M.C. 973 (1981).

[6] *United States v. Atlantica, S.p.A.*, 478 F. Supp. 833, 836 (SDNY 1979. *Sovereign International Corp., Etc.*, FMC No. 80-66, served February 19, 1982 (24 F.M.C. 880).

[7] See *Continental Forwarding, Inc., Etc.*, FMC No. 80-3, served February 2, 1981 (23 F.M.C. 623, 630), where the Commission indicated that "cooperation with investigators and immediately taking remedial action" is a valid mitigating circumstance.

Fitness.

After settlement of the penalty provisions the only issue left for decision is whether or not the respondents' ocean freight forwarder's license should be suspended or revoked pursuant to section 44(d) of the Shipping Act, 1916 (Issue No. 4 of the Order of Investigation and Hearing). In *Independent Freight Forwarder's License—E.L. Mobley Inc.*, 18 S.R.R. 451 (1979), Initial Decision served November 6, 1978, where the Commission issued an Order of Investigation regarding both civil penalties and the question of fitness, the Commission held that:

> Freight forwarder licensee will not be permitted to use the settlement procedures in lieu of proceeding with a hearing ordered by the Commission to investigate alleged violations of the freight forwarders rules and the fitness of the forwarder to continue as a licensee . . . it would be an abrogation of the agencies Shipping Act responsibilities to permit the licensee to negotiate the issue of fitness. . . .

So here, it is necessary to make a determination on this issue.

Section 44 of the Shipping Act, 1916, provides in pertinent part:

> SEC. 44.(a) No person shall engage in carrying on the business of forwarding as defined in this Act unless such person holds a license issued by the Federal Maritime Commission to engage in such business. . . .
>
> (b) 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 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, 1916; otherwise such application shall be denied. . . .

Part 510 of the Commission's rules (46 C.F.R. 510.1 *et seq.*) deals with the Licensing of Independent Ocean Freight Forwarders. The case law that has evolved from the application of the pertinent legislation and regulations is understandably subjective in nature. On the one hand it has been held that where violations of the Shipping Act have occurred and it is believed the licensee will continue in the violative conduct, that licensee cannot be deemed to be fit to be so licensed. *Independent Ocean Freight Forwarder Application—Alvarez Shipping Co., Inc.*, 16 F.M.C. 78 (1973); *G.R. Minon—Freight Forwarder License*, 12 F.M.C. 75 (1968). See also, *Harry Kaufman D/B/A International Shippers Co. of N.Y.—Independent Ocean Freight Forwarder License No. 35 and Forwarding Activities of Irving Betheil and Stephen M. Betheil*, 16 F.M.C. 256 (1973). On the other hand, it has been held in *Mobley, supra,* that:

> Administrative sanctions should not, however, be blindly or automatically imposed and even in cases where the violation is clear, evidence of mitigation will be considered in tailoring the sanctions to the facts of the specific case (footnote omitted). Section 44 and its regulations are based on an underlying remedial public interest purpose and the sanctions imposed must serve such a purpose and not be punitive in character (footnotes omitted);

and in *E. Allen Brown—Independent Ocean Freight Forwarder License No. 1246*, FMC Docket No. 79-16, Initial Decision served October 19, 1979 (22 F.M.C. 583), and partially adopted March 24, 1980, that:

> . . . Thus, the courts as well as the Commission have recognized that evidence of mitigation should be considered when determining whether a license applicant should be found to be fit although implicated in violations of the Act in the past (citations omitted). Furthermore, in previous cases the Commission has expressed its belief that the Freight Forwarder Law, P.L. 87-254, was enacted as remedial statute in order to correct abuses in the forwarding industry (citations omitted). The principle that the Commission should not rush to extreme sanctions without considering all factors of mitigation in an effort to fashion a just and reasonable remedy is well supported by the courts. Although agencies are not required to impose sanctions in a perfectly even manner because of the wide latitude they are given by the courts as the expert bodies most skilled in devising means to carry out specific legislative purposes, the agencies are nevertheless expected to consider less drastic alternative remedies and to base whatever remedy they select on facts and reasonable interpretations of law (footnote omitted).

Applying the above law and principles to the facts involved in this case, we must determine whether or not the respondents are fit to continue to be licensed as ocean freight forwarders. The evidence clearly establishes that the respondents violated provisions of the Shipping Act, and the Commission's Rules and Regulations. It also establishes that MCS's principal officer is now aware of the seriousness of the offenses involved and his testimony convinces us that they will not happen again. We believe that given Ramon E. Arguelles' obvious expertise in the area of freight forwarding, his obvious sincerity in testifying that he was determined to operate in accordance with the Commission's rules in the future, and the fact that his business is a small one wherein Mr. Arguelles' livelihood depends on future compliance with the law and regulations—suspension or revocation of the freight forwarder licenses would be too harsh a result. MCS and the Arguelles's deserve another chance and we, therefore, hold that the respondents are fit to carry on the business of independent ocean freight forwarders.

This proceeding is hereby discontinued.

(S) JOSEPH N. INGOLIA
Administrative Law Judge

BEFORE THE FEDERAL MARITIME COMMISSION

RAMON ARGUELLES AND RAMON E. ARGUELLES
D/B/A MIAMI CARGO SERVICES -
FMC INDEPENDENT OCEAN FREIGHT FORWARDER LICENSE NO. 1464

DOCKET NO. 81-42

PROPOSED SETTLEMENT OF CIVIL PENALTIES

This Proposed Settlement has been entered into between the Bureau of Hearings and Field Operations (Hearing Counsel) and Respondents, Ramon Arguelles and Ramon E. Arguelles d/b/a Miami Cargo Services. It is submitted to the presiding Administrative Law Judge for approval pursuant to Rule 162 of the Commission's Rules of Practice and Procedure (46 C.F.R. 502.162) and section 505.3 of the Commission's General Order 30 (46 C.F.R. 505.3) and is to be incorporated into the Final Order in the instant proceeding, if so approved.

WHEREAS, by Order of Investigation and Hearing served July 1, 1981, the Commission instituted the present investigation to determine whether Respondents had violated section 44(a) of the Shipping Act, 1916 (46 U.S.C. 841), and sections 510.23(d), 510.23(e), 510.23(f) & 510.23(j) of the Commission's General Order 4 (46 C.F.R. 510.23(d), 510.23(e), 510.23(f) & 510.23(j)), and whereas, that Order includes the issue of whether civil penalties should be assessed for any violations of the above sections of the Shipping Act, 1916, or the Commission's General Order 4 so found;

WHEREAS, the Order of Investigation and Hearing alleges that Respondents may have violated the above sections of the Shipping Act, 1916 and the Commission's General Order 4;

WHEREAS, Respondents have admitted that they have engaged in specified conduct which may be violative of section 44(a) of the Shipping Act, 1916, and sections 510.23(d), 510.23(e), 510.23(f), and 510.23(j) of the Commission's General Order 4;

WHEREAS, Respondents have terminated the conduct that may be violative of the Shipping Act, 1916, and of the Commission's General Order 4 and have instituted and have indicated their willingness and commitment to maintain measures designed to eliminate, discourage, and prevent such conduct in the future;

WHEREAS, the parties, in order to avoid the delay and expense that would be occasioned by further litigation of the issues specified in the Order of Investigation and Hearing, are desirous of settling expeditiously the issue of the appropriate amount to be paid by Respondents in accordance with the terms and conditions of this Agreement; and

WHEREAS, section 32(e) of the Shipping Act, 1916, (46 U.S.C. § 831(e)) authorizes the Commission to assess or compromise all civil penalty claims under the Shipping Act, 1916;

NOW, THEREFORE, in consideration of the premises set forth herein, and in compromise of all civil penalty claims arising from the conduct set forth in the factual record submitted in the present proceeding, Respondents agree, as a condition of this Agreement, to comply with all requirements set forth hereinafter, subject to the stipulations, conditions and terms of settlement contained herein:

1. Respondents hereby agree, as a condition of this Agreement, to pay a monetary amount of Thirty-Five Thousand Dollars ($35,000) of which Five Thousand Dollars ($5,000) shall be payable thirty (30) days following approval by the Commission of this Proposed Settlement and Thirty Thousand Dollars ($30,000) shall be payable according to the terms of the Promissory Note attached hereto as Appendix I.

2. Except as provided in paragraph six (6) below, this Agreement shall forever bar the commencement or institution by the Commission of any civil action or other claim for recovery of civil penalties from Respondents arising from the conduct set forth and described in the factual record submitted in the present proceeding. It is understood by Respondents that this Agreement shall not serve as a bar or defense to any criminal prosecution or civil litigation by the Commission or any other department or agency of the United States Government based upon the specific conduct engaged in by Respondents, other than these actions and claims for recovery referred to above.

3. Respondents agree to take all reasonable steps to preserve and maintain at a location agreeable to the Commission through January 1, 1987 all records and documents now in their possession or under their control that in any way or manner either indicate or verify the conduct set forth in the factual record submitted in the present proceeding and, upon reasonable notice, to allow Commission investigators or attorneys unimpeded access to such records and documents and to allow the removal of documents specifically requested by Commission investigators or attorneys for the purpose of duplication.

4. Respondents agree to take all reasonable measures designed to discourage, prevent, and eliminate the conduct that may be violative of the Commission's General Order 4. These measures shall include, but need not be limited to, the measures set forth in Appendix II attached hereto.

5. Respondents agree that within thirty (30) days following the approval of this Proposed Settlement, they will either furnish copies of this Agreement, or will give affirmative notice of the terms and provisions thereof, to all of their owners, directors, officers, and employees.

6. Respondents hereby agree, as a condition of this Agreement, that, if they breach this Agreement, they will not interpose the Statute of Limitations as a bar or a defense in any action or proceeding instituted prior to January 1, 1987, by or on behalf of the Commission, to recover civil penalties for violations of the Commission's General Order 4, arising out of the conduct set forth in the factual record submitted in the instant proceeding. In the event of such a breach by Respondents, if such noncompliance shall not have been cured or explained to the Commission's satisfaction within thirty (30) days after written notice to Respondents by the Commission, the Commission shall have the option to seek enforcement of all terms and conditions of this Agreement, or to declare this Agreement null and void; provided, however, that Respondent's waiver of the Statute of Limitations under this paragraph shall remain in full force and effect. In the event the Commission declares this Agreement null and void and such determination is not reversed by a court of competent jurisdiction, any monies paid to the Commission shall remain the property of the United States, and Respondents will not interpose any defense based on the Statute of Limitations in any action which the Commission may institute to recover civil penalties arising out of the conduct set forth in the factual record submitted in the present proceeding.

7. In the event of changes of law or other circumstances at any time during the term of this Agreement that Respondents believe warrant modification or mitigation of any of the requirements imposed on Respondents by this Agreement, the Commission agrees, as an inherent part of this Agreement, to Respondents' right to petition the Commission to this end.

8. It is expressly understood and agreed that this Agreement is not to be construed as an admission by Respondents of the violations alleged in the Order of Investigation and Hearing by which this proceeding was instituted.

9. Respondents acknowledge that they have voluntarily signed this Agreement and state that no promises or representations have been made to them, other than the agreements and consideration herein expressed.

10. The undersigned represents that he/she is properly authorized and empowered to execute this Agreement on behalf of Respondents and to fully bind Respondents to all of the terms and conditions set forth herein.

11. Insofar as this agreement may be inconsistent with Commission procedures for compromise and settlement of violations as set out at 46 C.F.R. 505, the parties hereby waive application of such procedures.

RAMON ARGUELLES AND
RAMON E. ARGUELLES D/B/A
MIAMI CARGO SERVICES

BY______________________

TITLE ____________________

ALAN J. JACOBSON
Hearing Counsel

JOSEPH B. SLUNT, *Chief*
Office of Hearing Counsel

JOHN ROBERT EWERS,
Director
Bureau of Hearings and Field Operations

January ________, 1982

PROMISSORY NOTE

Appendix I to Proposed Settlement in FMC Docket No. 81-42

For value received, Ramon Arguelles and Ramon E. Arguelles d/b/a Miami Cargo Services (MCS) promise to pay to the Federal Maritime Commission (Commission) the principal sum of Thirty-Five Thousand Dollars ($35,000) to be paid at the offices of the Commission in Washington, D.C., by bank cashier's or certified check in the following installments:

Five Thousand Dollars ($5,000) on or before thirty (30) days following the approval by the Commission of the Proposed Settlement in FMC Docket No. 81-42;

Three Thousand Dollars ($3,000) on or before six (6) months following the approval by the Commission of the Proposed Settlement in FMC Docket No. 81-42;

Three Thousand Dollars ($3,000) on or before twelve (12) months following the approval by the Commission of the Proposed Settlement in FMC Docket No. 81-42;

Three Thousand Dollars ($3,000) on or before eighteen (18) months following the approval by the Commission of the Proposed Settlement in FMC Docket No. 81-42;

Three Thousand Dollars ($3,000) on or before twenty-four (24) months following the approval by the Commission of the Proposed Settlement in FMC Docket No. 81-42;

Three Thousand Dollars ($3,000) on or before thirty (30) months following the approval by the Commission of the Proposed Settlement in FMC Docket No. 81-42;

Three Thousand Dollars ($3,000) on or before thirty-six (36) months following the approval by the Commission of the Proposed Settlement in FMC Docket No. 81-42;

Three Thousand Dollars ($3,000) on or before forty-two (42) months following the approval by the Commission of the Proposed Settlement in FMC Docket No. 81-42;

Three Thousand Dollars ($3,000) on or before forty-eight (48) months following the approval by the Commission of the Proposed Settlement in FMC Docket No. 81-42;

Three Thousand Dollars ($3,000) on or before 54 months following the approval by the Commission of the Proposed Settlement in FMC Docket No. 81-42;

Three Thousand Dollars ($3,000) on or before 60 months following the approval by the Commission of the Proposed Settlement in Docket No. 81-42.

In addition to the principal amount payable hereunder, interest on the unpaid balance thereof shall be paid with each installment. Such interest shall accrue from the date upon which the Commission approves the Proposed Settlement in FMC Docket No. 81-42 and be computed at the rate of twelve percent (12%) per annum on the unpaid balance.

If any payment of principal or interest shall remain unpaid for a period of thirty (30) days after becoming due and payable, the entire unpaid principal amount of the Promissory Note, together with interest thereon, shall become immediately due and payable at the option of the Commission without demand or notice, said demand and notice being hereby expressly waived.

If a default shall occur in the payment of principal or interest under the Promissory Note, MCS does hereby authorize and empower any U.S. attorney, any of his/her assistants or any attorney of any court of record, Federal or State, to appear for them, and to enter and confess judgment against MCS for the entire unpaid principal amount of this Promissory Note, together with interest, in any court of record, Federal or State; to waive the issuance and service of process upon MCS in any suit on this Promissory Note; to waive any venue requirement in such suit; to release all errors which may intervene in entering up such judgment or in issuing any execution thereon; and to consent to immediate execution on said judgment. MCS hereby ratifies and confirms all that said attorney may do by virtue thereof.

This Promissory Note may be prepaid in whole or in part by MCS by bank cashier's or certified check at any time, provided that accrued interest on the principal amount prepaid shall be paid at the time of the prepayment.

RAMON ARGUELLES AND RAMON E. ARGUELLES
D/B/A MIAMI CARGO SERVICES

BY: ____________________

TITLE: ____________________

DATE: ____________________

Appendix II to Proposed Settlement in FMC Docket No. 81-42

For a period of four years following final Commission approval of the Proposed Settlement in FMC Docket No. 81-42, Ramon Arguelles and Ramon E. Arguelles d/b/a Miami Cargo Services (MCS) will permit an independent audit of their books and records, as described below.

(1) The audit will be conducted by a certified public accountant or such other independent auditor as may be named subject to Commission approval who will have complete authority to examine any and all books and records of MCS and Miami Cargo Services Overseas Corporation (MCSOC) (see Attachment A hereto); and upon the issuance of a written statement by the independent auditor that he/she has been denied access or reasonable cooperation in an audit of MCS's or MCSOC's books and records, he/she will so certify to the Commission, and said action by MCS or MCSOC will be conclusively considered to be a breach of the Settlement Agreement.

(2) The independent auditor will be authorized to audit MCS and MCSOC's books and records for the purpose of detecting violations of Federal Maritime Commission's freight forwarder regulations and/or section 44 of the Shipping Act, 1916.

(3) The audits will take place once a year with or without notice to MCS or MCSOC.

(4) The independent auditor will furnish MCS and the Commission with a report of each audit, identifying in his/her report the materials inspected, including in such identification the reference number of the shipping files reviewed, the method of review and the findings of the audit.

RAMON ARGUELLES AND RAMON E. ARGUELLES
D/B/A MIAMI CARGO SERVICES

BY:______________________________

TITLE:____________________________

DATE:____________________________

Attachment A to Appendix II to Proposed Settlement Agreement in FMC Docket No. 81-42

[MIAMI CARGO SERVICES Letterhead]

Re: *Audit of Miami Cargo Services and Miami Cargo Services Overseas Corporation*

Gentlemen:

This is to set forth the terms of our agreement that you provide the necessary services to audit the billing practices of Miami Cargo Services and Miami Cargo Services Overseas Corporation (Collectively MCS).

Pursuant to the Settlement Agreement in Federal Maritime Commission Docket No. 81-42, MCS has undertaken to adopt measures to eliminate and prevent practices by MCS which may violate the Federal Maritime Commission's freight forwarder regulations.

To accomplish this, MCS has authorized you to conduct an independent audit of the books and records of MCS. This auditing is to continue for a period of four years following final Federal Maritime Commission approval of the Settlement Agreement. The audits will take place every twelve months.

The complete terms of the audit procedures and of MCS's obligations thereunder are contained in Appendix II to the Settlement Agreement, which is attached hereto.

It is agreed that you will be compensated for your audit services at $________________________.

It is also agreed that all information and documents that you obtain by virtue of this audit will be maintained by you in strict confidence, except to the extent the Settlement Agreement requires you to make reports to the Federal Maritime Commission.

If the foregoing comports with your understanding of our agreement, please sign the enclosed copy of this letter, and return it.

MIAMI CARGO SERVICES

BY:____________________

TITLE:____________________

DATE:____________________

Attachment

BY:____________________

TITLE:____________________

DATE:____________________

cc: Federal Maritime Commission

FEDERAL MARITIME COMMISSION

DOCKET NO. 79-45

LOUIS DREYFUS CORPORATION, ET AL.

v.

PLAQUEMINES PORT, HARBOR AND TERMINAL DISTRICT

ORDER ADOPTING INITIAL DECISION

July 30, 1982

This proceeding was instituted by the filing of a complaint pursuant to section 22 of the Shipping Act, 1916 by various shippers and carriers (Complainants) [1] against the Plaquemines Port, Harbor & Terminal District (Port).[2] The complaint alleges that the Port has assessed Complainants fees for the use of terminal facilities which are unjust and unreasonable and unduly prejudicial in violation of sections 15, 16 and 17 of the Act (46 U.S.C. 814, 815 and 816). The Commission's Bureau of Hearings and Field Operations (Hearing Counsel) intervened in the proceeding. Administrative Law Judge Charles E. Morgan issued an Initial Decision finding that the Port was an "other person" within the meaning of section 1 and that its fees violated sections 16 and 17 of the Shipping Act, 1916.[3] Exceptions to that decision have been filed by the

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[1] Complainants are: Louis Dreyfus Corp.; The Early & Daniel Co., Inc.; Dixie Carriers, Inc.; LeBeouf Bros. Towing Co., Inc.; The Valley Line Company; Federal Barge Lines, Inc.; and Hollywood Marine, Inc.

[2] Prior to the filing of this complaint Louis Dreyfus Corp. brought suit in the U.S. District Court for the Eastern District of Louisiana against the Port alleging that the tariff is unconstitutional. Several local collection suits were removed to the federal court and consolidated with that proceeding. The court action has been stayed pending the outcome of the FMC proceeding.

[3] The pertinent provisions of the Shipping Act, 1916 are:

(a) Section 1 (46 U.S.C. § 801):

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.

(b) Section 16 First (46 U.S.C. § 815):

That it shall be unlawful for any common carrier by water, or other person subject to this Act, either alone or in conjunction with any other person, directly or indirectly:

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. . . .

(c) Section 17 (46 U.S.C. § 816):

Every such carrier and every other person subject to this 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. Whenever the board finds that any such reg-

Continued

Port and Hearing Counsel. Complainants have filed a Reply to these Exceptions.

INITIAL DECISION

A. *Findings of Fact*

The Port encompasses approximately the first 100 miles of the Mississippi River from its mouth in the Gulf of Mexico and is coextensive with the Parish of Plaquemines in the State of Louisiana. It operates five public facilities, none of which serves common carriers by water. There are several private facilities within the Port serving, among others, common carriers by water.

The Port has on file with the Commission a tariff which provides for the assessment of a Harbor Fee and a Supplemental Harbor Fee. The Harbor Fee is collected from any vessel over 100 feet which docks or anchors within the Port. The fee is $100 for vessels 100 to 250 feet in length and $150 for vessels over 250 feet. The fee applies unless a flat rate permit is issued. Permits are issued free of charge to vessels entered on the Parish *ad valorem* tax rolls. Vessels are held primarily liable for the Harbor Fee but cargo and wharf interests are made sureties.

The Supplemental Harbor Fee is a charge of $.10 per ton on all cargo over 500 tons "first handled" within the Port at anchorage or in midstream. Cargo owned by the wharf owner is exempt from this charge. The cargo is primarily liable for the Supplemental Harbor Fee but vessel and wharf interests are made sureties. The tariff also provides that the Harbor Fee shall be credited against the Supplemental Harbor Fee.

The Port is the sole interpreter of the tariff and reserves the right to deny access to private Port facilities as well as assess civil and criminal penalties against those who fail to pay the charges stated in the tariff.

The Port's original interpretation of the tariff was that vessels which handled cargo paying a Supplemental Harbor Fee were not assessed a Harbor Fee. Subsequently, this interpretation was changed. Presently all vessels handling cargo are assessed the Harbor Fee and this amount is credited against the cargo's Supplemental Harbor Fee. The Port's cargo reporting system is unreliable and resulted in many vessels paying a Harbor Fee which would not otherwise have been assessed.

The Port has exempted subsidiaries of wharf owners from the Supplemental Harbor Fee. The 500 ton Supplemental Harbor Fee exemption was applied to loaded ships leaving the Port although the tariff

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ulation or practice is unjust or unreasonable it may determine, prescribe, and order enforced a just and reasonable regulation or practice.

The allegations of a section 15 violation were dismissed by the Presiding Officer due to lack of proof.

stated that the fee was assessed on cargo "first handled" in the Port. Until recently, if the Supplemental Harbor Fee was less than the Harbor Fee the Port assessed the Harbor Fee.

In 1978, the first full year the tariff was in effect, the Port collected over $1.35 million in fees, divided approximately equally between Harbor Fees and Supplemental Harbor Fees. Complainant Dreyfus paid 23% of all Supplemental Harbor Fees for 1978 and 11% of all fees collected in 1978. Complainant Early was found to have paid 7% of all Supplemental Harbor Fees for 1978 and 3% of all fees collected in 1978.

Total Port expenditures were approximate]y $1.59 million in 1978, of which $1.35 million were general parish service costs allocated to the Port. The remainder were *direct* Port expenditures. That portion of each Parish operating department budget which, in the opinion of its department head, reflects "marine related" expenses, is allocated to the Port.

There are no written criteria for determining what is a "marine related" expense. They are reported on an "honor system". No attempt is made to allocate expenses to those classes of entities which actually pay tariff fees. Rather, a "but for" test is applied which results in anything remotely related to the Port being allocated as "marine related".[4] Those ultimately assessed the tariff fees obtained little or no direct services from the Port.

B. *Jurisdiction*

The Port was found to be an "other person" subject to the Shipping Act within the meaning of section 1 on the basis that through its municipal authority it exerts critical control over both the access of common carriers to the Port's private facilities and the rates and practices of those facilities. Under Louisiana law private marine facilities are impressed with a public servitude. The Port can control facilities in which it has no direct ownership interest. On this basis the Port has the authority to assess charges and control a crucial link in the chain of transportation. In light of this control the Presiding Officer held that the Port was "furnishing . . . terminal facilities" within the meaning of section 1.[5]

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[4] Allocated expenses have included those of the Sheriff's Department, Councilmen and Staff, Aviation, Fire Protection, Ferries, Safety Engineer, Ambulance, Itinerant Labor, Coroner, Health, Waterworks, Garbage, Sewerage, Purchasing, Internal Auditor, Data Processing, Accounting and Payroll, Insurance, Social Security, Retirement and Boatways.

[5] The Presiding Officer cites *Agreement Nos. T-2455/T-2553,* 18 F.M.C. 115 (1974) and *A.P. St. Philip, Inc. v. Atlantic Land Improvement Co.,* 13 F.M.C. 166 (1969) as cases which establish the "control" basis of jurisdiction and *Agreement No. T-2719,* 16 F.M.C. 318 (1973), and *New Orleans Steamship Asso. v. Bunge,* 8 F.M.C. 687 (1965) as cases which reject ownership of facilities as the required basis of jurisdiction.

The Presiding Officer also held that although the challenged charges are called "harbor" fees, by their express terms and in their application, they are in effect charges on the handling of cargo in the Port and, therefore, subject to section 17 of the Act.

C. *Sections 16 & 17 Violations*

The Presiding Officer concluded that the Supplemental Harbor Fee violated both sections 17 and 16 First. The charge was determined not to be reasonably related to the services provided those paying the fees and the exemptions in the tariff were found to create a narrow class of persons subject to the charge who were unjustly and unduly prejudiced by it. The Presiding Officer explained that the tariff exemptions resulted in identical cargo being treated differently. He found that most cargo pays no fees and the burden of supporting "port services" is borne by the shippers who are not exempt. The Presiding Officer rejected the Port's justification for the exemptions, *i.e.*, that wharf ownership and the payment of *ad valorem* taxes is a financial assistance to the Port, finding that these "substituted" revenues did not approach the level of otherwise assessable costs on these interests. Moreover, because the Port was charging for traditional government services, the tariff provisions were found to result in the costs of these "services" being borne by those who do not and cannot use them.

Other aspects of the Supplemental Harbor Fee were also found unlawful under section 17. Making vessel and wharf interest sureties under the tariff was determined to create liability for an obligation of a third party not in privity or duty bound to the charged party. The Presiding Officer also determined that the assessment on loaded ships leaving port instead of those entering port was contrary to the "first handled" provision of the tariff. Only one 500 ton fee exemption was allowed on an exiting ship when many such exemptions should have been granted on the entering inland barges constituting that load.

The Presiding Officer concluded that the Harbor Fee also violated sections 17 and 16 First. The tariff exemptions were held to be irrational and prejudicial, particularly because the exemption of all vessels under 100 feet includes most vessels calling in the Port and results in the major users of the Port not paying for the Port's "services". He explained that *ad valorem* tax revenues and flat rate permit fees do not recoup the costs fairly assessable to the interests exempted and that no recognition is given to those users paying state *ad valorem* taxes of which the Port obtains a portion. The Presiding Officer found that the existing system results in the expenses of the Port attributable to local and frequent users, the majority of the users of the Port, being passed on to other users. The surety provisions which apply to the Harbor Fee were also found to be unreasonable for the same reasons as were the Supplemental Harbor Fee surety provisions.

Finally, the Presiding Officer concluded that the enforcement provisions of the tariff were unreasonable under section 17. The Port's naming itself the sole interpreter of the tariff was found unreasonable, as was the imposition of civil and criminal penalties for non-payment of the tariff charges. The Presiding Officer viewed the tariff provisions as quasi-contractual in nature rendering these enforcement provisions unlawful and an abuse of municipal authority.

POSITIONS OF THE PARTIES

A. *The Port*

On exception, the Port argues that it is not an "other person" subject to the Shipping Act because it does not own or operate any facilities serving common carriers. It is alleged that no common carriers call at the public facilities owned by the Port, and that the percentage of common carriers calling within the Port is so small that there is an insufficient impact on the common carrier industry to warrant the assertion of jurisdiction over it as a matter of public policy.

Furthermore, the Port submits that the charges at issue do not relate to the handling of cargo but are rather a means of recouping the expenses of operating the Port. The Port insists that the charges are reasonably related to the services rendered users of the Port. The Port submits that Complainants should not be permitted to argue that the fees are too high because they refused to obtain flat rate special permits which would have substantially reduced their fees.

The Port also contends that the charges are not unduly preferential or unjustly discriminatory. In so doing, they argue that the exemption for small craft is based upon the administrative costs of accounting for these numerous vessel calls. Furthermore, most small craft using the Port are also on the *ad valorem* tax rolls. The *ad valorem* tax payer exemption is allegedly reasonable because it prevents a double assessment against interests located in the Parish. Flat rate permits are allegedly lawful because they allow frequent users to put a ceiling on their fees. The wharf owners' cargo exemption is allegedly justified because these entities incur significant expenditures to protect cargo and thereby supplement Parish services.

Finally, the Port argues that minor errors in the tariff and its application of the wharf owners exemption are not a valid basis upon which to find the tariff unlawful. The Port advises that the "first handled" language of the tariff was intended to prevent assessments for rehandled cargo, and does not preclude reporting of assessments on the basis of departing vessels, when cargo ownership is determined. Further, it maintains that assessing liability on third parties to a cargo transaction is lawful because all parties are users of the Port services. Finally, the Port insists that the Parish has an inherent right to impose civil and criminal penalties to enforce collection of assessments lawfully due it.

B. *Hearing Counsel*

Hearing Counsel agrees with the Port that the Commission does not have jurisdiction over it. Hearing Counsel submits that there must exist both an ownership interest as well as substantial control over the rates and practices of a terminal facility to confer jurisdiction. Finally, it is alleged that the charge at issue here is for the recoupment of expenses for general port services and is not related to receiving or handling cargo within the meaning of section 17.

C. *Complainants*

Complainants argue that the Presiding Officer was correct in finding that the Commission has jurisdiction over the Port. Controlling access to the private facilities and requiring the collection of fees for Port-rendered services allegedly constitute "furnishing . . . terminal facilities" within the meaning of the Shipping Act. The proprietary interest requirement advanced by Hearing Counsel is alleged to be erroneous in light of the fact that midstream transfers of cargo have been deemed to be a terminal operation and regulated by the Commission.

Complainants also maintain that the absence of common carriers calling at Port-owned facilities is irrelevant as there are sufficient carriers calling at Port-controlled facilities to make the Port subject to Commission jurisdiction.

Complainants allege that the charges at issue are within the ambit of section 17 because they are "related to or connected with receiving, handling or storing of property," but that in any event, even if a fee does not relate to the handling of property under section 17, this does not affect section 1 jurisdiction or the application of section 16 First.

Complainants believe that the Presiding Officer was correct in his determination that the charges violate section 17 because they are not reasonably related to the services rendered the charged party. The costs allocated for the specific benefits rendered by port services allegedly are not reasonably related to the class of users assessed. Complainants submit that only a very limited class of port service users are actually assessed fees which represent the costs attributable to all the users; this results in 49% of the Port's revenue being assessed on 25% of cargo.

It is alleged that cargo interests receive no direct benefit from the Port services and only an indirect benefit in the form of risk insurance, and that a generalized benefit is insufficient to sustain the charge under section 17. There allegedly must be a reasonable relationship between the costs assessed and the benefits derived based on actual use in order for the charge to be valid.

Complainants state that their refusal to obtain flat rate permits from the Port is justified because they are under no obligation to voluntarily comply with an illegal licensing scheme.

Complainants also believe that the Presiding Officer properly concluded that the charges as assessed result in undue and unjust preference and prejudice in violation of section 16 First. There is allegedly no need to establish a competitive or triangular relationship because the charges do not relate to the type or nature of the cargo assessed.

Complainants further argue that the Presiding Officer was correct in finding "errors" in assessments by the Port violated section 17. These "errors" were allegedly regularly and knowingly made and therefore constitute an unreasonable practice under section 17. Similarly, through its allegedly unreasonable interpretation of the "first handled" provision of the tariff, the Port denied numerous 500 ton Supplemental Harbor Fee exemptions to barges entering the Port and assessed Complainants substantial overcharges. The "solidary liability" provisions of the tariff are challenged because they impose *primary* liability on those not in privity with the assessed party. Finally, Complainants maintain that it is unreasonable and unjust for a local government authority to enforce a port tariff by means of criminal penalties.

DISCUSSION

The Commission has determined that the Presiding Officer correctly disposed of all issues presented in this proceeding with the exception of his treatment of the surety provisions of the Port's tariff. The Port's Exceptions are essentially a reargument of matters fully and adequately considered by the Presiding Officer, and will generally be denied. Accordingly, the Initial Decision will be adopted with only minor modifications.

A. *Jurisdiction*

The Commission finds, for reasons stated below, that the Port is an "other person" subject to the Shipping Act, 1916, *i.e.*, one which "furnishes . . . terminal facilities . . . in connection with a common carrier," within the meaning of section 1 of that Act. In construing the scope of the Commission's jurisdiction under section 1, the Supreme Court has focused upon the integrity of the legislative scheme of the Shipping Act and has required a broad construction of its terms to effect its purposes.[6] The statutory scheme contemplates regulation of any entity if it exercises sufficient control over terminal facilities to have a discernible effect on the commercial relationship between shippers and carriers involved in that link in transportation.

Local governmental authorities are not categorically exempt from the requirements of the Shipping Act,[7] nor is there any court or Commis-

[6] *U.S. v. American Union Transport,* 327 U.S. 437, 450-451 (1946); *California v. United States,* 320 U.S. 577, 585 (1944); *See also, Agreement No. 8905 Port of Seattle and Alaska S.S. Co.,* 7 F.M.C. 792, 795-796 (1964).

[7] *California v. United States, supra.*

sion precedent requiring ownership of a facility in order to confer jurisdiction under section 1. It was clearly the intent of Congress to prevent "any person", including local government authorities, from discriminating among shippers or carriers in providing terminal facilities.[8] Thus, the crucial issue in determining whether a given entity is subject to Commission jurisdiction as an "other person" is the degree of its involvement in the furnishing of terminal services to common carriers by water.

The "control" theory of jurisdiction, cited by the Presiding Officer, has, in different contexts, been relied upon by the Commission. An entity need not directly or physically provide terminal services to be deemed an "other person" subject to the Act. The holdings in several terminal lease cases support the proposition that it is the control of terminal rates and practices which constitutes "furnishing" terminal facilities and confers Commission jurisdiction.[9] Conditioning access to a port's private facilities upon the payment of a charge for governmental services reflects significant threshold control over terminal facilities.

Jurisdiction over the Port here, however, is not premised solely on the fact that it conditions access to private facilities upon the payment of a charge. Assessments by local authorities could in a variety of situations constitute the exercise of lawful taxation authority. The Shipping Act does not authorize the Commission to review local taxes for government services that are incidentally imposed on carriers and terminals. The Port's charges here, however, are not taxes--but rather fees for essential health, safety and security services which are rendered to vessel and cargo interests in commercial, cargo-handling transactions.

The Commission has determined that under the facts of this case the Port's practice of assessing, on the basis of cargo transactions, a fee for providing vessels and cargo essential health, safety and security services constitutes the furnishing of "other terminal facilities" within the meaning of section 1 of the Act. The term "other terminal facilities" contemplates not only physical assets such as docks, wharves and warehouses, but also encompasses *services* rendered "in connection" with the marine terminal "link" in transportation modes.[10] The Port is intimately involved in common carrier cargo transactions. It has imposed utilization of its services and payment of its fees as an unavoidable appurtenance of all private terminal facilities. The combination of the Port's exclusive ability to furnish such terminal services, its assessment of selective cargo transfer fees and its control of access to the private facilities

[8] *California v. United States, supra* at 586; 53 Cong. Rec. 8276.

[9] *Agreement Nos. T-2455/T-2553, supra* ; *Agreement No. T-4: Terminal Lease Agreement at Long Beach, Cal.*, 8 F.M.C. 521 (1964); *Agreement No. 8095 - Port of Seattle and Alaska Steamship Co., supra.*

[10] *See Marine Terminal Practices of the Port of Seattle*, 21 F.M.C. 397 (1978); *Status of Carloaders and Unloaders*, 2 U.S.M.C. 761, 767 (1946).

results in fundamental control over the rates and practices of terminal facilities. The Commission finds that such pervasive involvement in the business of common carriers,[11] marine terminals and the commerce of the United States confers on the Commission jurisdiction over the Port under section 1 of the Shipping Act, 1916, and subjects the Port's fees to scrutiny under the substantive provisions of that Act.

The Port's assessment of the fees in question also falls within the ambit of sections 16 First and 17 of the Act.[12] Complainants are clearly "persons" and the assessed cargo a "description of traffic" within the meaning of section 16 First.

In order for the Commission to assert jurisdiction under section 17 the charges or practices in question must have an underlying purpose related to terminal operations and must nave more than an incidental relationship to the handling of cargo or the movement of vessels into a harbor.[13] The underlying purpose and justification for the Port's charges enable the Commission to readily classify them as "terminal related". Moreover, because the Port's services are held to be "other terminal facilities" within the meaning of section 1, the charges for these same services are necessarily "terminal related". The Supplemental Harbor Fee is levied directly on cargo for terminal services allegedly rendered the cargo interests. The Harbor Fee directly affects the amount of Supplemental Harbor Fee paid by cargo interests. The Commission finds that both fees fall within the ambit of section 17.

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[11] Sufficient common carriers call at the Port to serve as a basis for jurisdiction if the Port is otherwise found to be "furnishing . . . terminal facilities." The Commission has found that even minimal contacts with oceangoing common carriers can serve as a basis of jurisdiction if interstate common carriers also call at a port and the port otherwise holds itself out as accessible to common carriers. *Bethlehem Steel Corp. v. Indiana Port Comm.* (Denial of Motion to Dismiss) 12 S.R.R. 1061 (1972), *adopted* 13 S.R.R. 22 (1972).

[12] Section 16 (46 U.S.C. § 815) provides, in pertinent part:

> That it shall be unlawful for any common carrier by water, or other person subject to this Act, either alone or in conjunction with any other person, directly or indirectly:
>
> 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.

Section 17 (46 U.S.C. § 816) provides in pertinent part:

> Every such carrier, and every other person subject to this 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. Whenever the board finds that any such regulation or practice is unjust or unreasonable it may determine, prescribe, and order enforced a just and reasonable regulation or practice.

[13] *See Bethlehem Steel Corp. v. Indiana Port Comm.*, 21 F.M.C. 629 (1979), *aff'd sub nom., Bethlehem Steel Corp. v. F.M.C., supra,* where the Commission held that section 17 applies to charges which are terminal related and not those which are navigation related.

B. *Sections 16 and 17 Violations*

The Commission has determined that the Presiding Officer was generally correct in his finding that the fees are unlawful under sections 16 First and 17 of the Shipping Act, 1916.

Because there is no differentiation as to the nature of the cargo or other transportation factors involved in the assessment of fees, a competitive or "triangular" relationship need not be proven to establish a violation of section 16 First.[14] The Port has treated different classes of persons and descriptions of traffic unequally in the imposition of its fees. Because the exemptions from the tariff fees create a situation where a minority of port users pay substantial fees to defray general port expenses while the majority of users pay little or nothing, Complainants have made a *prima facie* showing of undue preference and prejudice. This shifts the burden to the Port to justify the exemptions,[15] which burden the Port has failed to meet.

A measure of the reasonableness of the exemptions would be whether the other revenue considerations of the exempted classes are reasonably related to the fees forgiven. None of the exemptions appears to meet this standard. No revenue-based justification is advanced in defense of the Port's flat rate permit exemption. There is no evidence of record to substantiate the claim that the administrative cost of assessing vessels under 100 feet exceeds the revenues to be obtained. Similarly, there is no showing that the cargo protection costs saved through the expenditures of private wharf owners equals or exceeds the foregone revenue resulting from their exemption. Finally, there is no proof that the revenues derived from *ad valorem* taxes paid by port users exempted from the harbor fees are generally comparable to the fees that would otherwise be assessed these users. Indeed, the low *ad valorem* tax rates [16] and the admission by the Port that *ad valorem* revenues represent a small portion of Port revenues undermine the validity of the harbor fees exemption and support the Complainants' allegation that the fees are a device whereby non-local interests subsidize the governmental services rendered Parish residents.

Complainants have also made a *prima facie* showing under section 17 that the charges do not bear a reasonable relationship to the comparative benefit obtained from the Port services by the assessed parties.[17]

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[14] *Volkswagenwerk A.G. v. F.M.C.*, 390 U.S. 261, 278-80 (1968); *Valley Evaporating Co. v. Grace Line, Inc.*, 14 F.M.C. 16 (1970); *Investigation of Free Time Practices - Port of San Diego*, 9 F.M.C. 525 (1966).

[15] *See e.g., Freight Forwarder Bids on Gov't Shipments*, 19 F.M.C. 619 (1977). The failure of Complainants to obtain flat rate permits and thereby reduce their expenses does not relieve the Port of the obligation to rationally justify its assessment methods. Complainants are not seeking reparations and unless the Port can show that the use of the permit system results in a fair apportionment of revenue contributions among all users of the Port, this allegation is irrelevant.

[16] *See* Initial Decision at 14.

[17] *Volkswagenwerk A.G. v. F.M.C., supra.*; *Baton Rouge Marine Contractors, Inc. v. F.M.C.*, 655 F.2d 1210 (D.C. Cir. 1981).

The charged parties have not received benefits from the Port's services proportionate to the costs allocated to them. Moreover, other users of the services obtain equal or greater benefits and have not been shown to have paid their allocable share of Port costs. The charges are not based upon the actual use of the Port services by the charged parties. Even if the "generalized benefit" concept advanced by the Port were acceptable it appears that the exempted users obtain the same generalized benefit as the charged parties. Yet, as mentioned above, there is no evidence that these exempted classes have made other contributions to the operating costs of the Port that approach the level of fees that would have been paid under the Port tariff if an exemption were not granted. Moreover, the tariff is applicable only to users of the navigable waterways of the Port, although a large portion of "marine-related" Parish expenses allocated to the Port arises from Parish services provided outside the navigable waterways. While there need not be a precise correlation between "marine related" costs allocated to the Port by the Parish and the classes of Port users assessed fees, they must be reasonably related. Here, there is a broad basis for determining "marine related" costs and a narrow class of Port users assessed those costs.

The other tariff provisions and practices of the Port found to be in violation of the Shipping Act by the Presiding Officer, with one exception, have been correctly evaluated. Although isolated errors in billing procedures are not unlawful, repeated misbilling, particularly after the Port is made aware of the errors, constitutes a willful disregard of tariff provisions and an unreasonable practice under section 17.[18]

The "first handled" provision of the tariff is, at the very least, an ambiguous provision which obscures the rights and obligations of the charged parties.[19] Moreover, this provision has historically been given a strained construction against the shipper. It therefore constitutes an unreasonable practice.[20]

Finally, the civil and criminal penalty provisions of the tariff are unreasonable. Without determining whether this practice is otherwise unlawful, the Commission finds that it is excessive and not reasonably related, fit and appropriate to the ends in view.[21] While penalties in the form of denial of credit or access to the Port would be legitimate enforcement mechanisms, "fines" and incarceration are not.

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[18] *See European Trade Specialists, Inc. v. Prudential-Grace Lines, Inc.*, 21 F.M.C. 888, 892 (1979), *aff'd mem. sub nom. European Trade Specialists, Inc. v. FMC*, D.C. Cir. No. 79-1503, June 5, 1980.

[19] *See Investigation of Free Time Practices - Port of San Diego, supra* at 543.

[20] *West Gulf Maritime Ass. v. Port of Houston Authority*, 22 F.M.C. 420 (1979), *aff'd mem. sub nom. West Gulf Maritime Assoc. v. FMC*, 652 F.2d 197 (1981) (Table). The Port has not excepted to the Presiding Officer's finding that it was a violation of section 17 for the Port to include a provision in its tariff naming itself as sole interpreter of its provisions.

[21] *West Gulf Maritime Asso. v. Port of Houston Authority*, 21 F.M.C. 244, 248 (1978), *aff'd mem. sub. nom., West Gulf Maritime Ass'n v. F.M.C.*, 610 F.2d 1001 (D.C. Cir. 1979) (Table), *cert. denied*, 449 U.S. 822 (1980).

The Presiding Officer's holding that the surety provisions of the tariff are unreasonable, however, will not be adopted. A terminal operator can hold liable for tariff fees all direct and indirect users of its services.[22] All parties made sureties for the Port's fees are either direct or indirect users of the Port's services. Furthermore, the allegation that vessel interests, cargo interests and wharf interests are not in privity nor owe any duty to each other in a cargo handling transaction is not explained or supported by evidence. Finally, there is no evidence that the Port has abused these liability provisions or that a hardship or injustice has resulted from their application.

THEREFORE, IT IS ORDERED, That the Initial Decision of the Presiding Officer is adopted as clarified or limited above; and

IT IS FURTHER ORDERED, That the Exceptions of the Port are granted only to the limited extent indicated above, and denied in all other respects; and

IT IS FURTHER ORDERED, That the Port immediately cease and desist assessing a Harbor Fee and Supplemental Harbor Fee in violation of sections 16 First and 17 of the Shipping Act, 1916 as described herein.

By the Commission.*

(S) FRANCIS C. HURNEY
Secretary

[22] *Id.*

*Vice Chairman Moakley's dissenting opinion is attached. Commissioner Daschbach concurs in Vice Chairman Moakley's dissenting opinion.

DOCKET NO. 79-45

LOUIS DREYFUS CORPORATION, ET AL.

v.

PLAQUEMINES PORT, HARBOR AND TERMINAL DISTRICT

Vice Chairman Moakley, dissenting.

I cannot find on the basis of this record that respondent Plaquemines Port, Harbor and Terminal District is an other person subject to the Act within the meaning of Section 1 of the Shipping Act, 1916.

The Commission is not a court of equity, but an agency whose powers arise solely out of the statutes entrusted to it by Congress. The Shipping Act does not provide a cure for every practice that takes place in ocean transportation nor does it vest in the Commission the right to determine that actions taken by a litigant are so offensive that we must assume jurisdiction.

The pertinent statutory language is as follows:

> 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.

Respondent clearly furnishes no physical assets such as docks, wharves or warehouses in connection with common carriers. Recognizing this, the majority would interpret the word "facilities" to include "*services* rendered 'in connection' with the marine terminal 'link' in transportation modes." The authorities cited for this interpretation are two earlier Commission cases.

The first, *Marine Terminal Practices of the Port of Seattle,* 21 FMC 397 (1978) is a case in which a port, which was a terminal operator in other respects, was found to be an "other person" by virtue of providing consolidation services for inbound OCP shipments. The Commission said that

> the consolidation service is part of a broader marine terminal process, to the extent that the Port, in providing it is furnishing terminal facilities in connection with common carriers by water. (*id.* at 399)

The second, *Status of Carloaders and Unloaders,* 2 USMC 761, 767 (1946) stands for the proposition that a person furnishing hand trucks, lift trucks, flat top trucks and the labor required to operate such equipment for loading and unloading rail cars on a marine terminal is providing terminal facilities within the meaning of section 1.

The "services" provided by respondent in this case are quite distinguishable from those in the *Seattle* and *Carloaders* cases. They are essentially governmental services such as police, health, and fire protection. If, in charging a fee for those services, Plaquemines becomes an other person subject to the Act, then virtually every State and local taxing authority in this nation which assesses any type of fee to recoup the cost of such services is likewise subject to the Commission's jurisdiction. Moreover, the majority's rationale for exercising jurisdiction here could apply equally to jurisdiction over other federal agencies which charge fees for cargo-related services, such as the U.S. Customs Service or the U.S. Department of Agriculture.

I believe that this dramatic expansion of the Commission's jurisdiction is both impermissible and unwise. I would dismiss this complaint for lack of jurisdiction over the respondent.

FEDERAL MARITIME COMMISSION

DOCKET NO. 79-45

LOUIS DREYFUS CORPORATION, THE EARLY & DANIEL COMPANY, INC., DIXIE CARRIERS, INC., LE BEOUF BROS. TOWING CO., INC., THE VALLEY LINE COMPANY, FEDERAL BARGE LINES, INC., AND HOLLYWOOD MARINE, INC.

v.

PLAQUEMINES PORT, HARBOR AND TERMINAL DISTRICT

1. Plaquemines Port found to exercise control as to whether or not certain terminal facilities located in Plaquemines Port are furnished; and Plaquemines Port found by virtue of such control to be an "other person" subject to the Shipping Act, 1916, by furnishing wharfage, dock, or other terminal facilities in connection with common carriers by water.
2. Plaquemines Port's "supplemental harbor fee" found to be a wharfage charge based on tonnages of cargo handled at facilities located in Plaquemines Port; and the supplemental harbor fee to be subject to section 17 of the Act covering regulations and practices relating to or connected with the receiving, handling, storing, or delivering of property.
3. Plaquemines Port's "Harbor fee" found to be a dockage and anchorage charge on vessels docking or anchoring at facilities or points in Plaquemines Port, and insofar as this fee applies to vessels which dock for the purposes of having their cargoes handled at terminal facilities in Plaquemines Port, such harbor fee found to be related to the supplemental harbor fee inasmuch as the amount of the latter is reduced by the amount of the harbor fee; and because the harbor fee, at least in part, is related to the handling of cargoes at terminal facilities, said harbor fee found to be subject to section 17 of the Act covering the regulations and practices recited therein.
4. Plaquemines Port, as an other person, through the imposition of its supplemental harbor fee, found to have given undue and unreasonable preference or advantage to certain descriptions of traffic, such as to cargoes owned by facilities' owners and to certain cargoes believed to be but not in fact so owned, and to have subjected other descriptions of traffic to undue and unreasonable prejudice or disadvantage in violation of section 16 First of the Act. Similarly, Plaquemines Port found in violation of section 16 First, insofar as certain vessels were subjected to the harbor fee and other vessels were exempted from such fee.
5. Plaquemines Port, through the imposition of its supplemental harbor fee and harbor fee, found to have established, observed and enforced unjust and unreasonable regulations and practices relating to or connected with the receiving, handling, storing or delivering of property, particularly insofar as it has not been shown that the said fees are reasonably related to the services performed by Plaquemines Port.

6. Plaquemines Port found in violation of section 17 of the Act, insofar as its tariff provisions hold liable for the debts of shippers and consignees of cargoes all parties who may have contact with the debtors, including vessel owners, terminal operators and other "users" of the vessel or facility.
7. Plaquemines Port found in violation of section 17 of the Act, insofar as its tariff item 145, as amended, is ambiguous because it covers cargo when "first handled" in the Port and then contradicts the meaning of first handled by providing that the reporting of such cargoes should be made when the cargo leaves the wharf or facility.
8. Plaquemines Port found in violation of section 17 of the Act, insofar as its tariff under item 10 purports to establish itself as sole interpreter of the provisions of its tariff.
9. Plaquemines Port found in violation of section 17 of the Act, insofar as item 130 of its tariff sets up civil and criminal sanctions for the refusal to pay fees assessed by the tariff.
10. The complaint insofar as it alleges violations of section 15 of the Act is dismissed for lack of proof.

William E. O'Neil and *Terry A. McCall* for the complainants.

Louis B. Porterie and *Robert E. Fontonelle, Jr.*, for the respondent.

Paul J. Kaller and *Aaron W. Reese* as Hearing Counsel.

INITIAL DECISION [1] OF CHARLES E. MORGAN, ADMINISTRATIVE LAW JUDGE

Adopted July 30, 1982

INTRODUCTION. On February 1, 1978, the Plaquemines Parish Sheriff's Department arrested an intoxicated toolpusher, domiciled in the parish, for shooting his dog at a sand fill on Deadman's Lane in Boothville.[2] Two days later an oyster fisherman from another parish turned himself in at the Port Sulphur [2] Jail, upon learning of a warrant for his arrest for the unlawful removal of oysters from a leased bedding ground. In mid-April two fishermen from neighboring St. Bernard Parish were arrested for fishing with a gill net in the pond at Braithwaite Park.[2] Not a month later two more fishermen were arrested at their trailer home in Venice [2] and charged with the illegal firing of weapons: each had got off two blasts from a twelve-gauge shotgun.[2]

On the fifteenth of June a driver veered off the road and came to a stop in the midst of a cane field; [2] he thereupon climbed to the roof of his car and began hollering. Deputies quickly took him away. On July 1 a fisherman from Moss Point, Mississippi, improperly backed his car, causing it to strike a 1978 Ford Torino belonging to the Plaquemines Parish Commission Council, that was parked at the Good Rockin' Club.[2] The inept backer was carted off to jail. Two weeks later a

[1] This decision will become the decision of the Commission in the absence of review thereof by the Commission (Rule 227, Rules of Practice and Procedure, 46 CFR 502.227).

[2] Towns and locations referred to are located in Plaquemines Parish, Louisiana, unless some other Parish or State is specified.

laborer in the employ of Brown & Root, a construction firm, was seen tossing a beer can from the passenger window of his vehicle, which was northbound at the time on Louisiana Highway 23, just north of Burmaster Street.[2] When a deputy pulled him over, the suspect could not produce a driver's license and was promptly removed to jail. On July 21 a roustabout was found at home, bleeding from a self-inflicted neck wound, accomplished with a butcher's knife. Deputies took him to the Port Sulphur [2] Hospital, where the cut was stitched, and thence to jail, where a records check later revealed that the subject was on parole from a bank robbery conviction. August 11, 1978, found an agent of the Louisiana Department of Wildlife & Fisheries turning over to the Plaquemines sheriff a Vietnamese fisherman from Texas who had been apprehended in Breton Sound; [2] he was charged with double rigging in inside waters in closed season. Less than two weeks later a roustabout from Port Sulphur [2] turned himself in at the local jail upon learning of a warrant for his arrest: the offense—aggravated battery with a pool stick.

In the same year the Plaquemines Parish Fire Department was called upon to fight a variety of fires. On New Year's Day—an ominous portent of things to come—a Cadillac caught fire at the Shell Oil Company dock in Venice.[2] St. Patrick's Day was the occasion of a grass fire behind the office [2] of Freeport Sulphur Company. In June Trident Communications in Belle Chasse [2] was the scene of a fire caused by the punctured fuel tank of a tractor-trailer rig. On July 2 a Vietnamese fisherman's houseboat burned in the Kincaid Canal,[2] and a scant five days later a grass and trash fire erupted on the Belle Chasse [2] levee, not far from Tidewater Marine. A shortout in the fusebox at the day quarters [2] of Buster Hughes' night-shift construction workers led to a fire in late August, and within two weeks, in early September, an aluminum boat caught fire aboard a flatbed truck at Delta Well Tester.[2] A week before Halloween an underground natural gas pipeline [2] was inadvertently ruptured by a backhoe digging a waterline.

In the same year the Plaquemines Parish Health Unit donated its supply of rat traps, as yet unused, to the parish Mosquito Control Department. The unit also investigated a fish kill caused by the overflow of an oxidation pond at an industrial galvanizing plant.[2] The parish Ambulance Service transported the 16-month-old child of an oil company employee from her Buras home to the Port Sulphur [2] Hospital. And the coroner's office [2] issued death certificates on a variety of aircraft pilots, fishermen, pleasure boaters, and swimmers who drowned or suffered death from such causes as coronary and carcinoma. The Buras [2] Waterworks projected that it would run a deficit for the year

[2] See preceding pages for footnote.

of $29,280. And the five members of the Plaquemines Parish Commission Council devoted 30 percent of their official time to the business of the Plaquemines Port, Harbor and Terminal District.

The expenses above to local government occasioned by each and all of these occurrences—and thousands more—were classified as costs incurred by the Plaquemines Port, Harbor and Terminal District (Plaquemines Port or the Port), on the theory that these were "marine-related" events. The cost of these "marine-related" events was then passed on to common carriers by water, other vessels, and shippers utilizing private wharfage, dock, warehouse, and other terminal facilities within the port of Plaquemines, with said cost to be defrayed by the collection of harbor fees and supplemental harbor fees pursuant to a tariff filed with the Federal Maritime Commission.

The subject proceeding is a complaint filed by two shippers in the foreign trade, by three common carriers by water, and by two private carriers by water, all using terminal facilities in Plaquemines Port, alleging that the said harbor fees and supplemental harbor fees are unlawful in violation of the Shipping Act, 1916 (the Act).

THE COMPLAINANTS. The complainants Louis Dreyfus Corporation (Dreyfus) and The Early & Daniel Company, Inc. (Early), both are grain exporters in the foreign trade. The complainants Dixie Carriers, Inc. (Dixie), The Valley Line Company (Valley), and Federal Barge Lines, Inc. (Federal), are three common carriers by water certificated by the Interstate Commerce Commission, with operating rights to and from ports on the Great Lakes and to ports on all waterways connecting to the Great Lakes, including ports on the Mississippi River to the Gulf of Mexico. The complainants Le Beouf Bros. Towing Co., Inc. (Le Beouf), and Hollywood Marine, Inc. (Hollywood), are private carriers by water. All five of these carriers by water call at, among other ports, the port designated as the Plaquemines Port, Harbor and Terminal District. The two grain exporter complainants ship grain from a terminal located in Plaquemines Port.

THE RESPONDENT. The respondent is the Plaquemines Port, Harbor and Terminal District. Plaquemines Port extends southward from its boundary with the Port of New Orleans, at or about mile 81.6 on the Mississippi River, to mile 0 at "Head of the Passes" leading to the Gulf of Mexico, plus another 21.2 miles below Head of the Passes via Southwest Pass, for a total of about 102.8 miles. The principal waterway of Plaquemines Port is the Mississippi River, including its Passes to the Gulf of Mexico. The Plaquemines Port is coextensive geographically with the Parish of Plaquemines, Louisiana. In this state, a parish is the general equivalent of a county in another state. This Port and the Parish also include portions of the Gulf Intracoastal Waterway, various canals and other navigable waters. The Intracoastal Waterways flow across the northern portion of Plaquemines Port. The Doullut

Canal flows from the Mississippi River at Empire, La., and connects with a waterway which flows to the Gulf of Mexico.

The Plaquemines Parish is governed by the Plaquemines Parish Commission Council, which consists of five commissioners, who also govern the Plaquemines Port.

Located in Plaquemines Port are various terminal facilities, docks, a grain elevator, and federal anchorages for ocean-going vessels. Also in the Port are facilities which are located "midstream" in the Mississippi River, which are used for the transfer of coal and other commodities from barge to ocean vessel.

The locations of the major facilities on Plaquemines Port are:

On the Mississippi River and its passes.

On that portion of the Algiers Cut Off Canal (Intracoastal Alternate Waterway) lying between Orleans-Plaquemines Parish line (at Donner Canal) westward along the Intracoastal Waterway to the intersection with the Barataria of the Jefferson-Plaquemines Parish Line.

On the Empire Doullut Canal from the Mississippi River to the Gulf of Mexico.

At Jump Basin, Tiger Pass, Grand Pass, and Baptiste Collette, from the Mississippi River to the Gulf of Mexico.

Plaquemines Port and Plaquemines Parish do not operate any vessels which are common carriers by water in the foreign commerce, or in interstate commerce on the high seas or on the Great Lakes.

The Plaquemines Parish Commission Council, as governing body for the Parish of Plaquemines and for the Plaquemines Port, owns or operates only five public facilities in the nature of terminal facilities located on the Mississippi River or other Plaquemines Port waters.

These five facilities include three marinas or boat harbors, used by small pleasure craft and by fishing craft. The fourth facility is a shipyard for vessels 65 feet or less in length needing repairs, and the fifth facility is an unused dock about 90 to 100 feet long on the Mississippi River, which dock has been converted to an intake structure for water pumps supplying water from the river to the Plaquemines Parish Water Works.

The charges applicable at these three marinas and at the shipyard are not listed in Tariff No. 1 of the Plaquemines Port, which is filed with the Federal Maritime Commission, but these charges are noticed under separate ordinances of the Plaquemines Parish Commission Council.

However, items 155 and 160 of Tariff No. 1, respectively, provide "Wharfage Rates at Public Wharves," and "Basis for Assessment of Wharfage Charge." The wharfage charge of Plaquemines Port on all commodities at its Public Wharve is $0.50 per net ton or fraction thereof unloaded by and with the equipment furnished by the owner of cargo, with a minimum wharfage charge per shipment of $5.00.

It appears that at least in recent years Plaquemines Port has not assessed charges under items 155 and 160 of its tariff. Also it appears that in recent years no cargoes or vessels have used the above listed fifth facility, the dock, although it is conceivable that a new or different water intake facility could be utilized by the Parish, and the said dock could be converted back to use as a public dock for cargoes.

The existence of items 155 and 160 above do not show that Plaquemines Port now is a person furnishing terminal facilities in connection with common carriers by water.

However, there are many private facilities in Plaquemines Port, and in its answers to interrogatories propounded in certain stayed Federal Court actions, Plaquemines Port stated that it "administers" all privately owned docks, wharves, etc., within its geographical jurisdiction.

The respondent admits that, "There is a public interest of ownership impressed upon the banks of the navigable streams and waterways of the State of Louisiana." "The permission to use them is vested in local governments, especially when they have a Port District enabling statute." "These local governments have a right to make charges for the use of these areas for wharves." "The local governments have a corresponding power to impose a fee on the cargoes that are stored on such public banks, even if there are no wharves or facilities." "The right to make the charge is inherent, because private ownership of such area is impressed with the vested right of public use of the banks of such rivers and waterways." "In addition, the enabling legislation for the Port District states that the prior permission for the building of any wharves or facilities must be obtained."

Plaquemines Port was deemed not eligible to join the Mid-Gulf Seaport Marine Terminal Conference (FMC Agreement T-2002, approved January 17, 1967), by Mr. Cyrus C. Guidry, Executive Secretary and Legal Advisor to the said Conference. Mr. Guidry's opinion was based on certain information given to him by the attorney for Plaquemines Port. Mr. Guidry was told that Plaquemines Port did not own or operate or furnish any wharves for the use of which charges were assessed common carrier vessels loading or unloading cargo. Also Mr. Guidry was given other information, including that the sole public facilities of Plaquemines Port were marinas for pleasure and fishing boats.

Mr. Guidry's opinion is only a legal opinion and is not evidence of any basic facts relative to whether or not Plaquemines Port furnishes any terminal facilities in connection with common carriers by water.

Plaquemines Port filed its Tariff No. 1 with the Federal Maritime Commission for informational purposes only, with the understanding that the filing of the tariff, in and of itself, does not confer jurisdiction of the Federal Maritime Commission over Plaquemines Port.

Of course, the mere filing of a tariff is not proof of jurisdiction over the filer of a tariff. The filing of a tariff may be only one of many facts relating to jurisdiction.

In determining whether Plaquemines Port is an "other person" subject to the Shipping Act, one of the issues herein set out below, it must be determined whether Plaquemines Port is *a person* carrying on the business of forwarding or *furnishing wharfage, dock, warehouse, or other terminal facilities in connection with a common carrier by water.*

As will be seen below, many common carriers by water have used certain so-called private facilities in Plaquemines Port for the use of which facilities these carriers by water have been subjected to the Tariff No. 1 charges of Plaquemines Port. One principal factor in determining the ultimate jurisdictional question herein appears to be whether by conditioning the use of these private terminal facilities on the payment of its tariff charges, Plaquemines Port thereby controls the use of these terminal facilities, and in effect is, at least in part, furnishing these facilities.

THE COMPLAINT. By complaint filed April 20, 1979, served April 24, 1979, the seven complainants allege that the respondent, Plaquemines Port, is an "other person" subject to the Shipping Act. Further, it is alleged that the respondent's tariff on file with the Federal Maritime Commission (the Commission) contains: in item 135 a "Harbor Fee" which purports to be applicable to each vessel which docks, moors or anchors within the Plaquemines Port; in item 136(D) a provision for issuance to vessels over 100 feet long of special permits described in item 137; and in item 137 a provision that these special permits will be issued to certain vessels appraised for "ad valorem" taxes in the Parish of Plaquemines upon payment of such taxes.

It is alleged also that the combined effect of these tariff items results in the giving of undue and unreasonable preference and advantage to particular persons, such as the corporations whose vessels are entered on the tax rolls of the Parish, and results in undue and unreasonable prejudice and disadvantage to the five complainant carriers by water, who pay property taxes on their vessels in other Louisiana parishes, or in states other than Louisiana, and who are required by the terms of the tariff to incur charges from the Plaquemines Port of $150 each time one of their vessels enters the Plaquemines Port, in violation of section 16, First, of the Act.

Further, the complainants allege that the tariff contains in item 145 a Supplemental Harbor Fee which purports to be applicable to all cargo handled by a privately owned wharf, excepting cargo which is owned by the private wharf owner. The two complainant grain exporters, Dreyfus and Early, allegedly are subjected to undue and unreasonable prejudice, while other persons moving cargo owned by them across wharves or through terminals owned by them are given undue and unreasonable preference and advantage, by the terms of item 145, in violation of section 16, First, of the Act.

Further, it is alleged that the terms of item 145 result in the establishment, observance and enforcement of unjust and unreasonable regulations and practices related to and connected with the receiving, handling, storing, and delivering of property, in violation of section 17 of the Act.

Finally, it is alleged that the Supplemental Harbor Fee contained in item 145 of the tariff operates to the detriment of the commerce of the United States, is contrary to the public interest and is otherwise unlawful in violation of the Act, and therefore is in violation of section 15 of the Act.

Also, the complainants suggest that the Supplemental Harbor Fee contained in item 145 conflicts with guidelines of the Commission regarding the filings of tariffs by terminal operators, 46 CFR 533.6, defining "handling" of cargo between point of rest and any place on the terminal facility other than the end of ship's tackle, insofar as item 145 refers to cargo when first handled in the Plaquemines Port "in midstream or at anchorage," and insofar as item 145 further states that "all other cargo handled by a privately owned wharf shall be deemed midstream unloading." To complainants, item 145 appears to be an attempt to assess a fee that is tantamount to wharfage for the use of public facilities, when at the same time the private facilities, used by the complainants, additionally charge their own fees for the use of their facilities.

COLLATERAL PROCEEDINGS. Since September 1, 1977, the date on which the tariff of Plaquemines Port became effective, the Port has sought to charge the complainants its fees under items 135 and 145.

On March 15, 1978, Dreyfus brought suit in the United States District Court for the Eastern District of Louisiana, seeking to have the tariff of Plaquemines Port declared unconstitutional, and null and void "*ab initio.*" Trial was set for November 24, 1978.

On July 14, 1978, Dreyfus filed a motion for summary judgment, which was denied by the United States District Court on December 6, 1978.

On November 14, 1978, the Plaquemines Parish Commission Council, as governing body of Plaquemines Port, filed several suits in the Judicial District Court for the Parish of Plaquemines against 25 defendants, various vessel interests, shipping agents, and terminal operators doing business in Plaquemines Port, to enforce collection of amounts invoiced pursuant to the tariff of Plaquemines Port.

These additional Plaquemines Judicial District Court items were removed and consolidated with the Dreyfus action into the Federal Court action.

The parties defendant in the consolidated Federal Court action who are not before the Federal Maritime Commission in the present proceeding are National Marine Service, Inc., Midland Enterprises, . Inc., General Electric Credit and Leasing Corporation, TTT Shipping Agencies, Inc., Biehl & Company, Inc., Strachan Shipping Co., Rogers Terminal & Shipping Corporation, Oceans International Corporation, Hauser & Tidemann, Dalton Steamship Lines, Inc., Norton, Lilly & Co., Inc. (carriers or shipping agents representing carriers), Mississippi River Grain Elevator, Inc., Electro-Coal Transfer Corporation (terminals), and Mannesmann Pipe & Steel Corporation and Artfer, Inc. (shippers). Three other defendants have compromised and have been released, and another is bankrupt.

The amounts assessed the fifteen defendants who are not before the Federal Maritime Commission, through June 30, 1980, and in a few cases July 2, 1980, totaled $774,745.90.

This total above, plus $843,316.20 claimed against the complainant, as of the same time, made the total of tariff fees then in litigation of $1,618,062.10.

In each of its suits, the Plaquemines Parish Commission Council sought preliminary injunctions against the defendants, prohibiting their use of the Plaquemines Port and any facilities therein public or private.

In lieu of enjoining the defendants' access to the Mississippi River and Gulf Intracoastal Waterway and the facilities thereon located within Plaquemines Port, the Plaquemines Parish Council agreed to accept surety bonds and deposits in the registry of the federal courts to secure payment of the claimed fees.

A motion to dismiss the complaint filed by respondent was denied by the Administrative Law Judge on August 20, 1979, as was respondent's motion for leave to appeal to the Commission, which was denied on October 25, 1979.

Dreyfus filed a motion for stay in the United States District Court, based upon the doctrine that the Federal Maritime Commission has primary jurisdiction. This motion was granted on January 30, 1980, and the United States District Court Action and all consolidated actions were stayed, pending the outcome of the present proceeding before the Federal Maritime Commission.

INTERVENTION BY HEARING COUNSEL. A petition for leave to intervene was filed by Hearing Counsel, stating their belief that the impact of the tariff provisions at issue herein was far broader than the tariff provisions' effect upon the seven complainants, and stating that there was a significant effect on the shipping public and the ocean transportation industry. This petition was granted, but thereafter Hearing Counsel did not participate in the hearing, nor did they offer any evidence into the record. Hearing Counsel did file opening and reply briefs, taking the position that respondent is not an "other person," that respondent is not required to file a tariff with the Commission, and that the tariff items 135 and 145 providing a Harbor Fee and a Supplemental Harbor Fee are not regulations or practices related to or connected with the receiving, handling, storing or delivery of property.

Hearing Counsel do "concede that is arguable that the Supplemental Harbor Fee is a regulation or practice related to or connected with the receiving, handling, storing or delivering of property, for the reason that the fee is a charge against cargo and the assessed fees are based on tonnage." But, Hearing Counsel argue that this fee is not related to or based upon any terminal services or facilities "supplied" by respondent. Hearing Counsel on brief do not admit that control of the use of a terminal facility plus the imposition of a fee for use of such a facility might result in control of the furnishing of a terminal facility. Nor do Hearing Counsel on brief discuss other issues relating to the merits of the complaint, such as whether the amount of the Supplemental Harbor Fee is reasonably related to the benefits received by those charged this fee.

THE UNIQUENESS OF PLAQUEMINES PARISH AND PORT. The Plaquemines Port and the Parish sit astride the delta of the Mississippi River on its southernmost portion. Only 6 percent of the surface of the Parish is habitable. This habitable area consists of two relatively narrow strips of land along each bank of the Mississippi River between the riverfront levees and the back levees. The latter protect the land from waters other than the Mississippi. Substantially all of the habitable area is close to the waterways in Plaquemines Port. The remaining area is either water or marsh and wetland area.

On the East Bank, or left descending bank (l.d.b.) of the Mississippi River, the strip of habitable land is accessible by only one highway, 35 miles long, and on the West Bank, right descending bank (r.d.b.), the one highway is 70 miles long. The Parish population is about 27,000 permanent residents, plus as many or more itinerant laborers and professionals. The largest industry group and the largest employer in Plaquemines Parish is the oil industry. Plaquemines Parish has it own oil deposits and also serves as a base for offshore oil exploration and production in the Gulf of Mexico.

There are no bridges across the Mississippi River in Plaquemines Port. The first bridge north of the Gulf of Mexico is one at New Orleans. There are two ferryboat crossings of the Mississippi River in Plaquemines Port, one at Belle Chasse, La., in the northernmost part of Plaquemines Port, and the other at Pointe-a-la-Hache, La., nearer to the central point of Plaquemines Port.

Plaquemines Parish provides its two ferryboat services until about 11:30 p.m. daily. The parish has three ferryboats, one of which, the *M/V Louisiana*, has been equipped with water pumps and firefighting apparatus.

In the Parish there is a very considerable threat of extensive damages to property and life caused by hurricanes and other storms, which periodically beset this Gulf coastal area of Louisiana.

Because of the tendency of the hurricanes to damage citizens' residences in the Parish, one ostensible result is that property tax millage rates in Plaquemines Parish are either very low or the lowest in the State of Louisiana.

According to the state constitution, personal and real property is assessed for tax purposes at 15 percent of fair market value. Millages applied to the assessed valuation are determined by local election. The total combined millage rate for Plaquemines Parish in 1979 was 22.45 mills,[3] and the 1977 and 1978 rates were similar. The component millages included school tax, parish tax, water tax, hospital tax, library tax, pollution control tax, road maintenance tax, waste disposal tax, incineration tax, and law enforcement tax.

A property worth $100,000 assessed at 15 percent or $15,000 would pay ad valorem taxes at the rate of 22.45 mills of $336.75. One witness who owns 248 acres of marshland pays about $100 a year in ad valorem taxes.

Nevertheless, in spite of the hurricanes, etc., there are some properties in Plaquemines Parish of considerable value. A marine engineer who has specialized in the design and construction of marine terminals made an inspection and appraisal of the fair market value of certain marine facilities in Plaquemines Port, evaluating only that portion of a facility located from the center line of levee to the Mississippi River, including those structures in the river. His appraisals were:

Mississippi River Grain Corporation, Alliance, La.,
Barge-Unloading-Ship Loading Terminal,
$12,000,000.00

Amax Nickel Refining Co., Inc., Braithwaite, La.,
Dock Facilities,
$4,600,000.00

Cal-Ky Pipeline Terminal, Empire, La.,
Dock,
$812,000.00

[3] The Orleans Parish's millage rate was about 86 to 87 mills.

Getty Oil Company, Venice, La.,
Ship Dock and Barge Dock,
$4,675,000.00
Gulf Oil Co., U.S., Ostrica, La.,
Liquid Products Handling Facilities,
$6,350,000.00
Gulf Oil Company, U.S., Alliance, La.,
Coke Dock & Liquid Plastics Dock,
$20,350,000.00
Electro-Coal Transfer Corporation, Davant, La.,
Marine Transfer Facilities,
$30,000,000.00
Signal Oil Company, Homeplace, La.,
Loading Dock,
$690,000.00

As to the facilities above of the Mississippi River Grain Corporation, the fair market value estimate of $12,000,000 apparently included only the barge unloading and ship loading terminal. In fact, the replacement cost of the grain elevator and the dock facilities together would be about $80,000,000. Also, the other facilities listed above would show further values if properties beyond the center line of the Mississippi River levee were included.

When various industrial facilities were located within Plaquemines Port or Parish, often arrangements were made under Louisiana law to waive collection of certain taxes for a number of years as inducements for the industries to locate in the parish. For example, when the Mississippi River Grain Elevator facility originally was constructed, it was granted a ten-year industrial exemption from ad valorem taxes by the State of Louisiana. The exemption expired in 1978 on portions of the facility, and MRGE voluntarily has placed the remaining portions of the facility on the ad valorem tax rolls of Plaquemines Parish.

Other concerns having ad valorem tax exemptions in Plaquemines Parish include Chevron Chemical Company, Empire Menhaden Company, Inc., Louisiana Power & Light Co., SECO Industries, Universal Foods, and Signal Petroleum.

THE HISTORY OF PLAQUEMINES PORT AND ITS POWERS. The predecessor of Plaquemines Port originally was created in 1954 and was then entitled the Plaquemines Parish Port Authority. It was created by an Act of the Louisiana Legislature. Amendments to the statute by the state legislature account for Plaquemines Port's present form. From 1954 to 1977 Plaquemines Port and its predecessor existed in law but in fact were dormant. The Port was "activated" in 1977, as testified by the President of the Plaquemines Parish Commission Council, Mr. Chalin O. Perez, and by the Plaquemines Port Director, Mr. Albert Beshel, who also is one of the five commissioners of the Plaquemines Parish Commission Council.

Mr. Perez, a lifelong citizen of the Parish of Plaquemines, became president of the Parish Council in 1967. Certain other Parish Commissioners and Parish employees also are lifelong citizens of the Parish.

Under applicable Louisiana statutes which created the Plaquemines Port, Harbor and Terminal District (Ex. C-1 of record), Plaquemines Port may acquire by purchase, donation, expropriation, appropriation or otherwise any lands in the Plaquemines Port needed for railways, wharves, sheds, buildings, canals, channels and other facilities required for the operation of the Port. The Plaquemines Port may levy annually an ad valorem tax not to exceed five mills on the dollar on property subject to taxation situated in the Port.

The Plaquemines Port shall have the power to regulate the commerce and traffic within the Port in such manner as may in its judgment be best for the public interest.

Riparian owners or those lessees of property along the banks of any navigable stream or other body of water may, with the consent of Plaquemines Port and in conformity with plans and specifications approved by the governing authority of the Port, erect and maintain on the batture,[4] banks or bed of any navigable stream or other body of water owned or leased by them, such wharves, buildings or improvements, as may be required for public or private purposes; *but in all cases, such wharves, buildings or improvements shall remain subject to the administration and control of the Plaquemines Port with respect to their maintenance and to the fees and charges to be exacted for their case by the public.* (Emphasis supplied.)

As seen above, Plaquemines Port retains administrative authority and control over the private wharves and other terminal facilities in the Port, including control over the fees and charges exacted by the owners of private facilities for their use by the public.

The fees and charges of Plaquemines Port here in issue are in addition to the fees and charges and contractual rates and arrangements of the owner of a private facility, such as the Mississippi River Grain Elevator (MRGE).

MRGE has a "through-put" agreement, a private contract, with Dreyfus, for example. A through-put agreement provides an all-inclusive charge for certain services rendered by MRGE, including unloading grain from barges into MRGE's grain elevator, the storing of the grain in the elevator, and the taking of the grain out of the elevator and

[4] Batture is the land lying between the low tide line of the River and the middle of the levee.

loading it onto an ocean vessel. In other words, the grain is put through the elevator for a fee.

Also, MRGE has its own grain tariff, which provides, among other things, for dockage charges to vessels. The same MRGE grain tariff also provides charges for drying and cleaning the grain.

Plaquemines Port contains many oil deposits, and serves as a base for offshore oil exploration and production operations in the Gulf of Mexico.

The oil and gas portion of the Plaquemines Parish tax rolls is the largest in terms of value and produces the largest share ad valorem taxes collected.

Plaquemines Parish has a wide variety of industries related to oil exploration and production, such as oil field supply and service companies. Services include drilling pipe, diving, food, metering, and wireline services. Supplies include oil drilling chemicals and mud. Most of the oil field activity takes place in shallow, marshy waters outside of the principal land areas of the Parish.

A large number of vessels, many hundreds if not thousands, operate in the Parish to service the oil industry. About 95 percent of these are on the ad valorem tax rolls of the Parish. Most of the vessels are crewboats and supply boats which are less than 100 feet long.

Numerous pipelines for both oil and gas crisscross South Louisiana and Plaquemines Parish. These pipelines generally bring oil in from offshore areas to refineries or production facilities. Some pipelines are used for the interstate transmission of oil and gas.

Plaquemines Parish has a fishing industry, involving oysters, shrimp and menhaden. Most fishing vessels are less than 100 feet long. The Parish has a large number of docks and facilities for the fishing industry, including menhaden processing plants at Empire, La., and docking and ice facilities at Venice, La.

Plaquemines Parish also supports recreational fishing and hunting. Various marinas and boat launches supply services to hunters and pleasure fishermen. Pleasure fishing extends to the Gulf of Mexico and to the inland marsh areas of the Parish. Duck hunting is a popular pastime. Plaquemines Parish operates a number of marinas.

The "activation" of Plaquemines Port in 1977 coincided with a period of declining fortunes for the Parish, as its oil severance and royalty collections and other revenues were not keeping pace with increased Parish governmental expenditures.

The Parish passed its first sales tax in about 1976 or 1977. It was only one and one-half percent. Plaquemines Parish had a deficit for about the last four or five years up to April 29, 1980.

Because of declining oil and mineral revenues and for other reasons, such as the increased traffic on the Mississippi River and increased industrial activities in the Parish, the Plaquemines Parish Commission

Council decided on or about early in 1977 to raise additional revenues through the Harbor Fees and the Supplemental Harbor Fees here in issue, as published in the Plaquemines Port's tariff, which first became effective on September 1, 1977.

It is the complainants' view that at this time in 1977 it was the intent of the Plaquemines Parish Commission Council to raise additional funds for the general governmental functions of the Parish by levying the tariff charges in issue on "foreign business interests," that is, on those businesses such as the complainants' businesses, not domiciled in Plaquemines Parish.

Plaquemines Port takes the contrary view that it merely sought or seeks to recoup "marine-related" expenses from the users of the facilities of the Port of Plaquemines.

Plaquemines Port takes a very broad view of its definition of "marine-related" in allocating portions of the general expenses of the Parish government to the costs of operating Plaquemines Port. While practically every industry in Plaquemines Parish might be considered directly or indirectly marine-related, nevertheless it is abundantly clear from the evidence that the so-called "marine-related" expenses were not passed on to the persons and industries which caused these expenses, but these "marine-related" expenses were sought to be recovered only from vessels and cargoes subjected to the Harbor Fees and the Supplemental Harbor Fees.

THE FOUR LOUISIANA PORT AUTHORITIES. Plaquemines Port is one of the four port authorities created by the State of Louisiana along the Mississippi River from the Gulf of Mexico northward to and including Baton Rouge, La.

Plaquemines Port includes only one Parish (Plaquemines) and extends from the Gulf to Mile 81.6 on the River. The Board of Commissioners of the Port of New Orleans have jurisdiction over the area along the river from Miles 81.6 to 115, including the Parishes of St. Bernard, Orleans and Jefferson. The South Louisiana Port Commission has jurisdiction along the river from Miles 115 to 168, including the Parishes of St. Charles, St. John the Baptist and St. James. The Greater Baton Rouge Port Commission has jurisdiction covering Miles 168 to 255, including the Parishes of Ascension, Iberville, East Baton Rouge and West Baton Rouge.

The three upriver port authorities each are concerned with areas of three or more parishes, and either own or control public wharves.

The State of Louisiana authorized differing modes of government for these four Louisiana Port Authorities.

The Port of New Orleans has a seven-member board, with four members from Orleans Parish, two from Jefferson Parish and one from St. Bernard Parish. The State Governor selects these members of the board from among nominees put forth by civic and business organizations, including the Chamber of Commerce of New Orleans, the New Orleans Board of Trade, Ltd., the New Orleans Steamship Association, the International Freight Forwarders and Customs Brokers Association of New Orleans, Inc., and the International Trade Mart. The Greater Baton Rouge Port Commission has fifteen members appointed by the State Governor from nominees supplied by such authorities as the police jury of the Parish of West Baton Rouge, the mayor and alderman of the town of Port Allen, La., and the city council of Baton Rouge.

The South Louisiana Port Commission is composed of nine members, of whom two each are appointed by the authorities of the Parishes of St. Charles, St. John the Baptist and St. James. A seventh member is appointed by the State Governor, and the other two positions are occupied ex officio by the directors of the Louisiana Department of Public Works and the Louisiana Department of Commerce and Industry.

The title to port facilities operated by the Greater Baton Rouge Port Commission and by the South Louisiana Port Commission vests in the State of Louisiana.

As seen above, Plaquemines Port has the same governing body as does the Parish of Plaquemines, namely the five-member Plaquemines Parish Commission Council. This is in contrast with the three other Louisiana Port Authorities, whose governing bodies are independent of and differ greatly from the governing bodies of the various parishes. This situation in Plaquemines leads to the charge by the complainants that the Plaquemines Parish Commission Council has tended to conduct the business of Plaquemines Port without distinguishing it from the operations of the Parish government.

THE TARIFF PROVISIONS OF PLAQUEMINES PORT, WHICH RESULTED IN THE CHARGES IN ISSUE. The Complainants' exhibit No. 3 contains the entire tariff of Plaquemines Port as filed with the Commission, and as it was effective at the time of hearing, including some original and some revised pages. Originally the tariff was adopted April 20, 1977, but did not become effective. The tariff, as later adopted on August 17, 1977, became effective for the first time on September 1, 1977. Subsequent to the hearing, the Port's tariff was amended, effective July 4, 1980, to reflect changes, including changes in Items 135, 145 and 165. Pages 44 to 61, inclusive, of respondent's opening brief recite the tariff provisions and charges of the Port including the changes and additions effected on July 4, 1980. Official notice is taken of all of the tariff provisions of the Plaquemines Port's tariff, including those in the amendments effective July 4, 1980.

To fully understand the controversy herein, it is necessary to consider the tariff's provisions as they were originally at the time of the hearing, and as they were amended after the hearing. At the hearing, with Hearing Counsel not present to represent the public, the Administrative Law Judge deemed it advisable to comment on the existing tariff provisions, with the view of assisting in their clarification, so as to make the tariff provisions definite and certain, and more readily understandable by the shipping public.

Item 135 of the tariff at the time of the hearing was as follows:

> *Item 135 - Harbor Fee*
>
> Each vessel which docks, moors, or anchors within the District, including Lash and Seabee barges and movable oil rig and platforms, shall be assessed a Harbor Fee, as provided herein, to assist in defraying the expense of the administration and maintenance of the Plaquemines Port, Harbor and Terminal District, including the supervision of the shipping of the district, with the view of preventing collisions and fires, policing the river and river front, rendering aid to vessels in distress, and to aid in extinguishing fires in vessels and equipment and in their cargoes aboard such vessel, or upon wharves and other facilities in the District.
>
> Fee Per Vessel
>
> | | |
> |---|---|
> | Vessels over 100 and under 250 feet in length | $100.00 |
> | Vessels 250 feet and over in length | $150.00 |
>
> This Harbor Fee is due for the first five days or any part thereof that the vessel remains within the District.

Effective July 4, 1980, this item 135 was amended according to respondent for two reasons, one, to clarify the amount of the Harbor Fee for vessels remaining over five days in the Port and, two, to make all parties liable for the Harbor Fee. The amendment added the following:

> and for each day or any part thereof over five days that the vessel remains within the District, the Harbor Fee due shall be one-fifth of the above stated Fee Per Vessel.
>
> The payment of the Harbor Fee shall be the *primary obligation of the owner, agent, or user of the vessel,* but the owner of the facility handling or storing the cargo and the cargo owner whose cargo is loaded unto a vessel outbound from the Port District from any wharf, dock, facility, mooring facility, or anchorage within the Port District shall be liable *in solido as surety* for the payment of the Harbor fee due by the owner, agent or user of the vessel unto which such cargo has been loaded; subject, however, to the right of full subrogation and full recovery by those who have paid on behalf of the owner, agent, or user of the vessel against the owner, agent, or user of

the vessel, who is primarily liable for all amounts paid by those responsible in solido but not primarily obligated. (See Item 145 Supplemental Harbor Fee and Item 165, Payment of Bills hereof.)

Item 136 of the tariff provides:

Vessels Exempted From Harbor Fee

(A) Vessels passing through the port which do not berth at any wharf, anchor within the District, or in any way moor themselves within the District limits. Vessels stopped with the District for the sole purpose of changing pilots, or because inclement weather remaining less than twelve hours within the limits of the District.

(B) Government vessels not engaged in carrying cargo, troops or supplies.

(C) Private, non-commercial pleasure craft.

(D) Special permits, vessels over 100 ft. in length as set forth in Item 137.

Item 137 of the tariff provides:

Special Annual Or Temporary Port Permit Vessels

Annual special permits will be issued by Plaquemines Parish Port Authority to every vessel over 100 ft. in length that is appraised for Ad Valorem taxes in the Parish of Plaquemines upon payment of the Parish taxes resulting from such Parish assessments. Special Permits will be issued by Plaquemines Parish Port Authority upon the payment of the following fees:

I

Vessels over 100 ft. to 200 ft. in length:

a. For 30 days	$100.00
b. For 90 days	250.00
c. For 180 days	450.00
d. For 365 days	750.00

II

For non-self propelled barges, lighters or other watercraft over 100 feet in length, and not more than 200 feet in length:

a. For 30 days	$ 50.00
b. For 90 days	125.00
c. For 180 days	225.00
d. For 365 days	375.00

III

For non-self propelled barges, lighters or other watercraft over 200 feet in length and not more than 300 feet in length:

a. For 30 days	$200.00
b. For 90 days	500.00

c. For 180 days	900.00
d. For 365 days	1500.00

Such permits will exempt such vessels from payment of Harbor and Lay-Up Fees, as set out in Items 135, 136 and 140 hereof.

As seen from the *amended provision* regarding who shall be liable *in solido as surety* in item 135, the payment of this harbor fee relates to those *vessels on which cargo has been handled in the Port, or stored in the Port, or loaded upon a vessel outbound from Plaquemines Port.* As item 135 existed before the July 4, 1980, amendment, the fee related to *vessels which dock, moor or anchor* in the Port. As further seen in item 136 of the tariff, the exempted vessels which do not pay the harbor fee in item 135 are those vessels merely passing through the Port, etc. These vessels, in other words, are those vessels not handling cargo in not storing cargo in, or not loading cargo outbound from the Port.

Clearly items 135 and 136 connote the intention of Plaquemines Port to assess only those vessels handling cargo in the Port in some fashion. But, other vessels not assessed could be involved in collisions, fires, or other emergencies. Thus, the harbor fee is in reality more of a fee related to cargo than a fee regarding navigational problems in a harbor.

Item 145 of the tariff at the time of the hearing, 1st revised page 13, was as follows:

Item 145 Supplemental Harbor Fee

All cargo when first handled within the district in midstream or at anchorage shall be assessed, in addition to Items 135, 137 and 140, $.10 per net ton or fraction thereof over 500 tons of the weight of cargo handled, provided that no cargo shall be assessed a tonnage harbor fee more than one time. The payment of supplemental harbor fee shall be the *primary obligation of the owner of the cargo,* but the owners or other users of the vessels and facilities handling or storing such cargo shall be bound and responsible in *solido as surety* for the payment of such cargoes; subject, however, to the right of full subrogation and full recovery by those who have paid on behalf of the owner of the cargo against the owner of the cargo, who is primarily liable, for all amounts paid by those responsible in solido but not primarily obligated. The cargo of the owner of a privately owned wharf shall be handled by the owner of the wharf without the payment of this fee to the District. The Harbor Fee Charge of Item 135 and on any vessels involved in the handling of cargo subject to this supplemental harbor fee shall be credited against this cargo. All other cargo handled by a privately owned wharf shall be deemed midstream unloading and shall be subject to the same fee as that imposed above upon midstream unloading.

Effective July 4, 1980, item 145 was amended in several ways as follows:

The first sentence became the first paragraph. The second sentence became the second paragraph, and was changed somewhat but not in substance according to the respondent, to read as follows:

> The payment of Supplemental Harbor Fee shall be the *primary obligation of the owner of the cargo,* but the owners, the agents, or other users of the vessels and the owners of the facilities handling or storing such cargo shall be bound and responsible *in solido as surety* for the payment of such charges; subject, however, to the right of full subrogation and full recovery by those who have paid on behalf of the owner of the cargo against the owner of the cargo, who is primarily liable, for all amounts paid by those responsible in solido but not primarily obligated.

The new second paragraph above mentions "agents of vessels" specifically. In other words, the respondent intends that all parties involved with the handling of cargo in the Port to be liable for the fees in item 145. As seen, Item 145 of the tariff holds cargo interests primarily liable for the payment of the Supplemental Harbor Fee. But, in addition, this item makes the owners or other users of the vessels and facilities handling or storing such cargo bound and responsible *in solido as surety* for the payment of the debt incurred by the cargo owner, subject to the right of full subrogation and full recovery against the owner of the cargo.

It should be emphasized that item 145 provides a fee on cargo tonnage handled in a terminal facility. It is a fee assessed *against cargo,* and not a fee on vessels using a harbor, although its title, "Supplemental Harbor Fee," has that connotation. In other words, item 145 more properly should be titled a "Terminal Fee" instead of "Harbor Fee." This Plaquemines fee was modeled on the Supplemental Harbor Fee of the Port of New Orleans.

But by way of contrast, the Supplemental Harbor Fee of the Port of New Orleans is assessed *against vessels* handling or transferring cargo in midstream or when the vessels are anchored at or moored to mooring facilities, including barge fleet mooring facilities.

The third sentence of item 145 of Plaquemines Port's tariff has become the third paragraph.

The fourth sentence of item 145 was made the fourth paragraph and now reads:

> The Harbor Fee of Item 135 on any vessels involved in the handling of cargo subject to this Supplemental Harbor Fee shall be credited against this Supplemental Harbor Fee.

The above fourth paragraph corrected a clerical error (the word "and" after Item 135 in the prior version was deleted), and clarified "this charge" at the end of the sentence to mean "this Supplemental Harbor Fee."

This correction further has the effect of emphasizing that the Harbor Fee on vessels in item 135 is on any "*vessels involved in the handling of cargo,*" and as will be seen from item 136, such handling of cargo must be in Plaquemines Port. In other words, both the Supplemental Harbor Fee (item 145) and the Harbor Fee (item 135) relate to, or are dependent on, the handling of cargo in or on terminal facilities in Plaquemines Port. Item 145 is a fee on cargo based on tonnages of cargo handled, and item 135 is a fee on vessels but only on vessels which transport cargo handled in the Port. Vessels which merely pass through Plaquemines Port which do not berth at any wharf, anchor within the Port, or in any way moor themselves in Plaquemines Port are exempted from the Harbor Fee. That is, vessels loaded with cargo, but merely passing through Plaquemines Port and going to or from other ports, such as the Ports of New Orleans, Baton Rouge or South Louisiana, are exempted from the Harbor Fee.

The fifth and last sentence of the prior item 145 has become the seventh paragraph and reads:

> All cargo handled by a privately owned wharf shall be deemed midstream unloading and shall be subject to the Supplemental Harbor Fee imposed above which includes midstream unloading.

A new fifth paragraph of item 145 reads as follows:

> The cargo is assessed the Supplemental Harbor Fee when it is first handled within the District, but because of the exemption granted for cargo owned by the handling wharf owner, the reporting of cargoes should be made when the cargo leaves the wharf or facility, and the assessment calculation shall then be made since the joint ownership of the cargo and the wharf cannot be finally determined until the cargo leaves the wharf or facility. The Harbor Fee credit is given for the outbound vessels onto which the cargo is loaded from the wharf, and the reporting to the Port District as to cargoes, vessels, and ownership thereof is to be made at the instant before the cargo leaves the wharf or facility.

A new sixth paragraph of item 145 reads as follows:

> A Supplemental Harbor Fee shall be assessed for cargo not owned by the owner of the wharf or facility irrespective of the manner in which the cargo leaves the wharf or facility. If the cargo leaves the wharf or facility other than by vessel, for example by pipeline, rail, truck, etc., and therefore no Harbor Fee is assessed with such outbound cargo, there is no Harbor Fee to be credited against the Supplemental Harbor Fee.

The first proposed tariff of Plaquemines Port, which did not become effective (filed with the Federal Maritime Commission on May 23, 1977), provided a Supplemental Harbor Fee of 20¢ a net ton, with assessment against the vessel, rather than against the cargo.

The amended tariff No. 1 of the Plaquemines Port which became effective September 1, 1977 (filed with the Federal Maritime Commission on August 25, 1977), provided a Supplemental Harbor Fee of 10¢ a net ton, *with assessment against the vessel.*

However, the first revised item 145 (received by the Commission on December 27, 1977), effective January 1, 1978, provided the same 10¢ a net ton *Supplemental Harbor Fee*, but *with assessment against the cargo.* This assessment against the cargo remained at the time of, and subsequent to, the hearing.

The new fifth paragraph of item 145 remains somewhat contradictory in and of itself. First, it provides that cargo is assessed the "Supplemental Harbor Fee" "when it is first handled in the District." However, the new fifth paragraph goes on to state that "the reporting of cargoes should be made when the cargo leaves the wharf or facility."

Obviously, when cargo is first put into a facility such as the Mississippi River Grain Elevator, it has been "first handled." Just as obviously, when that same cargo leaves the facility, it has been second, third, or fourth handled, but surely not first handled.

The key words in the new fifth paragraph of item 145 are that the reporting of cargoes (for purposes of collecting the charges under item 145) should be made when the cargo leaves the facility "since the joint ownership of the cargo and the wharf cannot be finally determined until the cargo leaves the wharf or facility," (in the event that there is such a joint ownership).

The respondent's intention is, and generally has been, to assess the Supplemental Harbor Fee where there is no joint ownership against the owner of the cargo with such ownership to be determined when the cargo leaves the wharf or facility, apparently because such cargo owner, such as Dreyfus for example, does business regularly in Plaquemines Port, has employees stationed there, and is reachable easily for purposes of collecting the Supplemental Harbor Fee. This is in contrast to an ocean vessel which may make only one or a few calls in Plaquemines Port and may be difficult later to reach. As seen, item 145 in its second paragraph places the primary obligation of the charges on the owner of the cargo but makes all other parties responsible as surety.

The privately owned wharves in the Port of Plaquemines are publicly oriented, in that these wharves may handle cargoes owned by the general public, as well as any cargoes owned by the wharf owners. In contrast, at the Port of New Orleans, privately owned wharves are restricted by law to the handling of cargoes of their owners. The Port of New Orleans has "public wharves" owned or operated by the Board of Commissioners of the Port of New Orleans.

OTHER PERTINENT TARIFF PROVISIONS OF PLAQUEMINES PORT. Item 10 of the tariff provides, in part, that "The Plaquemines Port, Harbor and Terminal District shall be the sole judge as to the interpretation of this tariff." Item 10 also provides that the rates, rules and regulations in the tariff apply to all users of the waterways and facilities.

Item 50 (General Anchorage) of the tariff lists the General Anchorage for Plaquemines Port as follows:

1. Fairway Anchorages
   A. South Pass Mississippi River Anchorage
   B. Southwest Pass Mississippi River Anchorage
2. Pilottown Anchorage
   1.5-6.7 R.D.B.
3. Boothville Anchorage
   12.2-18.5 R.D.B.
4. Ostrica Anchorage
   23.5-24.4 R.D.B.
5. Port Sulphur Anchorage
   37.5-39.7 L.D.B.
6. Deer Range Anchorage
   53.5-54.5 L.D.B.
7. Alliance Anchorage
   63.6-65.8 R.D.B.
8. Cedar Grove Anchorage
   70.6-71.2 R.D.B.
9. Augusta Anchorage
   71.4-72.0 R.D.B.
10. Belle Chasse General Anchorage
    73.6-75.2 R.D.B.
11. 12 Mile Point Anchorage
    79.0-80.8 R.D.B.

The rules and regulations concerning the General Anchorages are prescribed by the U.S. Army, Corps of Engineers, and their enforcement is a responsibility of the U.S. Coast Guard. Vessels anchored in the River, except as below noted, shall be anchored in the above listed General Anchorages.

Item 55 (Special Permission To Anchor) of the tariff provides:

Vessels may be granted special permission by the Director (of Plaquemines Port) to anchor in other parts of the District.

Item 125 (Loss or Damage Responsibility) of the tariff provides:

> The Plaquemines Port, being a political subdivision of the State of Louisiana, is not liable and cannot assume responsibility for any loss or damage to cargo or other property while on the wharves, docks, landings or other *facilities, both public and private, under the administration of this District* which have been assigned or used for the shipment, reception or storage of such cargo or other property.
>
> Each shipper or receiver of cargo, or those acting for them, must protect such cargo from loss or damage from any causes whatsoever.

Item 130 (Penalties for Violation) of the tariff provides:

> (a) It shall be unlawful for any person, firm, or corporation to utilize or make use of the Plaquemines Port, Harbor and Terminal District or any of its facilities without paying to the District the proper toll, charge or fee therefore as fixed and specified in this tariff, or by designation otherwise, and every person, firm, or corporation violating any provision of this order, respecting the payment of any toll, charge or fee, shall be deemed guilty of a misdemeanor and upon conviction thereof shall be punishable by a fine of not more than Five Hundred ($500.00) Dollars, or by imprisonment in the Parish Jail, for a period of not more than thirty days, or by both such fine and imprisonment. The Court in its discretion may consider each day on which the violation occurs as a separate offense.
>
> (b) It shall be unlawful for any person, firm or corporation to fail, refuse or neglect to comply with any of the provisions of the rules and regulations prescribed by this tariff or supplement thereto, or by designation otherwise, and any person, firm or corporation violating any of the provisions of these rules and regulations shall be guilty of a misdemeanor and upon conviction thereof shall be punishable by a fine of not more than Five Hundred ($500.00) Dollars, or by imprisonment in the Parish Jail for a period of not more than thirty days, or by both such fine and imprisonment. The Court in its discretion may consider each day on which the violation occurs as a separate offense.

Item 155 (Wharfage Rates at Public Wharfs) of the tariff provides:

> The rate of wharfage on all commodities shall be $.50 per net ton, or fraction thereof, unloaded by and with the equipment furnished by the owner of the cargo. The minimum wharfage for any shipment shall be $5.00.

Item 160 (Basis for Assessment of Wharfage Charge) of the tariff provides:

> All cargo or freight, shall be subject to the wharfage charge as follows:

1. When cargo or freight is placed onto public wharves, docks, landings, mooring facilities, or other structures for handling to or from vessels; or
2. When cargo is placed on the public wharves for outbound movement and is not subsequently loaded aboard a vessel, but is removed from the wharves; or
3. When such cargo or freight is transferred over or under such wharves, docks, landings, mooring facilities, or other structures to or from vessels; or
4. When such cargo or freight is delivered to or received from vessels by other watercraft, or when transferred over the side of vessels directly to or from the water:
    a. When said vessels are occupying berths at wharves, docks, landings, mooring facilities or other structures;
    b. When said vessels are moored outside of other watercraft occupying berths at wharves, docks, landings, mooring facilities, or other structures.

Item 165 (Payments of Bills) of the tariff provides:

> All bills are due upon presentation by the District and failure to pay when presented shall place the name of the vessel, its owners and agents, or other user of the facilities, upon a Delinquent List, conditions of which are hereinafter defined. The payment of supplemental harbor fee shall be the *primary obligation of the owner of the cargo*, but the owners or other users of the vessels and facilities handling or storing such cargo shall be bound and responsible *in solido as surety* for the payment of such charges; subject, however, to the right of full subrogation and full recovery by those who have paid on behalf of the owner of the cargo against the owner of the cargo, who is primarily liable, for all amounts paid by those responsible in solido but not primarily obligated. All other charges applicable to this Tariff shall be assessed to owners of the vessels, their agents or facilities in solido.
>
> All common carriers, vessels, their owners and/or agents, and/or owners, assessors, or leasors [sic] of wharves or other users of the facilities, landing goods on or in the facilities, or receiving goods from and/or over the facilities, or delivering or receiving goods from barges or other craft while said vessel is berthed at a wharf, or at anchorage in the harbor, thereby contract to pay and are responsible for the dockarge, [sic] storage or other charge on such goods at the rates provided herein to be collected either from the common carrier, vessel, there [sic] owners, and/or agents, or other users of the facilities.
>
> The Plaquemines Port, Harbor and Terminal District reserves the right to estimate and collect in advance all charges which

> may accrue against common carrier vessels, their owners and/or agents, or against cargo loaded or discharged by such vessels or other users of the facilities of the Plaquemines Port, Harbor and Terminal District, whose credit has not been properly established with the District or who are habitually on the delinquent list. Use of the facilities may be denied until such advance payment or deposits are made.
>
> The District reserves the right to apply any payment received against the oldest bills rendered against common carriers, vessels, their owners and/or agent or other users of facilities.
>
> All common carriers, vessels, their owners and/or agents, and/or owners, assessors, or leasors [sic] of wharves or other users of the port or facilities of the Plaquemines Port, Harbor and Terminal District placed on the delinquent list for reasons hereto stated shall be denied further use of the port or facilities by the District until all such reports have been filed and all charges thereon, together with any other charges due, shall have been paid.

As seen, the provisions of item 165 of the tariff impose civil sanctions, including the placing of vessels, owners, agents, and users of Plaquemines Port facilities on a delinquent list with consequent denial of further use of the Port or its facilities. These civil sanctions are in addition to the criminal sanctions provided in item 130 of the tariff.

Item 175 (Reports Required From Towing Companies, Bar Pilots Assn., and Others) of the tariff provides:

> The owner, agent, operator or pilot of any watercraft engaged in the towing or transportation of any commodities within or passing through the waters under the jurisdiction of the District must render periodically, when called upon by the District, complete reports covering all tonnage handled, including description, weight, and approximate valuation. Failure to render reports will subject the person or persons concerned to the penalty prescribed in Item 130.

SOME OF THE EFFECTS OF THE TARIFF PROVISIONS. Item 135 imposes a harbor fee on vessels over 100 feet long which dock, moor or anchor in Plaquemines Port. Exempted are vessels passing through without berthing at a wharf, anchoring or mooring, vessels stopped only to change pilots or ride out inclement weather and for such purposes remaining less than twelve hours. Also exempted are government vessels not carrying cargo, troops, or supplies. Also exempted are private, non-commercial pleasure craft. And also exempted are vessels carrying "special permits" as defined in item 137 of the tariff.

Item 137 of the tariff makes two classes of vessels eligible for "special permits," every vessel over 100 feet in length which is appraised for ad valorem taxes in Plaquemines Parish and for which the assessment has been paid; and vessels between 100 feet and 300 feet in length for which the "special permit" may be purchased for periods of 30, 90, 180 or 365 days. Special permits are not available to selfpropelled vessels above 200 feet in length or to non-self-propelled vessels above 300 feet in length.

Unlike other Gulf Ports which have harbor fees, Plaquemines Port's fee falls on inland watercraft, as well as on those engaged in foreign, coastwise or intercoastal commerce.

Item 145 of the tariff, the "Supplemental Harbor Fee" is in fact a harbor tonnage fee or a cargo tonnage fee, to be assessed against all cargo when first handled in Plaquemines Port in midstream or at anchorage. This provision was modeled after a rarely used provision of the tariff of the Port of New Orleans, but the New Orleans fee is assessed not against cargoes but against vessels which handle cargoes in midstream or at anchorage. The New Orleans fee does not apply to operations at private wharves and does not apply to inland watercraft.

The Plaquemines Port fee of item 145 is assessed against cargoes moved across docks, wharves, and through terminals, as well as to cargoes handled at midstream or at anchorage.

Plaquemines Port has extended the fee in item 145 from a charge on cargo handled in midstream to a charge on cargo handled at docks. As seen, a part of item 145 provides that cargo handled by a privately owned wharf shall be deemed midstream unloading subject to the fee for the same.

Item 145 creates two classes of exemption, namely for the first 500 tons of cargo handled, and for the entire tonnage of any cargo which is owned by the owner of the facility at which the cargo is handled. The said "owner" includes parent company of the owner and any 100 percent owned subsidiary of the "owner" or parent company.

The rationale of the respondent regarding item 145's exemptions is that 500 tons at 10 cents a ton is $50, which would be uneconomical to bill and collect, and that the owner of a facility by virtue of his investment in the facility is entitled to special consideration.

Also contained in item 145 is a provision allowing a credit between the Supplemental Harbor Fee and the Harbor Fee of item 135. "The Harbor Fee charge of item 135 on any vessels involved in the handling of cargo subject to the Supplemental Harbor Fee shall be credited against this charge."

From May of 1978 until after May of 1980, Plaquemines Port interpreted this credit provision of item 145 so that if a Supplemental Harbor Fee was paid by the cargo owner, a credit in the amount of the Harbor Fee was given the vessels. In other words, in such case *no* Harbor Fee was assessed against the vessel.

In 1978, 434 oceangoing vessels docked in Plaquemines Port. Of these, 291 vessels were assessed the Harbor Fee docking charge, but for the remaining 143 ocean vessels *no* Harbor Fee was assessed because a Supplemental Harbor Fee was charged.

Subsequent to May 1980, after the hearing, Plaquemines Port changed its interpretation of the exact same wording in the credit provision of item 145 so that the vessel was charged the Harbor Fee in each instance, and the amount of the Harbor Fee was subtracted from (credited against) the amount assessed as a Supplemental Harbor Fee.

An example of the above follows. Prior to the hearing, vessels calling at the Mississippi River Grain Elevator to be loaded with Dreyfus grain were not assessed the $150 docking fee (Harbor Fee), as the Supplemental Harbor Fee was assessed without any credit of the Harbor Fee. The Supplemental Harbor Fee charge to Dreyfus averaged about $3,000 on the cargo loaded on an ocean vessel, and occasionally exceeded $7,000.

During the same period of time, ocean vessels calling at MRGE to receive grain from Artfer, Inc., were assessed the Harbor Fee of $150, but no Supplemental Harbor Fee was assessed under the mistaken belief that Artfer, Inc., and MRGE were under the same ownership. This mistaken belief rested upon the fact that a Mr. Ferruzi had an interest in both Artfer and MRGE.

Subsequent to the hearing, Plaquemines Port's new policy is to assess the vessel a $150 docking fee (Harbor Fee) and to assess the cargo owner the Supplemental Harbor Fee less the amount of the docking fee of $150.

For the calendar year 1978, about one-fourth of the total tonnage of cargo moved and handled through facilities in Plaquemines Port was assessed the Supplemental Harbor Fee, that is 6,875,412.09 tons out of 26,236,525.28 tons.

Appendices VI and X of Exhibit C-15 show that 6,857,412.09 tons [5] total were assessed the Supplemental Harbor Fee in 1978. This included 1,714,956.40 tons of soybean meal, 1,769,430.65 tons of coal, 776,291.50 tons of phosphate, 1,813,916.25 tons of corn, and 782,817 tons of "other" commodities, such as alfalfa pellets, urea, coke, ammonium sulfate, distilled corn & corn pellets, sunflower seeds, oats pellets & meal, wheat, chicken feed, linseed meal, soybean meal pellets, and rock salt.

In 1978 the monthly tonnage totals assessed the Supplemental Harbor Fee ranged from 320,490.13 tons in July to 1,040,881.23 tons in March and averaged 571,451 tons per month.

Appendix X of Exhibit C-15 shows the tonnages transferred over docks and facilities in Plaquemines Port, as reported, where the cargoes

[5] Appendix VI of Exhibit C-15 shows the incorrect total of 6,708,584.15 tons, which error results from an error in the total shown for August 1958. This appendix shows the incorrect total tons for August of 397,306.80, whereas the correct total for August is 546,134.14 tons.

were classified as owned by the facility owner, and thus these cargoes were exempted from the Supplemental Harbor Fee. The reported cargoes listed as exempt are coal, sulfuric acid, fuel oil, nickel products, nickel & cobalt products, nickel matte raw ore, and sulphur. Some of the figures are in tons and some are in barrels. The separate tonnage total is 6,471,657.21. Separately listed are 43,854,212.57 barrels, which when converted to tonnage amounts to 6,078,009.67 tons. The conversion factor apparently was 0.1385958. Also a note explains that the barrels reported above are incomplete, and the estimated apparently unreported barrels for 1978 are 94,204,033, or 13,056,283.22 tons.

Appendix IX to Exhibit C-15 shows dry tons for 1978 in the amount of 13,180,241.96 and 94,204,033 liquid barrels, or 13,056,283.32 unreported tons, or total dry and liquid tons of 26,236,525.28. This figure differs from the total calculated from Appendix IX of 12,549,666.88 tons, plus 13,056,283.32 tons, or a total of 25,605,950.20 tons. The 13,056,283 tons represents oil and petroleum products which were handled through terminal facilities in Plaquemines Port in 1978, but which cargoes were not assessed the Supplemental Harbor Fee.

With 6,857,412 tons subjected to the Supplemental Harbor Fee, and whether the total tonnage in 1978 was either 25.6 million or 26.2 million, these figures show that 26.78054 percent or 26.13689 percent of the total cargoes was subjected to the Supplemental Harbor Fee. Among other reasons, because some 74 or 73 percent of the cargoes were not subjected to the Supplemental Harbor Fee in 1978, the complainants naturally conclude that the implementation of the Supplemental Harbor Fee resulted in undue preference and undue prejudice.

During the period from September 1977 until June 1980, Plaquemines Port exempted from the charges of item 145 of its tariff, that is the Supplemental Harbor Fee, the cargoes of the oil companies and grain cargoes of Artfer, Inc., among others exempted.

ADDITIONAL FACTS OF RECORD. The monies generated by the Harbor Fee and Supplemental Harbor Fee (Items 135 and 145 of the tariff) are turned over by Plaquemines Port to the Plaquemines Parish Commission Council, which places them in the Parish's general fund. Tariff funds are commingled with revenues which the Parish obtains from such sources as ad valorem taxes, license fees, mineral royalties, and sales taxes. The identity of Plaquemines Port has been submerged within the identity of the Plaquemines Parish Commission Council. It was not until a meeting conducted in November 1977 that any systematic effort was made by the Plaquemines Parish or by Plaquemines Port to determine the cost of Parish services properly chargeable as expenditures of Plaquemines Port. This was done some months after the Plaquemines Port's tariff had been prepared and charges already imposed.

At the meeting in November 1977, attended by various heads of the branches of the Parish government, such as the comptroller, the safety director and the Commission Council members, the parties attending the meeting were advised to estimate the percentage of the budget of each department which could be charged to Plaquemines Port.

In other words, it had been determined already that vessels would be charged a specific fee for docking and anchoring, and cargoes a specific fee for wharfage, without any evidence of the actual costs of the services to be defrayed or recompensed by the Harbor Fees and Supplemental Harbor Fees.

At the meeting in November 1977, it was determined to advise each department head to select from his documentary records any document tending to show that the department's activity or service was water-connected or marine-related. Secondly, a determination was directed to be made of the percentage of such activity or service as related to the department's total activity or service performed. Thirdly, it was directed that the total annual budget of a department be multiplied by the said percentage, to get a dollar amount to be reimbursed from anticipated tariff revenues of Plaquemines Port. The sum of these calculations from the budgets of all departments of the Parish government, coupled with the actual projected expenditures of Plaquemines Port, constitute the Plaquemines Port's annual budget. These department percentages calculated at the end of each year as charged to Plaquemines Port, plus actual direct disbursements by Plaquemines Port, determine how much of its budget that Plaquemines Port has spent in a year.

In 1978, 50 percent of the cost of fire protection in Plaquemines Parish was allocated to Plaquemines Port. In 1979, the same percentage was used, although the budget of the fire department increased from $127,800 in 1978 to $200,300 in 1979. There was no administrative review of the 50 percent figure to determine for 1979 whether the percentage should be raised, lowered or maintained. Only slightly over four (4) percent of the 1978 fires bore any connection at all to the port users who had been subjected to the fees collected pursuant to the Port's tariff. That is, when complainants requested production by the fire marshall of documents of fires in those vessels or cargoes made subject to the payment of the harbor fees and supplemental harbor fees, the fire marshall produced fire reports regarding slightly over 4 percent of the fires.

The "marine-related" test or "port-related" test was applied individually by the head of each department of the Parish, or by employees of each department, without any general review.

Oceangoing vessels enter the Mississippi River through two passes at the river's delta, Southwest Pass and South Pass. From Southwest Pass, the primary pass, vessels travel 21.8 miles to the Head of Passes, where the main, as well as lesser passes not suitable for deep draft vessels, converge. Pilotage is compulsory on the river. The Bar Pilots board at the seabuoy and take vessels to Pilottown at the Head of Passes. There a Crescent River pilot boards. There is another change of pilots about mile 90 above the Head of Passes near New Orleans. A New Orleans-Baton Rouge pilot goes from there as far as Mile 255 near Baton Rouge.

During 1978, the first full year of the activation of Plaquemines Port, a total of about 26 million tons of cargo passed through terminal facilities in the Port, 434 oceangoing vessels docked at some 26 private facilities on the Mississippi River in the Port, and 3,286 tows or barge flotillas called at private docks in the Port.

The complainants Dreyfus and Early have been assessed "supplemental harbor fees" by Plaquemines Port; and Dixie, Le Beouf, Valley, Federal and Hollywood have been assessed "harbor fees" by the Port when their barges were docked at private facilities in the Port. Through the middle of 1979, some 202 corporate entities were assessed charges under the Plaquemines Port's tariff.

A representative sample of those assessed charges under the Port's tariff include Atlantic Richfield, Barber Lines Steamship Co., Biehl & Co., Inc., Canal Freight Line, Central Gulf Lines, Inc., Delta Steamship Lines, Inc., Exxon Company, U.S.A., Gulf Coast Shipping, Hansen & Tidemann, Inc., Ionian Transportation, Kerr Steamship Company, Lykes Bros. Steamship Co., Inc., Maersk Line Agency, Mitsubishi International Corp., Nopal Lines Steamship Agency, Norton, Lilly & Co., Pundsack International Shipping Agency, Seatrain, TTT Ship Agencies, Texaco, Inc., and Waterman Steamship Corp.

Lykes Bros. has received cargoes in Plaquemines Port aboard Lykes Seabee barges which were then carried to foreign destinations aboard oceangoing Seabee vessels. Likewise Combi Line, another common carrier with tariff on file with the Commission, has received cargo in Plaquemines Port aboard its LASH barges, which were then transported to foreign destinations aboard its oceangoing LASH vessels. Lykes and Combi were assessed docking charges (harbor fees) by Plaquemines Port in regard to these movements. Lykes was assessed for six such movements from March to July 1979, and Combi was assessed 58 times for its movements from January 1978 to August 1979, through its agent, Biehl & Company. From November 1977 to June 1978, Lykes was assessed on ten occasions for docking charges. Also, Lykes' vessels have been assessed anchoring charges by Plaquemines Port when these vessels were anchored in federally designated anchorages, such as Twelve Mile Point Anchorage, Belle Chasse Anchorage, and Boothville Anchorage.

For the years 1978 and 1979, the complainants combined were assessed nearly $750,000 by Plaquemines Port.

From January 1, 1978, through January 1, 1980, Dreyfus was assessed $310,943.90 of "supplemental harbor fees," at the rate of 10 cents per net ton of cargo over 500 tons per shipment pursuant to item 145 of the tariff in 98 instances where oceangoing vessels were loaded at MRGE.

Subsequent to the hearing, Plaquemines Port altered its interpretation of the credit provision of item 145, and reinvoiced Dreyfus for $287,442.40 for the same 98 instances. Each of the 98 original invoices was reduced by the amount of the harbor fee, usually $150. The old average invoice charge was $3,172.90, and the new altered invoice average charge was $2,933.10.

Early put grain through MRGE only from September 15, 1977, to December 31, 1978. Early also has been reinvoiced subsequent to the hearing. For 17 instances, Early originally was assessed $56,081.09 in supplemental harbor fees, and it has been reassessed a total of $46,599.60. The average charge of $3,298.89 has been revised to an average of $2,741.15.

MRGE is the southernmost grain elevator on the Mississippi River and is exclusively involved in the export shipment of grain. It is one of ten such export elevators located on the Mississippi River below Baton Rouge. MRGE is not engaged in grain merchandising or trading, and does not own any grain passing through its elevator. Although MRGE was organized by the late Mr. Arturo Ferruzzi, who had an interest in the grain trading company, Artfer, Inc., Artfer has no ownership interest in MRGE.

The silos of the grain elevator are more than 900 feet from the dock area of the MRGE facility, which was constructed in several stages. The dock was originally built in 1967, and it was improved in 1979 to enable it to handle a vessel in excess of 30,000 tons. Half of the silo structures were constructed in 1967, and the other half in 1973. To replace the entire facility of MRGE would cost about $80,000,000.

MRGE has facilities for receiving grain by barge and by railcar. Grain is barged from the heartland of the United States to the lower Mississippi River. Then the large river barge flotillas are broken up and individual barges are placed in numerous fleeting areas, usually between New Orleans and Baton Rouge. Smaller towboats take barges from the fleeting areas to their ultimate destinations on the lower Mississippi River.

The grain of Dreyfus and others using MRGE is brought to the elevator from three upriver fleeting areas. At the elevator each barge is discharged at the elevator's single barge unloader. Then the grain is moved through the elevator to a ship dock and to an awaiting ocean vessel.

There is never sufficient storage space at MRGE to allow the loading of an export ocean vessel only from the elevator. Instead grain in barges must be brought constantly to the unloader, unloaded into the elevator, inspected, graded, and blended or aerated as necessary, in the elevator, and then loaded aboard the oceangoing vessel. The most economical method of operation at MRGE is to keep a continuous flow of incoming barges when an ocean ship is loaded at the elevator. The coordination of ship and barge movements is an important cost factor in grain operations.

About 24 barge loads of grain are required to load one 30,000-ton ship.

About 7 percent of all grain shipped to MRGE arrives in railcars. In 1978 there were 1,109 rail carloads of Dreyfus grain received at MRGE. In 1978, the MRGE elevator handled about 4 million tons of grain for export. During 1978, Early moved about 24 million bushels of grain, and Dreyfus moved about 55 million bushels of grain through the MRGE elevator.

By the terms of its throughput agreement, Dreyfus pays MRGE certain contract fees which include the costs of the movement of barges from the MRGE fleet to a discharge berth at the elevator and return of the barges to the MRGE fleet, the movement of rail cars in and out of the Myrtle Grove switching district, barge dockage, unloading of the grain from the barges and railcars, inbound elevation of the grain in the silos, storage of the grain, insurance of the grain at full market value, routine blending and handling of the grain, and the loading of the grain into ocean vessels.

In addition to the above throughput fees, Dreyfus pays MRGE's private facility tariff rates for wharfage and dockage. MRGE provides office space and related facilities so that Dreyfus can station its six or seven employees at MRGE to observe the loading and unloading, storage, blending and handling of grain and attend to the interests of Dreyfus.

Dreyfus is the owner of all grain arriving at MRGE for the account of Dreyfus. It retains title to the grain while it is at MRGE. Title to the grain passes to the export buyer when the grain crosses the ship's rail and is loaded aboard the ocean vessels.

It is the practice of Plaquemines Port to apply the supplemental harbor fee to the total tonnage loaded aboard the outbound vessels, less the 500-ton exemption provided for in the tariff.

As seen, since the hearing Plaquemines Port has changed its policy, so as to credit, or subtract, the harbor fee from the supplemental harbor fee resulting in lower supplemental harbor fees since the hearing.

Both respondent and the complainants have submitted tables showing for the year 1978 the supplemental harbor fees assessed against Dreyfus and against Early (complainants corrected page 35 of its initial brief, and respondent's supplemental reply brief dated September 2, 1980).

They agree on a Dreyfus assessment figure of $153,856.20, subject to complainants' addition of $2,760 for Dreyfus invoice 5415 for the ship *Astoria*, Delta Steamship Lines, Inc., Agent, which departed - MRGE on December 26, 1978, but was invoiced on January 17, 1979. The complainants' total thus becomes $156,616.20 for Dreyfus.

Likewise, these two parties agree on an Early assessment figure of $44,294.40, subject to complainants' addition of $2,857 for Early invoice 5482 for the ship *Sea Corridor*, Strachan Shipping Co., Inc., Agent, which departed MRGE on December 29, 1978, but was invoiced on January 19, 1979. The complainants' total thus becomes $47,151.40 for Early.

The complainants' and the respondent's tonnage figures differ in that the complainants apparently include and the respondent excludes the 500 tons per shipment exempted or subtracted from the supplemental harbor fee assessment. In some cases the 500 tons would be prorated among two or more cargo owners in the event that their cargoes moved out on the same ocean vessel. Thus the Dreyfus or Early exemption would be less than 500 tons.

Both the complainants and the respondent use the figure of $670,732.20 as the total for 1978 for all assessments of the Supplemental Harbor Fee by Plaquemines Port.

Using $153,856.20, this is 22.93854 percent of $670,732.20. Using $156,616.20, this is 23.35003 percent of $670,732.20. In other words, about 23 percent of the total supplemental harbor fees for the year 1978 were assessed against Dreyfus.

In no way has the respondent shown that Dreyfus received 23 percent of the benefits for any services performed by Plaquemines Port for which Dreyfus was assessed these supplemental harbor fees.

Early's assessment for supplemental harbor fees for 1978 was $44,294.40, to which figure the complainants add $2,857 for invoice 5482, or a total of $47,151.40, as detailed above.

Using $44,294.40, this is 6.60388 percent of $670,732.20. Using $47,151.40, this is 7.02983 percent of $670,732.20. In other words, about 7 percent of the total supplemental harbor fees for the year 1978 were assessed against Early.

The total of Dreyfus and Early for 1978 was about 30 percent of the total for all supplemental harbor fees assessed by Plaquemines Port. Thus, it is clearly understandable why Dreyfus and Early are two of the complainants in this proceeding.

Appendix VII to Exhibit C-15 for the year 1978, under headings of "Docking" and "Anchorage," shows the Harbor Fees (docking fees) paid by 3,286 tows of $434,780, by 43 tugs of $4,350, and by 291 ships (ocean-going vessels) of $49,730, or a total of $488,860 for dockage. For anchorage, 978 ships paid a total of $200,000. The grand total of Harbor Fees was $688,860. In 1978, 143 ships were not billed for the Harbor Fee, inasmuch as the practice of the Port at the time was credit the Harbor Fee against itself, where the cargo was assessed an equal or larger Supplemental Harbor Fee. A proper description of tugs in this connection would include offshore supply vessels.

Adding the Harbor Fee total of $688,860 above to the total for Supplemental Harbor Fees of $670,732.20, brings the total of Harbor Fees and Supplemental Harbor Fees to $1,359,592.20 for the year 1978.

Using complainants' $156,616.20 of assessments against Dreyfus, this is 11.51935 percent of the total of Plaquemines Port's assessments for 1978. Using respondent's figure of $153,856.20, this is 11.31634 percent of the same $1,359,592.20.

Similar calculations for Early using complainants' $47,151.40 of assessments and respondent's $44,294.40 result respectively in percents of 3.46805 and 3.25791.

In other words, Dreyfus was assessed 11.5 or 11.3 percent of Plaquemines Port's total assessments for Harbor Fees and Supplemental Harbor Fees in 1978, and likewise Early was assessed 3.5 or 3.3 percent of the same.

The five water carrier complainants all have been assessed the "Harbor Fee" for the docking of their barges in order to discharge or load cargo at numerous privately owned terminal facilities in Plaquemines Port. In 1978 and 1979, the following assessments were made against these complainants:

Dixie	$158,000
Federal	5,150
Le Beouf	135,850
Valley	3,900
Hollywood	16,950

Dixie has carried steel pipe products to Anchor-Wate, a facility on the Intracoastal Waterway in Belle Chasse, La., in Plaquemines Port.

Federal has transported nickel products to or from the Amax Nickel Refining Company dock in Plaquemines Port and has carried steel pipe products to Anchor-Wate.

Valley has carried steel to the A and Z Terminal at Venice, La., in Plaquemines Port.

The five complainant carriers have called at the major private wharves in Plaquemines Port to load or unload cargo, including at Gulf, Alliance; Gulf, Ostrica; Gulf, Venice; Chevron Chemical; Amax Nickel; Anchor-Wate; Getty, Venice, Cal-Ky, Empire; Texas Pipeline, Pilottown; and Texas Pipeline, Davant.

Unlike the other Gulf ports which have charges denominated as "Harbor Fees," the Plaquemines Port's Harbor Fee falls on inland watercraft (such as barges), as well as on ocean vessels engaged in the foreign trade, and vessels engaged in the coastwise and intercoastal trades. Other ports such as New Orleans, Baton Rouge and Houston exempt inland watercraft from Harbor Fee provisions.

In order to implement its tariff charges, Plaquemines Port requires terminal facility owners or operators to report the loading and unloading of vessels at their facilities. A variety of methods of reporting has been permitted by Plaquemines Port. Form "PPA No. 1" contained no place to identify the owner of the cargo or the number of tons transferred. Form "PPA No. 1 Revised 4-1-78" was later provided, although the original form was still in use by some facility owners in late 1979. Some facilities such as Getty Oil, Gulf Alliance, Gulf Venice, Bass Cox Bay, Shell Southwest Pass, and Texas Pipeline were allowed to telephone their reports on cargo transfers, although the Plaquemines Port's telephone log forms do not contain blanks to record the owner of the cargo. Some facilities, such as Gulf Alliance and Gulf Venice were allowed to submit written summaries identifying the vessels calling at their docks to receive cargo, but not specifying the owner of the cargo.

With incomplete information as to the owner of the cargo, Plaquemines Port could not determine that the "Supplemental Harbor Fee" should be charged. "Harbor Fees" to vessels were prepared and assessed on vessels calling at facilities not supplying cargo information, whereas at the time, vessels calling at other facilities which did report cargo ownership and cargo tonnage enjoyed an exemption from the Harbor Fee under the Plaquemines Port's practice prior to the hearing of giving the vessel a credit if the "Supplemental Harbor Fee" was assessed.

To further complicate matters, where the appropriate cargo information was available, Plaquemines Port at times ignored the information and failed to assess the Supplemental Harbor Fee on numerous occasions. Plaquemines Port either failed to act on the cargo information in these instances or it charged whichever fee was the highest, thereby allowing the "Harbor Fee" to fall on the vessel interest rather than allowing the "Supplemental Harbor Fee" to fall on the cargo interest, if the "Supplemental Harbor Fee" was less than the "Harbor Fee" of $100 or $150 per vessel. Such an optional procedure of assessment was not sanctioned by any tariff provision.

An example is invoice No. 6779, dated April 24, 1979. A carrier operating under the name of Oilfield Barges was charged a Harbor Fee of $150 for docking at Anchor-Wate at 6:00 a.m., on April 17, 1979, and departing the dock at 5:00 p.m., the same day. The tow loaded 655 tons of pipe for the account of Tennessee Gas Company. The reporting form showed that the cargo owner and wharf owner were distinct and separate entities, and therefore the "Supplemental Harbor Fee" should have been assessed. Plaquemines Port failed to assess the cargo interests and assessed the carrier. Since item 145 creates an exemption of the first 500 tons of cargo, the "Supplemental Harbor Fee" should have been assessed against (655-500) 155 tons of cargo, at 10 cents a ton, or $15.50. Instead respondent invoiced the carrier and collected $150, rather than assessing the cargo and collecting $15.50.

On June 6, 1980, Plaquemines Port invoiced Artfer, Inc., an owner of cargoes mainly of grain and grain meal, which were loaded on ocean vessels at MRGE between September 1977 and March 31, 1979, assessing the "Supplemental Harbor Fee" on numerous shipments. A cover letter dated June 10, 1980, from Plaquemines Port explained that it had mistaken the cargoes handled for Artfer by MRGE to be cargoes belonging to the elevator, and as such exempt from the "Supplemental Harbor Fees." The same letter notes that Artfer is to be given credit for the "Harbor Fees" invoiced originally to the water carriers involved in these movements. These new invoices assess Artfer a total of $244,029.40 for cargoes handled by MRGE in 59 instances.

Plaquemines Port failed to invoice Artfer for "Supplemental Harbor Fees" from November 1978 through June 1980, even though respondent had knowledge from the deposition of the Manager of MRGE in November 1978 that MRGE did not have an ownership interest in the cargo at its facility.

In a usual operation at MRGE, the oceangoing ship will take about 2 million bushels of grain. MRGE's main function is to move the grain between the barge (or rail car) and the oceangoing vessel. MRGE also may dry, fumigate, aerate, or clean the grain.

Between the farmer in Iowa or the Dakotas, for example, there is the country elevator in the interior of the land, then there is the river elevator up north on the Mississippi, Illinois, Ohio, or other river. Then there is the terminal elevator such as MRGE. Although MRGE is not geared to receive grain from farmers, because no farmer would produce two million bushels of grain on his own farm, in one rare instance a farmer delivered direct to the MRGE elevator. In that case, Mr. Perez sold his grain to Artfer, Inc., which in turn shipped out the grain. The deposition of Mr. Robert L. Beukenkamp, Executive Vice President and General Manager of MRGE, does not reveal which Mr. Perez he refers to. Official notice is taken that members of the Perez family have for many years played prominent roles in Plaquemines Parish, and Lake Judge Perez is named in honor of the father of Chalin Perez, the President of the Plaquemines Parish Commission Council.

Plaquemines Port received "run tickets" from the Cal-Ky pipeline facility in Empire, La. These run tickets were used in lieu of the reporting form, and they showed that certain oil loaded or unloaded at the facility was for the account of others than Cal-Ky. Nevertheless, no Supplemental Harbor Fees were assessed at the time. However, following the hearing, Plaquemines Port issued 138 additional invoices to cargo owners for the oil moved at Cal-Ky. In the majority of these instances, the additionally invoiced Supplemental Harbor Fees involved movements for which one of the carrier complainants was invoiced a Harbor Fee, and under Plaquemines Port's policy prior to the hearing, the complainant carriers would not have been assessed the Harbor Fee if Plaquemines Port had assessed the Supplemental Harbor Fee.

Plaquemines Port's definition of owner in its tariff includes the parent company of the owner and any 100 percent owned subsidiary of the owner or parent company. This definition allows the cargoes of subsidiaries and related companies to be moved across the dock of a company without payment of the Supplemental Harbor Fee.

Thus Texaco, Inc., is not charged when its product is moved across the wharf of another corporate entity, Texas Pipeline Company. Transactions between Amax, Inc., and Amax Nickel Refining Company have not been subject to the Supplemental Harbor Fee. The Getty dock at Venice could handle products belonging to Getty Oil Company, Getty Refining and Marketing Co. and Getty Pipeline Company. The Gulf Alliance Refinery could handle products of Gulf Oil Corporation or Gulf Refining Co. Chevron Oil could handle products of Chevron USA, Inc., Chevron International Oil Co., Chevron Industries, Chevron Chemical and Chevron Pipeline Company.

As seen in the year 1978, only 6,875,412 tons of cargo out of 26,236,524 tons handled in Plaquemines Port were assessed a Supplemental Harbor Fee, and during the same year, 13,056,283 tons of oil and petroleum products were handled in the Port with nothing assessed against these oil and petroleum cargoes.

Plaquemines Port justifies its wharf owner exemption for several reasons. One is that the owner has a capital investment on which he pays ad valorem taxes for which his cargo should receive a credit. However, other facilities' owners in Plaquemines Port have large capital investments on which they pay ad valorem taxes, but do not own cargoes passing handled by their facilities, and these cargoes are assessed the Supplemental Harbor Fee. Such facilities include MRGE, Electrocoal and Cal-Ky.

On the other hand, the docks of Signal Oil, Getty Oil, and Gulf Ostrica have not handled cargoes assessed the Supplemental Harbor Fee.

MRGE's elevation fees (throughput contract fees) and its tariff fees together are designed to recover the costs to MRGE of providing wharf, dock and other facilities to Dreyfus and Early. One of the cost factors considered by MRGE in determining that rate which it charges is the ad valorem taxes assessed against MRGE.

The additional rationales of Plaquemines Port for the exemption of the wharf owner's cargo from the Supplemental Harbor Fee are that the private wharf owner is better equipped to take care of his cargo, and that although a facility may be privately owned or operated, its operations remain private when it handles its own cargo, but are public when it handles the cargo of others. But the ability to protect cargo does not vary as between owned cargo and non-owned cargo handled at any one facility.

Plaquemines Port's practice up to the completion of the hearing was to not charge a Harbor Fee to a vessel if a Supplemental Harbor Fee was charged to the cargo. Subsequent to the hearing, Plaquemines Port reinvoiced some Supplemental Harbor Fee charges less the amount of the Harbor Fee.

As a result, the overall charges of Plaquemines Port will not be reduced, but the Supplemental Harbor Fee will be reduced by the amount of the Harbor Fee for 143 vessels, and the "Harbor Fee, Docking: Ships" will be increased by the fee on 143 additional vessels, which amounts to a shift of about $150 times 143 vessels or $21,450.

The expenditures of Plaquemines Port are of two types, first, those items purchased directly for the Port, and second, "expenditures from other accounts," which are allocations of percentages of the expenditures of the various Plaquemines Parish departments.

For the Aviation Department, 50 percent is allocated to the Port; for the Coroner, 20 percent; for the primary salaries of Commission Council and staff, 30 percent; for Accounting and Payroll, 5 percent; for Internal Auditor, 10 percent; for Purchasing, 10 percent; for Data processing, 7 percent; for Fire protection, 50 percent; for Ambulance service, 50 percent; for the two Ferries (Belle Chasse and Pointe-a-la-Hache), 10 percent each; for Sewerage, 5 percent; for Garbage, 10 percent; and for the Waterworks, 10 percent. The Sheriff's Office does not have a percentage allocation, but a lump sum is estimated by the Sheriff and is charged as an expenditure of Plaquemines Port. Insurance is prorated in a percentage manner, but is listed as a lump sum expenditure of Plaquemines Port.

The percentage allocations figures for the various Parish departments are based upon the "marine-related" or "port-related" activities of each department, with the department heads outlining what they consider to be "marine-related" activities of their departments. The Plaquemines Parish Commission Council adopted the percentage figures suggested by the department heads.

The definition of "marine-related" originated with the Council according to Commissioner Albert Beshel, but there was no formal vote adopting a definition of "marine-related." Commissioner Beshel's definition of "marine-related" is:

> Any waterborne accident, seaman leaving ships causing problems in our small communities, automobile accidents by drunken seamen, drunken crew members, deaths by drowning, injuries on the water, any type of injury on watercraft.

However, the department heads have other interpretations of the origin of the definition of "marine-related" incidents. The Sheriff defined "marine-related" for himself based on his understandings of the discussion in November 1977. The administrator of the Parish Health Unit created her own definition. The Coroner's Office and the Aviation Department got their definitions or understandings from the November discussion. But no written guidelines were given to any of the participants in the 1977 meeting. The Port Manager, Mr. Hugh Benvenutti, who attended the November meeting, remembers that a definition of "marine-related" was discussed, but that no concrete examples were elicited. Mr. Benvenutti is responsible for auditing the backup materials of various departments to determine that the percentages given by these departments were accurate, according to Commissioner Beshel, but Mr. Benvenutti was not directed to audit the percentage figures, and did not do so.

The comptroller of the Parish described a process of annually accepting the Sheriff's estimate of his office's "marine-related" activities as the honor system.

Those department heads who prepared the backup material did not and do not understand the classes of vessels or cargoes which are charged the Harbor Fees and the Supplemental Harbor Fees under the terms of the tariff of Plaquemines Port. Those department heads did not limit their definition of "marine-related" activities to those activities only involving those persons charged by the tariff.

Plaquemines Port's rationale for classifying certain incidents as marine-related is based upon the "but for" test. "But for" the users of the Port, the Parish would not incur extra expenses according to the respondent. The Sheriff provides an example of the "but for" test. But for the presence of Brown & Root Company, an offshore construction company having a shipyard in Belle Chasse, the Sheriff would not have had to make arrests of either Brown & Root employees engaged in criminal activities or of other persons committing criminal acts against the property of Brown & Root.

The Sheriff's office in Plaquemines Parish is an independent agency established by Louisiana statute. This office maintains its own accounting practices, is audited by state auditors, receives its own ad valorem millage, and is not under the direction, supervision or control of either the Plaquemines Port or of the government of Plaquemines Parish.

Although the Plaquemines Sheriff by Louisiana statute may call a special election for the purposes of increasing general millage of the Law Enforcement District, the Sheriff has not done so to raise additional revenues since this law was passed in 1976. Rather, the Sheriff has received assistance in the form of grants from the Plaquemines Parish Commission Council to supplement funding of the Sheriff's Office. This assistance has been in the form of direct cash grants and the purchase by the Council of equipment for the use of the Sheriff's Office.

In making cash grants, the Parish has not required that the Sheriff's Office dedicate them to any specific purpose. The Sheriff may apply these funds as he sees fit in order to carry out his law enforcement duties. The Parish Sheriff has undertaken no duties other than those already required of his office by Louisiana state laws.

In the fiscal year ending June 30, 1978, of the Sheriff's Office, this office also received a variety of revenues from the federal and state governments. Louisiana sheriffs receive 15 percent of the federal revenue sharing funds allocated to the State of Louisiana and its parishes. The Sheriff's office similarly receives a sum under a state revenue sharing program, as well as state funds to supplement the salaries and supplemental pay of deputies. In the above fiscal year, 32 percent of the Plaquemines' Sheriff's "general fund" revenue was derived from the above-mentioned federal and state sources, as follows: $136,526 from federal revenue sharing, $25,225 from state appropriations for salaries of deputies, $136,617 from state appropriations for supplemental pay of deputies, and $130,677 from state revenue sharing, which makes a total of $429,045, and which was over 32 percent of the Plaquemines Sheriff's total revenues of $1,333,789. In that fiscal year, other revenues of the Plaquemines Sheriff's office included $588,021 from ad valorem taxes and a $125,000 appropriation from the Plaquemines Parish Commission Council, among other revenue items.

In fiscal 1978, the Plaquemines Sheriff had an excess of revenue over expenditures of $111,157, which brought his year-end general fund balance to $463,347. The fiscal year 1978 was the last year for which an official state legislative audit of the Plaquemines Sheriff's office was available for the record herein.

The Plaquemines Sheriff regarded as "marine-related" any incident connected with the waterways of the Parish involving a business connected with water in some manner. Under the Sheriff's definition, an oil field supply company which employs Parish residents, has no dock, and has none of its employees working over water, but which sells equipment which may be used offshore is considered marine-related, and the burglary of such a company is deemed a marine-related incident by the Sheriff. Incidents involving pleasure craft are considered marine-related.

Of a total of 1,076 arrests made between January and August 1978, 487 were classed as marine-related or port-related. Only 51 arrests involved employees or persons or companies assessed under the tariff of Plaquamines Port. These 51 arrests represent 10.97 percent of the so-called marine-related and 4.7 percent of total arrests. Of the 487 marine-related arrests, 60.74 percent were Parish residents, and 80 percent worked for Parish employers. Twenty-one of the 51 subjects whose employers were assessed under the tariff were themselves residents of the Parish. Employees of Brown & Root and J. Ray McDermott, two oil field service companies with extensive property holdings in the Parish accounted for 31 of the 51 arrests, or 68.63 percent of all arrests of subjects working for individuals or concerns subjected to tariff fees. Of the remaining 16 arrested subjects, 10 were employed by terminal facilities, two by shipping agents secondarily liable in the event shippers or carriers fail to pay the tariff charges, and four were employed by water carriers (including two by complainant Federal Barge Lines and two by oceangoing vessels).

The four arrests of employees of carriers amounted to less than one percent of "marine-related" incidents. The ten terminal-employed personnel accounted for 2.05 percent of marine-related arrests, and the two employees of shipping agents accounted for 0.4 percent of marine-related arrests.

Traffic violations accounted for 29 of the 51 arrests above, and other charges were possession of marijuana, disturbing the peace, aggravated battery with a crutch, forcible rape, littering, and criminal damage to property.

Among the 487 marine-related arrests were traffic violations, unlawful removal of oysters, shooting a dog, attempted murder, kidnapping, fugitives from other jurisdictions, assault with a rifle, forgery, attempted grand theft, trespassing at a picket line, criminal neglect of family, receiving stolen goods, shoplifting and various others not directly related to transportation by water or to the business of furnishing wharfage, dock, warehouse, or other terminal facilities in connection with common carriers by water.

A review of the sample months of August and September 1978 shows that only one of the 148 calls to the Sheriff classified as marine-related involved a corporation or employer subject to the tariff fees.

Thirty percent of the expenditures for the Plaquemines Parish Ambulance Department are charged is an expenditure of Plaquemines. Port. In 1978 the Parish ambulance responded to 1,463 calls, of which 394 were classified as port-related. Of these 394 there were 31 involving foreign seamen. Only 26 of the patients moved in these 394 instances were employed by these companies which had been assessed fees under the tariff. Two patients were employed by Parish or local government units and two by the federal government. None of the remaining 333 patients were employed by those assessed fees under the tariff.

Of the 26 patients employed by those assessed fees under the tariff, seven patients were residents of the Parish. None of the complainants, except Dixie Carriers, have ever used the Parish ambulance service. Dixie was invoiced for its one ambulance call and promptly paid the invoice.

In every case of the use of an ambulance, a bill is prepared by the Parish and sent to the user, but Parish collections of such billings generally have been limited. During the first eight months of 1979, the

Parish had total receivables of $51,022 for ambulance service. For all of 1979, the Parish collected ambulance receipts of $33,787.

The criteria of the Director of Ambulance Service to determine marine-related expense, generally, was where ambulances had to respond to incidents on water or to a company which handles vessels on water anywhere in the Parish. If the victims worked for an oil company, or an oil service company, it was deemed marine-related. No consideration was given to whether the incident involved a local resident, whether the employer was assessed tariff changes or was subject to ad valorem taxes, or whether the incident was of a type for which the employer might respond or be responsible.

Marine-related was deemed to include among others a 16-month-old child whose father was employed by Oil Well Services; an 81-year-old lady with no occupation listed whose husband was retired and for which incident a 16- to 18-foot boat was required to remove the lady from Lake Judge Perez; a 17-year-old unemployed male whose father worked for Freeport Sulphur; a Plaquemines Parish Council employee who had to be removed from his trailer park after he swallowed half of a thermometer, which mishap occurred after he, as a Ferry Boat employee, became sick on the ferry; a pregnant woman in labor; an employee of Southeastern Construction Company; an employee of the Belle Chasse Boat Launch, a facility using crewboats exempt from the Harbor Fee tariff provision because the boats were less than 100 feet long; an auto accident victim employed by Continental Oil Company; and a four-year-old girl whose father worked for A & Z Terminal Company, which provides drilling pipe and service pipe to oil field service personnel.

Thirty-three percent of the expenditures of the Parish Safety Department are charged to Plaquemines Port. The duties of the Safety Engineer include traffic control, investigating industrial accidents, evaluating the safety habits and equipment of Parish departments, and holding safety meetings. About 5 percent of the Safety Engineer's time is estimated to involve marine incidents. His assistant may devote as much as 10 percent of his time to marine activities.

The Safety Engineer does not make routine inspections of vessels or wharves or facilities in the Port. In the event of a shipboard fatality, he may have occasion to investigate aboard the vessel, and he will investigate in connection with explosions, fatalities of an accidental nature or drownings. When such investigations have proved extensive, the Parish has directly billed the companies involved.

The U.S. Coast Guard investigates marine casualties and accidents.

In 1978 the Plaquemines Parish Council commissioned a study by outside consultant engineers of the Myrtle Grove, La., facility of the MRGE. Although the Parish has several large oil refineries, chemical plants, and manufacturing complexes, as well as smaller oil storage facilities, MRGE is the only facility in the Parish which has been inspected by outside consultants for explosion and fire hazards.

The report prepared by the consulting engineers was sent to MRGE but the Parish neither followed up to determine whether the consultant's recommendations were implemented by MRGE, nor did the Parish take actions with regard to the recommendation made to it. The consultant's inspection report found that the high-risk area at MRGE is in the silo area, not at the loading and unloading areas, the docks.

MRGE is under the extensive regulation and inspection of various agencies which include the State Environmental Protection Agency, the Federal Grain Inspection Service, and the U.S. Department of Agriculture.

MRGE has implemented extensive design changes since 1977, including a negative pressure dust removal system. The probability of a fire or dust explosion has been reduced to an extremely low level, and the facility is capable of handling its own fire-fighting requirements. Dust missions have been virtually eliminated.

Ten percent of the budgets of each of the five Parish waterworks is allocated to Plaquemines Port. Funding for these waterworks is derived from rates paid by water users and an ad valorem water tax. The Port makes no direct sales of water to either vessels or the owners of cargo.

The 10 percent allocation above is related to the sales of water to "dock-related companies" having water lines on their docks. "Dock-related companies" include marinas, grocery stores, seafood, fishing and fish processing docks handling vessels less than 100 feet long, U.S. government installations such as the Corps of Engineers and the Coast Guard, small boat launches, ship repair facilities, oil and chemical plants, oil field and oil field service companies, grain handling companies, companies involved in mineral processing or mining other than oil and docks of private individuals. Water delivered to "dock-related companies" becomes the property of the company once it passes the water meter of a company. Such water is paid for at the prevailing water rate and through ad valorem taxes paid by such companies.

Only seven sites in Plaquemines Parish were approved by the U.S. Department of Health, Education and Welfare as acceptable vessel watering sites. Vessels operating in interstate commerce and those in international commerce may use these sites.

None of the water carriers have taken on water in Plaquemines Parish. Nor does MRGE supply water to vessels calling at that facility.

In the neighboring Port of New Orleans, oceangoing vessels requiring water contact the New Orleans Sewerage and Water Board, which installs a meter line and hose for use of the vessels. Vessels are then charged directly for water. Elsewhere along the Mississippi River, other than in Plaquemines Parish, water is furnished to ocean-going vessels by barge from New Orleans or by the mooring facility, on a gallonage or flat-rate basis. Generally, oceangoing vessels in Plaquemines Port obtain water through their agents in New Orleans with delivery to Plaquemines by barge.

Meter rates and the ad valorem millage charged by Plaquemines Parish are calculated to cover the operation and maintenance of the waterworks system, and this level of rates of taxes is not set to generate funds for capital improvements, such as extension of water lines to outlying areas.

Five percent of Plaquemines Parish's expenditures for sewerage are allocated to Plaquemines Port. The Port conducted a survey of companies with docks and only eight of 42 companies which responded were connected to the Parish sewerage system. Many industries use septic tanks. Of the eight companies connected to the Plaquemines sewerage system, no cargoes handled at these docks were assessed the Supplemental Harbor Fee.

None of the complainants in this proceeding use the sewerage system of the Parish. MRGE has a septic tank. The vessels calling at MRGE do not use this tank. Vessels operating in United States waters, including vessels operated by the complainants, are required to comply with federal standards established by the Environmental Protection Agency and enforced by the Coast Guard, requiring marine sanitation devices for the onboard handling and treatment of sewerage. The Plaquemines Port does not charge for the actual use of the Parish sewerage systems. The amount of sewerage generated by vessel or cargo is not known to Plaquemines Port.

Ten percent of the Parish budget for garbage is allocated to Plaquemines Port. There is no service charge for garbage collection in Plaquemines Parish.

In order to remove garbage, vessels engaged in foreign commerce must receive the permission of the United States Customs. Before garbage can be landed, the United States Department of Agriculture must approve of the disposal techniques, and upon such approval the garbage is removed and destroyed by incineration under the supervision of U.S. Customs and the Department of Agriculture.

During 1979 Plaquemines Parish responded to requests of United States Customs Service for the use of Parish incineration allowing the burning of vessel garbage on eight or nine occasions. Customs Service representatives were informed by Plaquemines that the Parish would not continue to accommodate or make a regular practice of responding to such Customs Service requests. The Parish has not accepted garbage for disposal on a continuing basis. The Parish made no charge for incineration in these limited instances.

In 1979 a Parish study of solid waste disposal concluded that 17 percent of Parish expenditures on solid waste management were attributable to Plaquemines Port users. The study was designed to disclose the level of effluents coming from "oil field related stuff and also from docks," but all of the supporting material refers to offshore and oil-field related wastes. Nothing in this study segregates waste generated aboard vessels or by cargo interests subject to the tariff from wastes generated by the offshore oil industry on fixed platforms or by oil field related companies on land. None of the complainants in this proceeding discharge garbage at any facilities in Plaquemines Parish. MRGE accepts no garbage from vessels mooring at the elevator and does not use the Parish's garbage pickup service.

Plaquemines Parish operates two ferries, one each at two crossings (Belle Chasse and Pointe-a-la-Hache). Ferry service to passengers and autos is provided 18 hours a day, from 6:00 a.m., to midnight. Ten percent of the Parish expenditures for these ferries is allocated as an expenditure of Plaquemines Port. This percentage does not include any of the Port's special expenditures to outfit one of the ferries for firefighting. In 1979, the 10 percent allocation paid for various repairs to ferry landings, mooring dolphins and log boom, one of the ferry boats, pilings, and the purchase of a new diesel engine for another ferry boat, all of these expenditures being in addition to the regular operations costs of the ferries.

Thirty percent of the costs of the Plaquemines Parish Health Unit are allocated to Plaquemines Port. This unit charges no fees for its services. The Louisiana statute requires that each parish of the state provide and fund a parish health unit. The administrator of the Plaquemines Parish Health Unit used her own criteria to determine "marine-related" matters, which she defined as anything that would have something to do with Plaquemines waterways. If a construction company provided material or equipment that is used in a way associated with marine use, that would be "marine-related" to the Health Unit. Other examples of marine-related would be inspection of an oyster shucking plant, inspection of the Venice, Boothville and Empire marinas being facilities which handle vessels less than 100 feet long, inspection of septic tanks of businesses not located on the Mississippi River or other waterways but which are oil field supply operations, x-raying persons employed on the Parish ferry, and public health medicine in the form of TB and VD programs for oil company rig workers and vessel operators.

The Health Unit on one occasion sent a public health nurse to a dock at the request of a private physician to stamp the immunization records of a seaman inoculated by the doctor. The nurse did not board the vessel. On only one occasion could the Health Unit Administrator remember any of its personnel going aboard vessels. The agents of oceangoing vessels generally use medical clinics in New Orleans for inoculations and health examinations of crew members.

Private sewage facilities may be operated only if they comply with the Sanitary Code of the State of Louisiana. Construction of a septic tank may not be undertaken without a permit issued by the State Health Office.

In the three years from 1977 to 1980, the Health Unit has investigated less than ten fish kills, which included incidents such as the discharge of effluent from the oxidizing pool of a galvanizing plant, discharge of fish heads and shrimps from trawlers less than 100 feet long, and a fish kill caused either by discharges from a menhaden processing plant or by boats operating in a canal churning up water and depriving fish of oxygen.

In 1977 the Administrator of the Health Unit advised a Commission Council member that one of the services available to vessels operating within the Parish was a control program for murine typhus, a disease often transmitted by rodents who host the fleas which carry the typhus. The only actions taken by the Health Unit in this regard consisted of the purchase of several rat traps, later turned over to the Mosquito Control Unit and never used, and the showing of a film on murine typhus.

All vessels entering the United States from foreign countries are subject to the quarantine regulations of the U.S. Public Health Service. Vessels may be granted radio-free *pratique* by the Public Health Service without a full quarantine inspection if the vessel properly responds to questions posed to the master of the vessel by radio. An office of the U.S. Public Health Service in New Orleans grants such *pratiques.*

Vessels also are subject to a sanitary inspection by the Public Health Service at any time. Vessels entering the United States are required to have a valid de-rat certificate issued for six-month periods. The Food & Drug Administration approves all interstate vessel watering points and inspects them every six months, with a representative of the Louisiana State Health Department also present. A member of the Parish Health Unit accompanies the inspection team. Approval is based on federal standards. The Parish has a water sampling program, but this sampling is required by the Environmental Protection Agency and is a necessary duty even if no vessels were in the local jurisdiction. The U.S. Public Health Service maintains a hospital in New Orleans which provides full medicinal care for United States seamen.

Fifty percent of the expenditures of the Parish Aviation Department are allocated as expenditures of Plaquemines Port. At its inception in 1964, the Aviation Department had a helicopter and a spray plane for mosquito control. At present this department operates one helicopter and two fixed-wing aircraft, one of which is a seaplane. These aircraft are available to all departments of the Parish government, as well as to other local officials such as the Sheriff, District Attorney, Clerk of Court, and Tax Assessor.

The Port contends that 50 percent of flight time is devoted to port, harbor and marine matters. Flight time for the Port is deemed proper if the flight is associated with water, either inland, outland, river or any type of water. If it is a water-oriented type of activity, the Plaquemines Port is charged for a portion of the flight. Port-related activities are deemed to include mosquito control, protection of levees, flights over water to an extent, and flights for the Sheriff such as those involving surveillance to intercept contraband. Other activities considered port-related include search and rescue and surveillance of anchorages. Search and rescue operations primarily are for commercial fishermen who operate boats 24 to 26 feet long, and secondarily for hunters and pleasure craft. Plaquemines Parish did this kind of rescue operation before the enactment of the tariff here in issue.

The Coast Guard maintains an air station in Plaquemines Parish from which it conducts all types of search and rescue activities in the Parish. Coast Guard aircraft are better equipped than those of the Parish. The Coast Guard, in conjunction with the Public Health Service, carries out standard procedures for the evacuation of personnel from vessels at sea. Vessel agents rely on the Coast Guard when the evacuation of personnel from oceangoing vessels is required.

At the lower end of the Parish, a large number of private aircraft, seaplanes and helicopters utilized in oil operations in the Gulf and surrounding areas is available to the oil industry for search and rescue of its personnel. The New Orleans area supports an organization known as MEDI-VAC, a helicopter ambulance unit stationed at the West Jefferson Hospital. Plaquemines Parish's ambulance director calls for this MEDI-VAC unit when his auto ambulance has no land access to a patient, and he does not call the Parish helicopter which is not equipped for medical evacuation.

Anchorages in the Mississippi River have been created by the U.S. Coast Guard pursuant to federal law and regulation. The Coast Guard enforces such regulations and requires vessels which are out of anchorage to return to designated anchorages. During daily flights from its air station in Plaquemines Parish, the Coast Guard conducts surveillance operations to control pollution and for general purposes. On the other hand, the head of the Plaquemines Aviation Department does not carry with him a chart identifying the locations of the federal anchorages when he flies.

The Aviation Department has been listing every ship anchored in the Mississippi River in Plaquemines Port since January 1980, but the same information is available by telephone from two official sources: (1) the Pilot's Association, an organization of state-licensed compulsory pilots whose members have the sole discretion to decide where to anchor a particular vessel, and (2) the U.S. Coast Guard Vessel Traffic Service.

The Sheriff's Office does not have its own aircraft, but utilizes the Parish helicopter to aid in enforcement activities. When such activities are over terrain subject to tidal action, they are logged as Port matters.

Beginning in 1979, 50 percent of the expenditures of the Itinerant Labor Department of Plaquemines Parish were charged as expenditures of Plaquemines Port.

This Department operates a program whereby itinerants, people coming in and out of the Parish, are fingerprinted and photographed to determine if there is a rap sheet on them or if they are undesirables. Those persons employed in the Parish for more than six weeks are issued permits by this department, and a processing fee is imposed. In June 1980, subsequent to the hearing, Plaquemines Port changed its policy so as to give a credit to the Port for the revenue from the processing fees. Vessel personnel, crews of oceangoing vessels or of barges or tugs, are not required to obtain itinerant labor permits unless they remain in Plaquemines Parish for a longer period than six weeks to two months.

Some 50 to 60 percent of all businesses taken care of through the Itinerant Labor Department was oil field related. None of the complainants in the subject proceeding have employees to whom have been issued itinerant labor work permits. None of the barge line complainants have any employees permanently stationed in Plaquemines Parish.

Beginning in 1979, 20 percent of the cost of the Coroner's Office of Plaquemines Parish was allocated to Plaquemines Port. The Coroner under state law is an independent elected officer, but each Parish is required by statute to compensate the Coroner for the performance of autopsies and other services. In addition, the Coroner receives compensation from the state.

Regardless of whether the complainants or others pay tariff charges to Plaquemines Port, the Coroner is obligated to investigate deaths in accordance with Louisiana statutes, and he must investigate deaths whether the decedent is or is not a resident of Plaquemines, and whether or not the decedent or his employer pays ad valorem taxes to Plaquemines Parish. In classifying deaths as port-related, this was done where the deaths were directly connected with navigable waterways of the Port.

In 1979 33 of 110 parish wide total deaths were classified as directly related to the Port. Such port-related deaths included the recovery of six unknown persons from the Mississippi River; two bodies that drifted into Plaquemines Parish from upriver parishes; the deaths of three aircraft pilots, two over water and one on land from a heart attack on takeoff; the death of a man falling overboard from a work barge in the Gulf of Mexico; four deaths from a pipeline explosion; three deaths from drownings of persons swimming in the Mississippi River; the death of a man who wandered away from his cottage and fell into the Mississippi River; the deaths of two fishermen aboard vessels less than 100 feet long engaged in servicing fish processing plants; and the death of a retired carpenter preparing to go trawl fishing. The Coroner classified these thirty-three deaths as four heart disease, one homicide, ten accidental drownings, twelve industrial drownings, one industrial death, two industrial plane crashes, and three unclassified.

Of the above thirty-three deaths, twelve were Parish residents or persons who worked for firms on the Parish ad valorem tax rolls, six unidentified persons removed from the Mississippi River. three nonresidents of the Parish who were not at work at their place of employment at the time of their deaths, one Orleans Parish resident whose body drifted downriver, and three non-residents of the Parish whose deaths occurred in areas open to the Gulf of Mexico outside the area in which the respondent assesses its tariff charges. The remaining eight persons included one foreign seaman, an Orleans Parish resident employed by the telephone company who died while not at work aboard a small boat 15 to 25 feet long, and an Arkansas resident and deckhand employed by a water taxi service who suffered a heart attack aboard a vessel about 65 feet long.

None of the decedents classified as directly related to the Port were employed by any of the complainants or by anyone assessed the Supplemental Harbor Fee. None of these decedents can be identified as being employed by those charged the Harbor Fee.

The Port of New Orleans immediately upriver does not impose charges in its Federal Maritime Commission tariff for services provided by the Coroner of Orleans, St. Bernard or Jefferson Parishes. Nor are such services claimed to be provided for, or paid for, through the tariff charges of other Gulf ports.

Fifty percent of the expenditures of the four volunteer fire departments operated by Plaquemines Parish is allocated to Plaquemines Port. The four departments are located at Belle Chasse, Port Sulphur, Buras and Venice, La., all on the west bank of the Mississippi River, or right descending bank. The Parish is in the process of establishing a fifth fire department on the east bank of the river to replace the contract service of St. Bernard Parish.

In both 1978 and 1980, the Fire Marshal of the Plaquemines Parish estimated that 5 to 8 percent of the fires reported in the Parish are aboard vessels. In 1978, there were 14 vessel fires, including one aboard a dredge out of a total of 321 fires in the parish representing 4.36 percent of the fires that year.

These vessel fires included fires aboard a Vietnamese fishing boat in Mrs. Kincaid's canal at Empire; an unidentified boat fire; a fire in an aluminum hull boat belonging to the Delta Well Testing Service while the boat was on a flatbed trailer; a fire aboard a crew boat belonging to residents of Plaquemines Parish; a fire aboard an unidentified skiff; a fire aboard an oyster boat owned by an Orleans Parish resident; a fire involving an old boat hull with owner unknown; a fire aboard a boat of the Johnette Boat Rental Company; a fire aboard the *M/V Captain Kyle* owned by a Plaquemines resident; a fire aboard a boat at the Bayside Marina; a fire aboard a crew barge belonging to the Circle Bar Drilling Company, which is on the ad valorem tax rolls of the Parish; a fire aboard a tugboat alongside the said barge and belonging to the same company; and a fire aboard a suction dredge in Tiger Pass. These fires can be classified alternatively as six involving private fishing or pleasure craft, three crewboats, crew barges or tugs, one boat on a flatbed trailer, one oyster boat, one dredge, and one unidentified boat. Eight of the vessels in these fires belonged to persons residing in or paying ad valorem taxes to the Parish, in three cases the fire records do not reveal the identity or residence of the owner, and in two cases the owner resided in other Louisiana parishes. In one case the owner but not his residence was identified.

In 1978 there were three dock fires, which included a dock under construction at Mile 57 on the River; a dock fire involving Dravo, a contractor for a new coal plant; and a fire spreading to the Lee Service Dock from a crewboat belonging to a parish resident.

The Plaquemines Port classified 61 of the total of 321 fires as marine-related. These marine-related fires include the three dock and fourteen vessel fires above, plus two automobile fires, six truck fires, six fires in buildings, seven trash fires, two grass fires, two waste oil fires, two sulphur fires, six cases of gas leaks or gas clouds, three tank fires, one crane fire, one fire alert, five false alarms, and one shiploader fire.

GENERAL DISCUSSION. The complainants generally contend that the services charged for by Plaquemines Port in its tariff filed with the Commission are services purportedly provided by the Port, but in truth are the customary day-to-day services rendered by the Parish of Plaquemines to the people, citizens or not, within its boundaries. The complainants contend that the Parish services are comparable to those provided by any similar governmental unit, and that for Plaquemines Port to charge for these services is unlawful in violation of the Shipping Act.

On the other hand, the respondent points out that Plaquemines Parish is not a typical Louisiana Parish, in that, for example, a central Louisiana Parish where there is no Mississippi River would not have ship collisions and the drownings associated with the Mississippi River. Respondent also points out that in the stretch of the River between Venice and Pilottown, at times there are as many as 100 to 200 vessels, and because Plaquemines Parish is stretched out over 100 miles from end to end, a Port or Harbor police force separate from the Parish police force would be impractical.

The record shows in general that the responsibility for ships anchorage in the Mississippi River is that of the U.S. Army Corps of Engineers and the U.S. Coast Guard. For fires and collisions and other harbor matters, including communications, the U.S. Coast Guard primarily responds, whereas the Parish of Plaquemines and the Port of Plaquemines acting as good neighbors have voluntarily sought to help in emergency situations.

The ordinary services of police, fire, ambulance, etc., were provided as a matter of course by the Plaquemines Parish government or by the Sheriff prior to September 1, 1977, without thought of relating such services to Plaquemines Port. Since that date, these services have not been shown to be directly related to the so-called supplemental harbor fees and harbor fees of Plaquemines Port.

The fee embodied in Item 145 of the tariff is denominated as a "Supplemental Harbor Fee," but in fact it is a fee assessed solely against cargo. It is in the nature of a wharfage fee. The fee is to be charged against all cargo handled within Plaquemines Port, exempting the first 500 tons in a cargo-handling operation, and with the exception that no charge is made for the handling of cargo whenever the cargo owner utilizes his own wharf, dock, warehouse, or other terminal facility in connection with the movement of cargo to or from a vessel. But in other instances, where the owner of the cargo is not the owner of the facility which handles the cargo, the wharfage fee (Supplemental Harbor Fee) is assessed by Plaquemines Port, even though the facility is not owned by Plaquemines Port.

Plaquemines Port conditions the public's use of the Mississippi River and of private terminal facilities located in the Port. The "Supplemental Harbor Fee" operates as a wharfage fee for the use of private facilities, which in addition themselves charge wharfage, or fees which are in lieu of wharfage. The Plaquemines Port administers and controls all private facilities within the Port and is empowered to condition the shipping public's use of such facilities upon the payment of its wharfage charges (Supplemental Harbor Fee).

Every person subject to the Act must establish, observe and enforce just and reasonable regulations and practices related to or connected with the receiving, handling, storing, or delivering of property. The charging of wharfage by Plaquemines Port, for the use of private facilities, when the private facilities also charge wharfage, is an unreasonable and unlawful practice, contrary to section 17 of the Act. This practice is assuredly unlawful inasmuch as the charges assessed clearly are not reasonably related to the services provided. For example, Dreyfus was assessed about 23 percent of the total supplemental harbor fees assessed by Plaquemines Port in 1978, whereas there is little or no proof that Dreyfus received any of the services of the police, fire, ambulance, coroner, sewage, water and other departments whose costs were allocated in substantial parts to the Port of Plaquemines.

The Supplemental Harbor Fee discriminates against the cargoes of persons other than facility owners, subjecting these persons' cargoes to undue and unreasonable prejudice and disadvantage, under section 16

First of the Act, while giving the cargoes of the facility owners undue and unreasonable preference and advantage.

Plaquemines Port contends in effect that its assessment of the Supplemental Harbor Fee, as an equivalent of wharfage, is justified on the ground that all private facilities located within the Port are impressed with a servitude of public use, and that all private facilities are public facilities when they receive cargoes owned by persons other than the facility owner. If, as Plaquemines Port says, these private facilities become public facilities, and Plaquemines Port charges a supplemental harbor fee for use cargo handled through such facilities, then Plaquemines is not only administering these public facilities, but also is controlling them through the imposition of its fees.

Regardless of who owns the terminal facilities in Plaquemines Port, if Plaquemines Port were justified in assessing supplemental harbor fees against any cargo owner whose cargo is handled through a terminal facility located in Plaquemines Port, then all such cargo owners whose cargoes are so handled should be assessed equally; and if Plaquemines Port were to give credit to cargo owners who also owned facilities, this conceivably might be accomplished by crediting assessed supplemental harbor fees paid by a facility owner against ad valorem taxes paid or to be paid by the same cargo-and-facility owner, thus preserving equality of assessments of the supplemental harbor fees.

Instead, at present certain facility owners are exempted from supplemental harbor fee assessments merely because they own their facilities and pay ad valorem taxes.

In docket Nos. 73-17 and 74-40, *Sea-Land Service, Inc. and Gulf Puerto Rico Lines, Inc. - Proposed Rules on Containers,* 21 F.M.C. 1 (1978), Order on Reconsideration served June 14, 1978, 20 F.M.C. 788, the Commission held unlawful a requirement in the tariff which would have required importers and consignees utilizing facilities other than their own to pay normal warehouse storage fees for a minimum of thirty days even though such storage service was not desired, while at the same time exempting other importers and consignees who owned or operated their own warehouse facilities, instead of using public warehouses. This proceeding in Nos. 73-17 and 74-40 is under appeal in the Court of Appeals for the D.C. Circuit, but is not being appealed on the above tariff principle.

The complainants herein properly contend that it is unlawful to differentiate between shippers in the assessment of terminal charges (supplemental harbor fees) based on differences in ownership or operations of terminal facilities.

The complainants also point out that the ad valorem taxes paid by the facilities' owners in the present proceeding (No. 79-45) are not paid to Plaquemines Port, but are paid to Plaquemines Parish. This fact bolsters the above finding of unlawfulness as between the treatment of cargo owners not owning facilities and cargo owners also owning facilities.

At least up until the time of the close of the hearing, the respondent exempted the cargoes of Artfer, Inc., and the cargoes of all of the oil companies, notwithstanding that all of Artfer's cargoes and many of the oil cargoes under the tariff's terms failed to qualify for exemption under item 145. In the calendar year 1978, about 26 percent of the total tonnage of cargo moved through Plaquemines Port was assessed the supplemental harbor fee. Assuming that respondent properly calculated the 10-cents a ton fee on estimated tonnage, it follows that respondent's failure to assess some significant tonnages of cargo would result in a higher than reasonable basis of charges to those cargoes actually assessed the supplemental harbor fee, and that perhaps the supplemental harbor fee should have been 2-1/2 cents a ton.

A giving of a noncompensatory rate to some shippers or cargo owners can cause a disproportionate share or burden of costs to fall on other cargo owners. A competitive relationship between such shippers or cargo owners is not necessarily a prerequisite to a finding of unlawfulness. In *Investigation of Free Time Practices - Port of San Diego*, 9 F.M.C. 525 (1966), it was held at page 547 that, whatever the justification for requiring a competitive relationship when determining the existence of preference or prejudice in ocean freight rates, such a requirement cannot be justified when determining whether prejudice or preference results from free time or free storage practices, for free time bears no relationship to the character of the cargo. In the present proceeding, we have a charge for wharfage to one cargo owner and no charge to another cargo owner for wharfage. The same finding as in the *Port of San Diego* case should follow in the present cases, to wit, that the wharfage charge (supplemental harbor charge) herein is unlawful.

The police, fire, ambulance, etc., services allegedly provided by Plaquemines Port, which services are said to justify the supplemental harbor fee, are essentially the general services of local government and they are not dependent upon such factors as differences in transportation circumstances or differences in commodities.

The actual costs incurred by Plaquemines Port, through the receiving, handling, storing, and delivering of property at private facilities do not reflect the cost to Plaquemines of the services provided to those assessed under the tariff of Plaquemines Port. Actually the tariff rates require that those assessed pay for services which they do not, and in many instances, cannot use.

Each ton of cargo is uniformly charged for police, fire, ambulance, coroner, aviation, water, sewerage, and other general Parish services. But, a shipment of grain owned by Dreyfus is never attended by the coroner, conveyed to a hospital in a Parish ambulance, etc., and it is assessed 10 cents a net ton for services it has not received.

Item 145 provides that "the owners or other users of the vessels and facilities handling or storing the assessed cargo herein shall be bound and responsible *in solido as surety* for the payment of the supplemental harbor fee or wharfage charge." This provision creates a liability in a given person for the obligations of a third party with whom the given person is not in privity, and to whom the given person owes no duty. This tariff provision is therefore unlawful for this reason alone.

Item 145 defines the handling of certain cargoes by a privately-owned wharf as "midstream unloading" and subject to the same fees as imposed for midstream unloading. Section 1 (Definitions) of the tariff defines midstream unloading as "cargo loaded from a vessel and reloaded on a vessel without being removed from a public or private wharf."

Thus the tariff defines "midstream unloading" as a cargo operation accomplished without the use of wharfage, dock, warehouse or other terminal facilities, but elsewhere in item 145, the tariff classifies midstream unloading as cargo operations when conducted at such terminal facilities.

It is evident that a more precise heading for item 145, in lieu of "supplemental harbor fee," would be "midstream unloading fee; and wharfage fee at privately owned wharves."

Item 145 of the tariff was in part changed by amendment effective July 4 1980. But, the first paragraph of this item still provides, as it did before the amendment, that "all cargo *when first handled* (emphasis supplied) within the District in midstream or at anchorage shall be assessed . . . $.10 per net ton or fraction thereof over 500 tons of the weight of the cargo handled, provided that no cargo shall be assessed a tonnage harbor fee more than one time."

Another part of item 145 was amended on July 4, 1980, to provide in the fifth paragraph (an added paragraph or added provision) that the cargo is assessed the Supplemental Harbor Fee when it is first handled within the District, but because of the exemption granted for cargo owned by the handling wharf owner, the *reporting of cargoes should be made when the cargo leaves the wharf or facility* (emphasis supplied), and the assessment calculation shall then be made since the joint ownership of the cargo and the wharf cannot be finally determined until the cargo leaves the wharf or facility." "The Harbor Fee credit is given for the outbound vessels onto which the cargo is loaded from the wharf, and the reporting to the Port District as to cargoes, vessels, and ownership thereof is to be made at the instant before the cargo leaves the wharf or facility."

The inconsistency in the tariff of the meaning of "first handled" is of materiality to the complainants, because of the exemption afforded the first 500 tons of any cargo handled within the District.

Were this exemption literally applied to the cargo when first handled, it would result in the first 500 tons offloaded from each and every barge calling at the MRGE elevator, for example, being exempted under terms of tariff item 145. But by assessing the cargo, not upon first handling, but rather as it leaves the elevator and is onloaded into oceangoing vessels, Plaquemines Port avoids granting a multiplicity of 500-ton exemptions and instead grants only a single exemption per ocean-going vessel.

If Plaquemines Port had adhered to the terms of its tariff item 145 as it originally provided clearly before July 4, 1980, it would have resulted in the assessment of the supplemental harbor fee of $.10 per net ton against only 50 tons from each of the barges (based upon a barge-load of 550 tons), for a total assessment of $5 per barge times 30 barges, or a total of $150. But, ignoring the "first handled" requirement, and assessing the supplemental harbor fee against the ocean vessel, the shipper is required to pay for all but 500 tons of the same 16,500 tons (30 barges times 550 tons per barge) of soybeans, and the shipper's supplemental harbor fee or wharfage fee is $1,600 (16,500 tons minus 500 tons, times 10 cents a ton).

Dreyfus, from September 1, 1977, through June 3, 1980, was assessed $414,000 in cargo fees under item 145, but on the basis that the 500 ton exemption should have been applied per barge, rather than per ocean vessel, Dreyfus' estimated overcharge in this period is about $372,000.

Cargo such as Dreyfus' grain is always in the care of either a vessel or of a facility such as MRGE. These vessels are assessed a "harbor fee" for docking or anchoring within Plaquemines Port when they are handling cargo such as Dreyfus' grain. The MRGE elevator facility or other facilities located in Plaquemines Port pay ad valorem taxes purportedly for any services rendered to them by Plaquemines Port. Without the cargo, such as Dreyfus' grain, there would be no need for the vessels or facilities above. Thus, the attempt by Plaquemines Port to separately charge the cargo above, regardless of charges or taxes paid by the vessels and facilities above, is illogical.

Only one other Gulf of Mexico port of the United States, the Port of New Orleans, imposes a supplemental harbor fee. New Orleans assesses this fee only against midstream activity, whereas Plaquemines moves shoreward to impose the fee against cargo operations conducted at private wharfage, dock, warehouse and other terminal facilities.

Plaquemines' supplemental harbor fee discriminates against interstate and foreign commerce, it imposes charges for services not rendered, and is unreasonably high. The tariff provision itself is ambiguous. It holds unrelated third parties liable for payment, and it conditions the public's access to and use of navigable waters of the United States, and of privately owned facilities situated on such waters.

Item 135 of the tariff is titled as a Harbor Fee and is in reality a fee for anchoring and docking. In fact, the bills rendered by Plaquemines Port to the various vessels paying such a fee uniformly refer to anchoring, or docking, or both. The harbor fee does not apply to vessels under 100 feet long. It is difficult to see that hundreds of 90-foot oil industry crewboats and supply boats, daily trafficking between Plaquemines Port's docks and numerous offshore platforms, place no burden on the Port, if at the same time vessels over 100 feet long and under 250 feet are charged $100 per entry into the port, and vessels 250 feet and longer are charged $150 per entry, plus $20 or $30 respectively for each day over five days. Nearly all vessels trafficking in the oil and mineral business in Plaquemines Port are under 100 feet in length, and thus exempted from the Harbor Fee.

Item 135 thus burdens vessels in interstate and foreign commerce, and gives an undue and unreasonable preference and advantage to vessels under 100 feet, essentially local vessels or boats in the oil industry.

Item 136(D) of the tariff provides for special permits for vessels over 100 feet in length as set forth in item 137. This item provides exemptions to all vessels which have been appraised for ad valorem taxes in the Parish of Plaquemines. This exemption accords an undue and unreasonable preference and advantage to local maritime interests and subjects interstate shipping to undue prejudice and disadvantage. Certain vessels, such as the barge lines, not paying ad valorem taxes in Plaquemines Parish, are required by the State of Louisiana, and by other states, to pay a percentage of ad valorem tax, which is equivalent to the percentage of the carrier's (barge line's) total transportation mileage attributable to its movement through the waters of the state. Thus, while paying state-assessed ad valorem taxes, common carriers by water in interstate commerce cannot qualify for Plaquemines Port's tariff exemption based on appraisal for ad valorem taxes because their tax situs is elsewhere than in Plaquemines Parish.

Item 137 further provides for the sale of special permits to vessels which, because of their tax situs, cannot qualify for the free permit granted to locally taxed vessels. This permit scheme operates to reduce the compensation required of vessels holding permits to a fraction of the amounts which would be realized if the permits were not offered.

Consequently, those vessels granted special permits on the basis of their ad valorem tax status and those vessels purchasing special permits in anticipation of avoiding the higher cost of a multiplicity of harbor fees have been unduly and unreasonably preferred in violation of section 16 First of the Act.

The tariff in item 135 specifies that the harbor fee is to assist in defraying the expense of the administration and maintenance of the Port, including the supervision of the shipping in the Port, with the view of preventing collisions and fires, policing the river and river front, rendering aid to vessels in distress, and to aid in extinguishing fires in vessels and equipment and in their cargoes aboard such vessels, or upon wharves and other facilities in the Port.

To exempt local traffic from the harbor fee, while assessing interstate and foreign water carriers, amounts to an unreasonable practice in violation of section 17 of the Act, inasmuch as the expenses ostensibly incurred by Plaquemines Port in respect to local water carriers necessarily must be passed on to non-local water carriers. Because local traffic is of greater frequency than interstate or foreign traffic, a greater part of the burden purportedly placed on Plaquemines Port is shifted by the terms of the tariff to a class of water carriers responsible for the lesser part of that burden. The permit scheme from top to bottom shifts the major share of port costs to the minority of port users.

The permit scheme furthermore operates to license the use of the first 102 miles of the Mississippi River and the Plaquemines mileage of the Gulf Intracoastal Waterways.

The complainants point out that the exemption of shippers and consignees from the supplemental harbor fee (wharfage fee) when they own the terminal facilities handling their cargo is violative of section 16 First of the Act. This violation is compounded when the water carrier handling the shipper's or consignee's cargo must pay the harbor fee, whereas in the past, before May 1980, the vessel did not have to pay such a harbor fee when the supplemental harbor fee was assessed. By the conditioning in the past of the payment of a harbor fee upon the applicability to cargo of the wharfage fee, this was in itself a violation of section 16 First of the Act. In other words, in the past, while it was in the economic best interests of the cargo to escape the wharfage fee, it was to the vessel's best interest to carry only cargo destined to pay the wharfage fee.

A tariff provision which sets up such a conflict between the water carrier and the shipper is at odds with the principle that all shippers should be treated substantially equally.

Item 165 of the tariff establishes rules and regulations for the payment of the harbor fees and the supplemental harbor fees. Paragraph four of item 165 provides that Plaquemines Port may require common carriers or other users of the facilities of the Port to make advance payment of estimated assessments for harbor fees (dockage), whose credit has not been established with the Port. Use of the facilities may be denied, according to this paragraph of item 165, until advance payments or deposits are made.

Paragraph six of item 165 provides that common carriers, vessels, their owners or agents, and owners of wharves, and other users of the Port or its facilities, upon being placed on a delinquent list shall be denied further use of the Port or facilities until all charges have been paid.

These provisions of item 165 of Plaquemines Port's tariff condition the use of the Port itself and of all private and public facilities therein upon the payment of fees for anchoring, docking, and utilizing such facilities for the handling of cargo.

Consequently, no use can be made of any facility within Plaquemines Port without the entering into and the performing of certain contractual obligations to Plaquemines Port. Respondent, thus by controlling the use of terminal facilities in the Port, such as the MRGE facility, and by subjecting the public which used such facilities to the harbor fees and supplemental harbor fees, in effect in substantial part furnishes all wharfage, dock, warehouse and other terminal facilities in Plaquemines Port.

Item 165 of the tariff is not a sanction without teeth. Items 130(a) and 130(b) of the tariff, respectively, provide that failure to pay Plaquemines Port the proper toll, charge or fee for use of any facilities, and failure to comply with any provisions of the rules and regulations prescribed by the tariff, both will result in findings deeming the person, firm, or corporation guilty of a misdemeanor, punishable upon conviction by a fine of up to $500 or by imprisonment in the Parish Jail for 30 days, or both; and that the Court in its discretion may consider each day on which a violation occurs as a separate offense. The complainants suggest that respondent is without power to impose the sanctions in items 130(a) and 130(b) for violations of its tariff provisions.

Item 10 of the tariff states in part that Plaquemines Port is the sole judge as to the interpretation of its tariff. However, the law requires that tariffs be clear and definite. If tariffs are ambiguous, they must be construed against the tariff issuer. A tariff provision purporting to allow a port to interpret provisions of the port's tariff is in violation of section 17 of the Act. Docket No. 74-15, *West Gulf Maritime Association v. Port of Houston*, order adopting initial decision, served January 28, 1980, 22 F.M.C. 423.

Plaquemines Port's expenditures for 1978 totalled $1,590,879.87. Of this amount, $1,345,856.59 represented the charges allocated to the Port from the various departments of the Parish government. This transfer of Parish expenses to the Port was improper in view of the fact that the Parish expenses so transferred were not compensable by the common carriers, other vessel interests, and shippers who use the Port.

Many of the Parish expenses transferred to the Port are expenses which can be and have been recouped by municipalities by fees assessed against those using the services.

Parties using the Parish ambulance service are individually invoiced but the Parish failed to pursue its accounts receivable, permitting or suffering the ambulance service to operate at a loss. To recover this deficit, the Parish required the Port to bear 30 percent of the deficit. The Port in turn passed on or attempted to pass on its costs to the shipping public.

Ten percent of the cost of the two ferries conveying vehicles and passengers across the Mississippi River in the Parish was passed on to the shipping public, but no tolls are charged for the use of the ferries.

Ten percent of the Parish budget for garbage collection and disposal, five percent of the cost of sewerage, and ten percent of the annual deficit of the various Parish waterworks were passed on to the shipping public, notwithstanding that fees for these services are assessed the facilities in the Parish.

Tariff assessments against vessels and cargoes have been used for the operation of five waterworks in the Parish, and for the stock water plants, and water delivery truck, whereas the record shows that no vessel and no cargo utilizing Plaquemines Port has freely obtained any water from the Parish. All water is metered out, and any water used by a vessel or cargo has been charged to the shoreside facility through whose meter it has flowed.

Part of the cost of fire protection is the purchase of foam for fighting fires. The Parish charges a fee to any vessel receiving the benefit of such foam. The ferries perform no services to vessels.

To allocate 10 percent of the annual water deficit to the Port, or more than $100,000, is to charge twice for the same service.

Forty-nine percent of all assessments by Plaquemines Port for the year 1978 were based on the supplemental harbor fee, the fee for wharfage of cargo. Yet the majority of Parish departmental services (the expenses of which were allocated to the Port to be defrayed less the supplemental harbor fee and harbor fee assessments) are of no avail to cargo.

The ferries, the ambulances, the coroner, the health unit, the Parish helicopter, water, sewerage and garbage are services which cannot be rendered to cargo.

General administrative expenses of Plaquemines Port have been inflated because they were based in part on the time of the Parish Council in administering certain services, which services in turn, could not be in many instances, and were not, rendered to vessel and cargo interests. Since the basic services cannot be allocated properly to the Port's users, the costs of administering the basic services also cannot be so allocated properly. Hence, 30 percent of the Council's official time, costing the Port $80,580 for 1978, and varying percentages of the expenses for data processing, internal auditing, insurance, hospitalization, social security contributions, etc., were improperly and unreasonably allocated to the Port.

In 1978, part of the Plaquemines Sheriff costs were allocated to the Port in the amount of more than $290,000, assertedly for services performed in connection with "Parish waterways, coastal waters and offshore industries." The record shows that the great majority of these services were in no way connected with the shipping public.

A principle of criminal law is that one person is not chargeable for the criminal offense of another merely because of a conjugal, blood, or employer relationship. In spite of the above principle, the respondent seems to take the position that an employer, whether water carrier, shipper, or terminal operator, is answerable for the criminal acts of his employee. Plaquemines Port seemingly contends that the employer is obligated to pay for the Sheriff's expense in arresting an offending employee, booking and housing him in the Parish jail, and otherwise exercising control and custody of him.

An oil field service company will pay neither the harbor fee nor the supplemental harbor fee, but the cost to the Port ostensibly created by the employee's violation of the law will be shifted to those who do pay the harbor fees and the supplemental harbor fees, such as Dreyfus, Early, Lykes Bros. Steamship Co., Combi Line, and the complainant barge lines.

Respondent erred in ascribing to the shipping public the costs incurred by the Sheriff in policing Plaquemines Parish for two reasons, first, for holding the employer liable for the criminal acts of an employee when such Acts were committed beyond the scope of the employment, and second, by charging costs occasioned by criminal acts to employers other than those whose employees committed the acts.

The allocation to the shipping public of $1,345,000 of Parish governmental expenses for 1978, which expenses were substantially local in nature, resulted in assessments against the shipping public without any substantial proof of any related services being performed for the shipping public. A terminal charge for services not rendered is violative of section 17 of the Act.

THE RESPONDENT, PLAQUEMINES PORT, IS AN "OTHER PERSON" SUBJECT TO THE SHIPPING ACT. Plaquemines Port is one of four port authorities authorized by the State of Louisiana to promote and facilitate marine commerce on that portion of the Mississippi River which serves ocean commerce. Respondent exercises its jurisdiction over 102 miles of the Mississippi River from the Gulf of Mexico to the Port of New Orleans, and over a part of the Gulf Intracoastal Waterway. Through its tariff on file with the Federal Maritime Commission, Plaquemines Port *controls* the shipping and cargo-handling activities of at least 110 wharves, docks, and terminals, and of at least 202 water carriers, including common carriers by water as defined by section 1 of the Act.

Plaquemines Port derives its authority from Louisiana statute laws. Its authority includes the right to make reasonable charges and collect the same for the use of all structures, works and facilities administered by the Port, and it may regulate the fees and charges made by privately owned wharves, docks, warehouses, elevators and other facilities located within Plaquemines Port when the same are offered for public use.

Respondent Plaquemines Port, in its annual report of 1978 and in its answers to interrogatories in certain civil actions in the United States District Court Eastern District of Louisiana (Exhibits C-15 and C-21 of the present record), admits that it administers all privately owned docks and wharves within the Port, as well as all cargoes and vessels during their presence in the Port.

In addition, respondent owns three marinas or boat harbors, a small shipyard for boat repair, and a used dock 90 to 100 feet long. Its tariff in items 155, 160, and 165 provides wharfage rates at public wharves, conditions under which wharfage will be assessed, and for the responsibility of common carriers, vessels, owners, agents, etc., for payment for dockage, storage or other charges, among other provisions of these items. Thus, Plaquemines Port offers its facilities to the public through a published tariff, but inasmuch as there is no record of the use of such facilities by common carriers and no record of payment of wharfage charges under item 155, the finding below that respondent is an "other person" does not rely on these tariff items. Rather the finding relies on the fact that respondent Plaquemines Port controls the use of certain private terminal facilities and subjects their use to the imposition of its harbor fee and supplemental harbor fee.

In the year 1978, some 26 million tons of cargo were handled through private terminal facilities in Plaquemines Port, and the Port imposed its harbor fees and supplemental harbor fees on a substantial portion of this cargo. Many common carriers by water have called at these private terminal facilities, and many cargoes transported by these common carriers have been subjected to the supplemental harbor fees herein, and many of the vessels transporting these cargoes have been subjected to the harbor fees herein.

Plaquemines Port superimposes its tariff fees upon the charges (contract and tariff) of the private terminal facilities located in the Port. Furthermore, and most important to the "other person" finding herein, Plaquemines Port conditions the use of these private terminal facilities upon the payment to Plaquemines Port of its harbor fee and supplemental harbor fee. If these fees are not paid, Plaquemines Port will bar, or attempt to bar, the use of these private facilities to the shipping public, viz, common carriers by water and cargo owners, shippers and consignees.

In so conditioning the use of these private facilities, Plaquemines Port controls their use, and control is the key factor. Control outweighs the factor of private ownership of these facilities. But, even then Plaquemines Port asserts that ownership of battures and banks of rivers under Louisiana law are impressed with a public interest and a private wharf can only be built with the consent of a deep-water port commission. This public interest in private facilities forms part of the basis for Plaquemines Port's right to charge its harbor fees and supplemental harbor fees in the view of the Port.

Control of the use of these private facilities in Plaquemines Port, in the circumstances herein, outweighs the factor of who operates these facilities, because these facilities cannot be operated unless the harbor fees and supplemental harbor fees are paid to Plaquemines Port on cargoes not owned by the facilities' owners.

In the case of MRGE, which is solely a service company, all cargoes passing through this facility are not owned by MRGE. Thus, MRGE is a privately owned facility which serves the public. So, Plaquemines Port, in controlling the use of the facilities of MRGE, is at least in substantial part carrying on the business of furnishing wharfage, dock, warehouse or other terminal facilities in connection with common carriers by water.

The assessment of the supplemental harbor fee on the cargo by Plaquemines Port has the same effect on the cargo owner as if the private facility had imposed this charge. In the same manner as other terminal charges affect water commerce, so do the supplemental harbor fees (wharfage charges) herein. These charges are one of the crucial links in the transportation chain which the Shipping Act was intended to regulate.

One who conditions the use of a terminal facility is himself an other person because such a person influences whether and on what terms a terminal facility will be furnished to common carriers or to the shipping public. A lessor of terminal facilities, whose lease conditions the use of the facilities, is an other person because the lessee's use of the terminal facilities is influenced by the lease provisions. Here, Plaquemines Port is analogous to a lessor whose lease is conditional, because Plaquemines Port says, to MRGE for example, you can only operate your grain elevator if you collect 10 cents a net ton on grain handled through your terminal facility and remit this 10 cents a ton to Plaquemines Port.

Public entities owning or operating wharves are subject to the Shipping Act, so that they are subject to the same Shipping Act Laws preventing discrimination between carriers and between shippers, as are private owners of wharves. It follows that public entities controlling the use of wharves are likewise subject to the Shipping Act the same as are owners and lessees of wharves, when the latter control the use of these terminal facilities. In fact, obviously the more fundamental factor is not ownership, but it is control of the use of the facility. An owner of a terminal facility who has given up all control of that facility, by long-term lease for example, may be in no wise carrying on the business of furnishing terminal facilities, and in such case the lessee would be the other person. But, if the owner by the lease terms or otherwise retains some control of the furnishing of the terminal facility, that owner, of course, remains an other person. To properly regulate terminal activities, one must not go only to the nominal person furnishing the terminal facility, but to the actual person or persons who controls the business of furnishing terminal facilities.

The interpretation of the term "other person," as made herein, and the finding that Plaquemines Port is an other person, appear absolutely necessary to the general intent of the Shipping Act insofar as it is designed to prevent unlawful discrimination among shippers and common carriers by water.

Plaquemines Port not only superimposes its charges upon those of private facilities, such as MRGE, but in addition Plaquemines Port has the right under Louisiana law in connection with "such wharves, buildings or improvements" in Plaquemines Port, to administer and control with respect to their maintenance and to do the same with respect *to the fees and charges to be exacted for their use by the public.*

While Plaquemines Port has not yet, so far as the record shows, dictated or controlled the fees and charges of any facility, such as MRGE, Plaquemines Port does have the right to control such fees and charges. Thus, in toto, Plaquemines Port controls the harbor fees and supplemental harbor fees which it charges, and also may control those fees and charges of the private facilities it administers. In effect, Plaquemines Port may exercise total control over such fees and charges as are imposed in connection with the use of private terminal facilities in Plaquemines Port.

Midstream activity takes place in Plaquemines Parish. Dockside, Inc., operates a floating elevator in midstream 5 or 6 miles below the Belle Chasse, La., ferry landing in the Mississippi River. Other midstream activity involves the loading and unloading of LASH and Seabee barges. This is a type of terminal activity, such as the loading of barges onto mother vessels, which no doubt was not contemplated more than sixty years ago when the Shipping Act was enacted, but the terms of the Act can be read now to include this type of terminal (midstream) operation within the term "other terminal facilities in connection with a common carrier by water." Herein, Plaquemines Port furnishes the point of interchange in midstream at which the terminal activity takes place, by conditioning the very existence of midstream loading and unloading in the Mississippi River upon the payment of Plaquemines Port's supplemental harbor fees.

The essence of a terminal operation is that of a point of interchange or a link between one mode of transportation in another.

When Plaquemines Port conditions and controls midstream activity upon the payment of its supplemental harbor fees, Plaquemines Port again controls the furnishing of terminal facilities in connection with common carriers by water. Plaquemines Port is an other person under the Shipping Act.

SOME CASE LAW CITATIONS. In *Bethlehem Steel Corp. v. Indiana Port Commission*, docket No. 71-76, served January 8, 1979, 21 F.M.C. 629, it was determined that a harbor service charge was not necessarily a regulation or practice related to or connected with the receiving, handling, storing or delivery of property, inasmuch as the harbor charge was intended to recoup the port's investment in construction of the harbor, and that purpose was unrelated to cargo handling. The charge was levied on vessels entering the harbor and was assessed per gross registered ton of the vessel. This was a manmade port, not a natural one. It was constructed in part with State of Indiana or Port funds. Bethelem Steel Corp. and the Midwest Steel Division of National Steel Corporation constructed large portions of the harbor.

The facts and circumstances in the present proceeding differ greatly from those in the *Bethlehem Steel* case above. There it was decided that not all of the Indiana Port's activities were subject to section 17 of the Act simply because the Port was a terminal operator and an "other person" subject to the Act. The Indiana harbor charge was related to the construction of the harbor, rather than to the construction of pier facilities, warehousing or wharfage facilities. The charge in question was based on the navigational aspect of the harbor, and it was unrelated to cargo handling.

In the present proceeding, we do not have fees or charges related to the construction of a harbor. Plaquemines Port's harbor is in essence the Mississippi River and is not a man-made harbor. Plaquemines Port's fees mostly are related to cargo handling, not to navigational aspects of the River. The supplemental harbor fee only applies to cargoes handled through terminal facilities, midstream or shoreside. The harbor fee only applies on vessels, docking, mooring, or anchoring, and when they have their cargoes handled at terminals in Plaquemines Port, whereas vessels passing through the Port of Plaquemines are exempted.

Patently, the *Bethlehem Steel* case does not support the contention that Plaquemines Port's supplemental harbor fee and harbor fee are not regulations or practices related to or connected with the receiving, handling, storing or delivering of property under section 17 of the Act. Most assuredly, the Plaquemines supplemental harbor fee relates to the receiving, handling, storing or delivering of property, such as grain at MRGE.

The Plaquemines harbor fee falls on vessels which are docked so that they may have their cargoes, of grain for example, delivered to MRGE or handled by MRGE. If the vessels are merely passing through Plaquemines Port and their cargoes are not being handled in terminals, there is no harbor fee assessed by Plaquemines Port, such vessels being exempted by the tariff's terms.

In *New Orleans Steamship Association v. Bunge*, 8 F.M.C. 687 (1965), and in *Agreement No. T-2719*, 16 F.M.C. 318 (1973), the Commission held that an operator of a terminal grain facility who had filed a tariff indicating that common carriers would not be served, is not an other person subject to the Act.

In the present proceeding, Plaquemines Port argues that it does not furnish terminal facilities to common carriers by water, but this argument relates only to the aspect of *furnishing terminal facilities* rather than to the fact that common carriers are welcomed and served at the various private terminal facilities in Plaquemines Port. Accordingly, the two cases cited next above are not determinative of the basic issue in the present proceeding, which issue is whether Plaquemines Port by controlling the use of private terminal facilities is thereby furnishing such facilities.

In *Clyde Mallory Lines v. State of Alabama*, 296 U.S. 261 (1935), at page 266, the Supreme Court stated that "the policing of a harbor so as to insure the safety and facility of movement of vessels using it differs from wharfage or other services which benefit only the particular vessels using them."

In the present proceeding, Plaquemines Port's supplemental harbor charge is a wharfage charge applied on tonnages of cargoes, and it is not a harbor policing charge. In like manner, the Plaquemines Port's harbor charge has been applied in part to vessels whose cargoes are handled at terminals in Plaquemines Port, and other vessels passing through the harbor are not charged the harbor fee. Thus, this fee is not a navigational fee or a fee related to policing of the harbor, but is a fee related to cargo handling. Additionally, these fees are set off one against the other. Since both the supplemental harbor fee and the harbor fee herein, therefore, are wharfage, dockage, and cargo related fees, the principles of the *Clyde Mallory* case are not pertinent to the present Plaquemines proceeding.

In *Department of Revenue of the State of Washington v. Association of Washington Stevedoring Companies*, 435 U.S. 735 (1978), cited by the respondent, in issue was the State of Washington's application of its business and occupation tax to stevedoring. Obviously, the present Plaquemines proceeding differs, because it is not concerned with state taxes, but with Port fees.

In *Volkswagenwerk Aktiengesellschaft v. Federal Maritime Commission*, 390 U.S. 261 (1968), an assessment levied upon terminal operators and ship lines who were members of the Pacific Maritime Association to fund a modernization and mechanization fund was found unlawful, because of the measure of the assessment on automobiles. It was found that the question under section 17 of the Shipping Act is not whether petitioner had received some substantial benefit as a result of the assessment, but whether the correlation of that benefit to the charges imposed is reasonable. Both the respondent and the complainants rely on the principle of this *Volkswagenwerk* case. The respondent argues that there is a reasonable approximation between the benefits which Plaquemines Port provides and the charges which it assesses in consideration of these benefits, whereas the complainants argue that these benefits and charges are not reasonably related. The complainants in this proceeding have shown that the fees imposed by respondent have been anything but fair, and that these fees have not been imposed in a reasonable and evenhanded manner.

An initial basic issue herein is whether respondent is an "other person." The critical fact is that Plaquemines Port absolutely controls whether or not any terminal facility located in Plaquemines Port (whether such facility is private or public) may carry on the business of furnishing wharfage, dock, warehouse, or other terminal facilities in connection with common carriers by water. Unless Plaquemines Port's fees (the supplemental harbor fee and harbor fee) are paid to it, the shippers of cargoes and the river barges and ocean vessels will be barred by Plaquemines Port from using any terminal facilities located in the Port.

Thus, *control* of the furnishing of terminal facilities, in connection with common carriers by water, amounts to the *furnishing* of terminal facilities in connection with common carriers by water. Plaquemines Port by virtue of such control is an "other person" subject to the Shipping Act.

Plaquemines Port superimposes its charges on fees on the charges or fees (contractual or tariff) of existing private facilities, conditioning the use of those private terminal facilities upon the payment of Plaquemines Port's supplemental harbor fee and harbor fee.

In *Investigation of Storage Practices*, 6 F.M.B. 871 (1961), the Board reasoned that one of the respondents therein, Trans-Oceanic Agencies (TOA), was an "other person" because it placed itself between the Port of Stockton and its consignee customers for the purposes of ordering or obtaining the port's services for them, and that if Stockton furnished warehouse or terminal facilities in connection with a common carrier by water, so did TOA. In the present proceeding, Plaquemines Port has placed itself between or astride the private terminal operators and their consignee customers, for the purpose of collecting Plaquemines Port's fees.

In the matter of *Agreement Nos. T-2455/T-2553*, 18 F.M.C. 115 (1974), the Commission determined that the Philadelphia Port Corporation (PPC) was an "other person" because a clause in a lease agreement gave PPC some "oversight control" of the use of terminal facilities. In the present proceeding, Plaquemines Port has greater control than mere oversight because Plaquemines Port levies direct charges (fees) for the use of terminal facilities, and because under its tariff provisions Plaquemines Port may exclude cargo owners and vessels from using terminal facilities located in Plaquemines Port. Plaquemines has done more than PPC. Plaquemines has exercised control, whereas PPC had not done so.

In *A. P. St. Philip, Inc., v. Atlantic Land Improvement Co.,* 13 F.M.C. 166 (1969), the Commission found that the lessor of a terminal facility effectively controlled the persons and traffic, who and which were permitted to use the facility, by requiring in its lease agreement that all vessels berthing at the facility make use of a specific tug service. Respondent Atlantic therein was found to have subjected itself by its control of the terminal facility to the jurisdiction of the Shipping Act.

The status of a lessor is not determinative of whether a person is furnishing terminal facilities. The conditioning and controlling of their use is the key. The lessor who does not so control or condition is not an other person. The lessor who does is.

The status of "other person" does not attach to lessors as a class, but rather attaches to those persons who condition or control the furnishing of facilities. Plaquemines Port by Louisiana statute and by its tariff is vested with and retains control over private terminal facilities in Plaquemines Port. As an administrator of such facilities, Plaquemines Port has the power to control and to condition the use of private terminal facilities in the Port. It is concluded and found that Plaquemines Port is an "other person" subject to the Act.

The regulatory authority in its definition in section 1 of an "other person" concerns persons who furnish facilities rather than furnish services because it is the facility which is the link between shippers, carriers, terminals and modes of transportation.

Plaquemines Port as an other person has cast a wide net and snared numerous common carriers and shippers of cargo. Total assessments for one year, 1978, were about $671,000 for the supplemental harbor fee and about $689,000 for the harbor fee.

Cargo tonnages assessed the supplemental harbor fee in 1978 totalled about 6,857,413 tons. About 3,620 vessels were assessed docking fees totalling $488,860 in 1978; and about 978 ships were assessed anchoring fees in 1978 of $200,000 by Plaquemines Port. None of the complainant barge lines were assessed the harbor fees herein for anchoring, but these five complainants were assessed the harbor fees for docking at privately owned terminal facilities in the Port.

In 1978 and 1979 combined, the following harbor fees for docking of barges in order to discharge or load cargo at numerous privately owned facilities in Plaquemines Port were assessed, against Dixie $158,000, against Federal $5,150, against Le Beouf $135,850, against Valley $3,900, and against Hollywood $16,950. As seen, supplemental harbor charges assessed in 1978 against Dreyfus were $156,619.20 and against Early were $47,151.40.

RULING ON LATE-FILED MOTIONS. Since the close of the hearing, the respondent has filed motions to file late exhibits and to file a supplemental brief, which motions are opposed by the complainants. The last such motion was dated October 6, 1981.

Except to the extent that such motions and exhibits refer to tariff items, or to amendments to tariff items, and to Louisiana statute laws, the said motions hereby are denied. Ordinarily, tariffs may be noticed officially, and the recognition of the Louisiana laws referred to in the last motion and exhibits does not alter the existing record in any substantial way, nor does it affect the findings and conclusions in this decision.

ULTIMATE CONCLUSIONS AND FINDINGS. It is ultimately concluded and found: (1) that Plaquemines Port has exercised, and exercises, control as to whether or not certain terminal facilities located in Plaquemines Port are furnished; and that Plaquemines Port is by virtue of such exercise of control an "other person" subject to the Shipping Act, 1916, because it furnishes wharfage, dock, or other terminal facilities in connection with common carriers by water; (2) that Plaquemines Port's "supplemental harbor fee" is a wharfage charge which is based on tonnages of cargo handled at terminal facilities located in Plaquemines Port; and that this supplemental harbor fee is subject to section 17 of the Act, covering regulations and practices related to or connected with the receiving, handling, storing or delivering of property; (3) that Plaquemines Port's harbor fee is a dockage and anchoring charge on vessels docking or anchoring at facilities or points in Plaquemines Port, and because this fee applies to vessels which dock for the purposes of having their cargoes handled at terminal facilities in Plaquemines Port, such harbor fee is related to the supplemental harbor fee inasmuch as the amount of the latter is reduced by the amount of the harbor fee; and because the harbor fee, at least in part, is related to the handling of cargoes at terminal facilities, said harbor fee is subject to section 17 of the Act covering the regulations and practices recited therein; (4) that Plaquemines Port, as an other person, through the imposition of its supplemental harbor fee, has given undue and unreasonable preference or advantage to certain descriptions of traffic, such as to cargoes owned by facilities owners and to certain cargoes believed to be but not in fact so owned, and that Plaquemines Port has subjected other descriptions of traffic to undue and unreasonable prejudice and disadvantage in violation of section 16 First of the Act; that Plaquemines Port is in violation of section 16 First of the Act because certain vessels were subjected to the harbor fee and other vessels such as those under 100 feet long and those issued certain permits were exempted from such fee; (5) that Plaquemines Port, through the imposition of its supplemental harbor fee and its harbor fee has established, observed and enforced unjust and unreasonable regulations and practices relating to or connected with the receiving, handling, storing or delivery of property, particularly because it has not been shown that the said fees are reasonably related to the services performed by Plaquemines Port, and because it has been shown that the complainants have been subjected to charges which are not reasonably related to any services performed in their behalf by Plaquemines Port; (6) that Plaquemines Port is in violation of section 17 of the Act because its tariff provisions hold liable for the debts of shippers and consignees of cargoes all parties who may have had contact with the debtors, including vessel owners, terminal operators and other "users" of the vessel or facility; (7) that Plaquemines Port is in violation of section 17 of the Act because its tariff item 145, as amended, is ambiguous because it covers cargo when "first handled" in the Port and then contradicts the meaning of "first handled" by providing that the reporting of such cargoes should be made when the cargo leaves the wharf or facility; (8) that Plaquemines Port is in violation of section 17 of the Act because its tariff item 10 purports to establish itself as sole interpreter of the provisions of its tariff; (9) that Plaquemines Port is in violation of section 17 of the Act because its item 130 of its tariff sets up civil and criminal sanctions for the refusal to pay fees assessed by the tariff; and (10) that the complaint insofar as it alleges violations of section 15 of the Act is dismissed for lack of proof.

An appropriate order should be entered barring the assessments against the complainants which herein have been found to be unlawful under the Shipping Act.

(S) CHARLES E. MORGAN
Administrative Law

FEDERAL MARITIME COMMISSION

DOCKET NO. 81-77

U.S. SOUTH ATLANTIC & GULF/PANAMA & COSTA RICA RATE AGREEMENT (NO. 10045–6)

U.S. SOUTH ATLANTIC & GULF/GUATEMALA, HONDURAS & EL SALVADOR RATE AGREEMENT (10105–4)

NOTICE

July 30, 1982

Notice is given that no exceptions have been filed to the June 25, 1982 initial decision in this proceeding and the time within which the Commission could determine to review that decision has expired. No such determination has been made and accordingly, that decision has become administratively final.

(S) FRANCIS C. HURNEY
Secretary

FEDERAL MARITIME COMMISSION

DOCKET NO. 81-77

U.S. SOUTH ATLANTIC & GULF/PANAMA & COSTA RICA RATE AGREEMENT (AGREEMENT NO. 10045-6)

U.S. SOUTH ATLANTIC & GULF/GUATEMALA, HONDURAS & EL SALVADOR RATE AGREEMENT (AGREEMENT NO. 10105-4)

The Commission instituted this proceeding to determine whether two 48-hour rate agreements consisting of three carriers operating in two Central American trades, which agreements, as expanded, the Commission approved effective November 1980, should continue to enjoy approval under section 15 of the Shipping Act, 1916. This determination was to consider updated evidence showing the effects of the expanded agreements on the trades served, how intermodal authority was being used, and the effects, if any, of an overlapping conference. I find the agreements deserve continued approval for a three-year term for the following reasons:

(1) Findings which the Commission made when approving the agreements in 1980 regarding the potential for rate instability in the trade and the potential stabilizing effect of the agreements are still valid;

(2) There are benefits which have occurred since the approval of the expanded agreements, namely, the development of joint tariffs publishing uniform rates and uniform descriptions of service, the implementation of uniform intermodal service, and the employment of a full self-policing system. Although all the hoped-for stabilizing effects have not been realized so far and numerous outside competitors continue to operate in the trade, there is some sign of improving rate stability and no signs of harm to shippers or outside carriers. Moreover, there is no overlapping effect between the agreement covering Panama and the separate Panama Conference agreement;

(3) Firm conclusions regarding effects of the agreements on cargo shares and trade carryings cannot be made because pertinent Census data are not available beyond June 1981, shortly after the agreements' joint tariffs were filed, and such data are unadjusted. However, the data show no harmful trends developing as to outside carriers but rather a decline for agreement members in 1981;

(4) The agreements should be approved for a term of three years following final Commission decision rather than enjoy unlimited approval. This follows Commission precedent by which parties to agreements are permitted opportunities to demonstrate that their agreements are beneficial on the basis of actual operating evidence when their operating experience has been limited and when evidence of such experience has not been available.

Donald J. Brunner for proponents.

John Robert Ewers, Joseph B. Slunt and William D. Weiswasser for the Commission's Bureau of Hearings and Field Operations, Office of Hearing Counsel.

INITIAL DECISION [1] OF NORMAN D. KLINE, ADMINISTRATIVE LAW JUDGE

Finalized July 30, 1982

This proceeding was begun by the Commission to determine whether two rate-fixing agreements in the trade between U.S. South Atlantic and Gulf ports and five Central American countries should continue to enjoy Commission approval under section 15 of the Shipping Act, 1916, or whether they should be disapproved, canceled, or modified on the basis of an updated record which would be developed in the formal investigation. The two agreements consist of so-called 48-hour rate agreements under which the member carriers may fix rates jointly but are free to determine their own individual rates provided they give other members of the agreements 48-hours notice. One of the agreements (No. 10045) presently consists of three member lines, Coordinated Caribbean Transport, Inc. (CCT), Linea Naviera Pan Atlantica, S.A. d/b/a Pan Atlantic Lines (LINAPA), and Sea-Land Service, Inc., and covers the trades between ports in the U.S. South Atlantic and Gulf ranges and Caribbean ports and points in Costa Rica and Panama. The other agreement (No. 10105) also presently consists of three member lines, CCT, Pan American Mail Lines d/b/a Pan Atlantic Lines (PAML),[2] and Sea-Land, and covers the trades between U.S. South Atlantic and Gulf ports and Caribbean ports and points in Guatemala, El Salvador, and Honduras. Sea-Land, which is a member of both agreements, is also a party to another agreement (Agreement No. 3868 - The Atlantic & Gulf/Panama Canal Zone, Colon and Panama City Conference) but, as mentioned below, it does not participate in Agreement No. 10045 with respect to any ports in Central America within the scope of the aforementioned Panama Conference, in other words, Sea-Land does not participate in the Panama section of Agreement No. 10045.

Agreement No. 10045 (Panama/Costa Rica) was first approved by the Commission on July 5, 1973. Agreement No. 10105 (Guatemala, El Salvador, and Honduras) was first approved on May 23, 1974. Originally, the scope of these agreements was limited to Florida ports on the U.S. side and consisted of only two carriers (CCT and Pan Atlantic). In 1978, however, Sea-Land sought to join the agreements and the parties sought other changes as well, namely, an extension of the geographic scope of the agreements to add U.S. Atlantic and Gulf ports, to include inland points in the Central American republics, to establish new self-

[1] This decision will become the decision of the Commission in the absence of review thereof by the Commission (Rule 227, Rules of Practice and Procedure, 46 CFR 502.227).

[2] Under a separate agreement approved by the Commission (No. 10421), the two companies, LINAPA and PAML, are permitted to utilize the same trade name, Pan Atlantic Lines.

policing provisions as required by the Commission's General Order 7, 46 CFR 528, to authorize joint tariffs, and to make certain other changes relating to authority to agree on demurrage charges and to alteration of certain voting procedures. (See *Conditional Approval of Agreement No. 10045-3,* 20 SRR 437 (1980).) Proponents sought these changes to their agreements on several grounds, contending that the subject trades were highly competitive and unstable, that tariff and rate structures were confusing and chaotic, that rates had recently undergone wide fluctuations, that these conditions prompted certain carriers to leave the trades, that the uniform tariff would benefit shippers, that an expanded scope of the agreements would make it possible for additional carriers to join the agreements, and that the agreements, as expanded, would lead to greater rate stability and thereby encourage carriers to make major investment decisions which would result in improved quality of service. (*Id.,* 20 SRR at 437-438).

On September 15, 1980, the Commission issued two orders of conditional approval, which, with two dissenting opinions, approved the amended agreements on certain conditions, effective November 10, 1980, for a one-year term. The Commission found that the proponents had demonstrated the existence of past rate instability and a clear potential for future instability and that the authority to discuss and agree upon rates in an expanded trade area "should have a stabilizing effect." (*Id.,* 20 SRR at 439). The Commission further found that prevention or correction of rate instability "is a legitimate Shipping Act objective and the Commission considers the instant agreement to be a manifestation of such a measure." (*Id.*) The Commission acknowledged that the existence of non-comparable tariffs and rate structures made it difficult for shippers to make accurate rate comparisons but was not convinced that the agreements would solve this problem because there were only three carriers out of 13 or so in the trades who were members of the agreements and even the three retained the right to file separate rates on 48-hours' notice. The Commission concluded that important public benefits would be derived and valid regulatory purposes would be served by expansion of the subject agreements and that the additional authority to establish intermodal through rates to add from inland points in Central America was warranted in view of inadequate port facilities, the needs of shippers for fast-flowing inland service, the natural movement of cargo to and from inland points in Central America, the consistency of such intermodal service with proponents' ro-ro and containership services, and the offering of such services by competitors.

Having found benefits and valid regulatory purposes, the Commission approved the agreements but on several conditions. Thus, it restricted the agreements to U.S. South Atlantic and Gulf ports on the U.S. side, finding no "nexus of competition" among proponent carriers outside of the Southeastern and Gulf regions of the United States. (*Id.,* at 439). The Commission also limited the term of approval to one year so that "the Commission may have a further opportunity to assess the impact the expanded rate agreement has had on the trade." (*Id.* at 439; Order of Investigation and Hearing, p. 2). The Commission imposed further conditions on approval, namely, requiring the agreements to specify the use of a joint tariff rather than individual tariffs as required by 46 CFR 536.3(j), restricting Sea-Land's participation in Agreement No. 10045 (Panama/Costa Rica) to Costa Rican matters so long as Sea-Land remained a member of the separate Panamanian conference agreement (No. 3868), clarifying that the foreign ports served would be Caribbean ports, and conforming the new self-policing provisions of the agreements to the detailed requirements of General Order 7, 46 CFR 528. (*Conditional Approval of Agreement No. 10045-3,* cited above, 20 SRR at 441-442).

After these conditions were met and the Commission's approval became effective on November 10, 1980, for a one-year term, as mentioned, nearly three months were consumed by the parties who were required by the Commission's orders to formulate new joint tariffs to reflect the agreements' expanded scope. Because time had to be utilized for developing these tariffs and because the agreements had to be refiled with the Commission some time in advance of their expiration date (which was in November 1981),[3] proponents were able to furnish the Commission with trade and carriage data which covered only six months of the one-year approval period. In the Order of Investigation and Hearing which began this proceeding, the Commission stated that although proponents had demonstrated the existence of past rate instability and the potential for future rate instability, the data submitted by proponents together with their refiling did not demonstrate that their rate agreements had ameliorated this instability. However, the Commission acknowledged that proponents only had a relatively short time to show the actual effects of the agreements on the trades and that the Commission would therefore permit the parties to develop further evidence "which the Commission requires to realistically assess the agreements' impact." (Order, p. 3). Moreover, the Commission stated that based upon their review of the limited data furnished, the Commission believed that the stabilizing effect which proponents had contended would result from the expanded scope of the agreements "has not yet occurred." (*Id.,* p. 3). Rather than granting the indefinite extension of approval as sought by proponents, the Commission granted approval

[3] The Commission's regulations (General Order 17, 46 CFR 521) require parties to agreements, who wish to have their agreements' period of approval extended, to file the requisite application "not less than one hundred twenty (120) days prior to the date on which the approved agreement would otherwise terminate." 46 CFR 521.2(a). Proponents requested extension on July 17, 1981.

pendente lite and launched this investigation.[4] However, the Commission did not limit its concern to the question of whether the agreements were ameliorating unstable conditions in the trade and should be approved or disapproved only on that basis. Rather the Commission stated that it wished to examine the entire question of continued approval of the subject agreements under the standards enunciated by the Supreme Court in *F.M.C. v. Aktiebolaget Svenska Amerika Linien,* 390 U.S. 238, 243 (1966) (*Svenska*), and that it would consider four factors, among others, when deciding whether the agreements continued to meet the Svenska standards. These four factors are:

(1) the impact of the agreements on the rates and cargo shares of the parties in the subject trades;

(2) the impact of the agreements on overall rate stability and service in the trades;

(3) the utilization of intermodal authority; and

(4) the effect, if any, of overlapping conferences. (Order, p. 3).

The Record Developing Phase of the Proceeding

As noted above, the Commission initiated this formal investigation to permit the parties to develop a more recent record to enable the Commission to evaluate the various contentions made by proponents that the subject agreements were producing benefits and serving valid purposes and also to determine the impact of the agreements on the basis of actual experience with particular concern for specific evidence of rates and cargo shares, overall rate stability and service, utilization of intermodal authority, and the effect of overlapping conferences in the Panama trade area. In response to the Commission's wishes, the parties cooperated in an effort to develop an adequate record despite certain handicaps relating to the limited period of time in which the agreements have been operating under joint tariffs and the difficulty of assembling reliable trade data from unadjusted Census Bureau figures and actual carrier data. Notwithstanding these difficulties, the parties did accumulate additional evidence in accordance with procedures established at several informal prehearing conferences and in response to my own requests. The evidence of record furnished in this manner consists of the following items: (1) written, sworn testimony of Messrs. Robert E. Tapia of CCT and Kenneth J. Coleman of Pan Atlantic Lines and related answers of Mr. Tapia to Hearing Counsel's interrogatories, under cover letter dated March 1, 1982, from Mr. Donald J. Brunner to Hearing Counsel; (2) written, sworn testimony of Mr. Fran-

[4] By previous order of the Commission of November 6, 1981, approval of the subject agreements had been extended from November 10, 1981 to December 31, 1981. The Commission's Order of Investigation and Hearing and Pendente Lite Approval, which was served on December 23, 1981, extended approval *pendente lite* to prevent the lapse in approval which would otherwise have occurred.

cis J. O'Donnell of Sea-Land together with copies of the amended agreements, justification statements and data for the amended agreements submitted in 1978, a petition of October 1981 seeking expedited consideration of the agreements, a copy of the Commission's order of conditional approval of Agreement No. 10045-3, and statistical data for the first and second quarters of 1981, all under cover letter from Mr. Brunner to myself dated March 9, 1982; (3) written testimony given under penalty of perjury by Robert G. Adam, senior economist of the Commission's Office of Regulatory Policy and Planning, consisting of 51 pages with attached tables. These various materials, which have been treated as evidence of record by the parties in accordance with my tacit approval, are hereby admitted formally into evidence. Since neither party saw any need to cross-examine these witnesses, no trial-type hearing was conducted and the parties submitted simultaneous opening and reply briefs on May 21 and June 4, 1982, respectively.

Summary of the Evidence

The following section provides a summary of the evidence which, as mentioned, consists mainly of the written testimony of three officials of each proponent carrier, the rather detailed economic testimony of Mr. Adam, the Commission's economist, and numerous statistical data and tables relating to cargo carryings in the subject trades.

A. *Proponents' Services and Investments in the Trades*

1. CCT provides the following service as listed below by vessel name and TEU capacity. All vessels are RO/RO-type vessels:

Vessel	*TEU Capacity*	*Scheduling*
Lionheart	240	weekly-Miami to Guatemala and Honduras
Mar Caribe	112	every 10 days-Miami to Costa Rica, Panama
Coral Gables	120	weekly-New Orleans to Guatemala, Honduras
Sea Drake	110	every 10 days-New Orleans to Costa Rica, Panama

2. LINAPA provides a 9-day sailing between Miami, Florida, and Panama/Costa Rica, utilizing the *MV Costa Rica* which is a 148 TEU RO-RO vessel.

3. PAML offers a weekly service between Miami and Guatemala/Honduras/El Salvador, utilizing the *MV Central America,* a RO-RO vessel with a 14B TEU capacity. PAML offers a service on a 9-day

turn from New Orleans to Guatemala/Honduras/El Salvador, employing the *MV Pan Caribe,* a RO-RO vessel with a 60 TEU capacity.

4. Sea-Land serves the Gulf ports on a weekly basis, utilizing four vessels with TEU capacities varying between 569 and 630 TEU's connecting with feeder vessels at Kingston, Jamaica. Sea-Land serves the South Atlantic range with the vessel, *Seattle,* which has a 620 TEU capacity. This cargo is relayed at San Juan to Kingston, thence by feeder to the ultimate destination. Sea-Land has two feeder ships, the *ASD Hektor,* a 300 TEU vessel which serves Porto Cortes and Santo Tomas on a 7-day turn. The *MAR Tierra,* a 126 TEU vessel serves Porto Limon on a 7-day turn. All Sea-Land vessels are lift-on/lift-off.

5. The line haul vessels which have been listed for Sea-Land in the preceding interrogatory also serve the Puerto Rico trade, Caribbean Islands trade and Panama, in addition to serving North Atlantic ports.

6. CCT and Pan Atlantic have been established carriers in the Miami/Central America trade for over twenty years. Both have recently inaugurated their services from New Orleans to Central America, to Guatemala/Honduras/El Salvador in November 1980, and to Costa Rica/ Panama in May 1981.

7. Sea-Land has a worldwide transportation system and has been in the subject trade for the last five years. Sea-Land announced that its America's service has become a separate division (the other two divisions within Sea-Land are the Atlantic and Pacific).[5]

8. All proponents have increased their investment in the trade in the last three years. CCT's total new investment during this period (including vessels, terminal improvements, trailers, etc.) totals $61,427,000. Pan Atlantic's new investment during that period was approximately $40,000,000, including two new ships, new refrigerated equipment and expanded terminal facilities at Miami and New Orleans. Sea-Land's specific investment to the trade is difficult to identify because Sea-Land serves the foreign countries from the North Atlantic (not within the scope of Agreements Nos. 10045 and 10105), the West Coast (minibridge) as well as foreign origins. However, Sea-Land has increased its equipment pool and terminal facilities in the foreign countries encompassed within the agreements. Also, Sea-Land has recently expanded its service to include Port Everglades (Miami).

B. *Competition*

9. The record contains various estimates of the large number of carriers competing in the subject trades, ranging from 14 to 20. Thus,

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[5] This announcement was made after the record closed. Hence, as proponents suggest it is outside the record. However, Commission Rule 226, 46 CFR 502.226, permits me to take official notice of such matters of widespread knowledge which require no formal proof. Since Hearing Counsel have not disputed this proposed fact and it appears not necessary to provide formal proof of the public announcement, I will invoke Rule 226.

according to Mr. Adam, the Commission's staff had at one time found 14 carriers serving the trades in 1981 (Adam, p. 5). Pan Atlantic's witness Coleman identified 16 carriers competing in recent years with the members of the subject agreements (Coleman Interrogatory No. 25) including such carriers as Cass Line, Mayan, Chilean Line, Johnson Line, Nexos Line, and Bernuth Marine, in addition to better known national-flag lines. According to Mr. Coleman, furthermore, Pan Atlantic has faced competition from as many as ten lines which have refused invitations to join the subject agreements. Flomerca, the national flag line of Guatemala, had once been a member of Agreement No. 10105 (Guatemala/Honduras/El Salvador) but withdrew for reasons relating to its desire to maintain a 15 percent rate differential below the existing structure of the agreement members. Flomerca also enjoys a certain advantage over other lines serving Guatemala because Flomerca is exempt from a 6 percent Guatemalan Merchant Marine Tax. 10. In the agreement area covering Guatemala/Honduras/El Salvador, the primary nonagreement competition is presented by Flomerca Line, which, as noted, is the national flag carrier of Guatemala. In addition, government supported lines, namely, NAMUCAR, NANICA (Nicaragua national lines) and TRANS NAVE (Ecuadorian national line) compete for cargo between U.S. Atlantic, Gulf and all foreign ports encompassed within the agreements. Moreover, at Panama, there is direct competition with members of FMC Agreement No. 3868, as amended, which includes Sea-Land, U.S. Lines, Delta, Lykes and others.

11. Competition in the trade can best be characterized as "carriers who serve the trade on inducement or who are in and out of the trade in a relatively short period of time." Armasal and Uiterwyk Lines were, at one time, members of the agreements. However, the former went bankrupt and the latter discontinued its services to both trade areas presumably because of lack of profitability. Recently, Jeco Lines entered the trade, cut rates and existed within three months.

12. The agreement lines offer the only consistent regular containerized service in the trades and carry or have carried a majority of the liner cargo. Based upon *Import Bulletin* data, the agreement lines are consistently among the top four liner carriers in each country (except Panama). The fourth carrier is the aforementioned Flomerca which offers a breakbulk service limited to Gulf ports.

C. *Unfavorable Economic and Political Conditions in Central America*

13. Mr. Adam has prepared a detailed study of the economic conditions of the five Central American republics served by the parties to the two agreements. He paints a rather gloomy picture of the prevailing conditions. Generally, all of Latin America registered its lowest rate of economic growth in 1981 for the past 35 years, its gross domestic product (GDP) rising by a mere 1.2 percent in 1981. During 1981 a

decline in the rate of real economic growth was experienced in all of the Central American countries where most of them suffered either a continuation or an aggravation of political tensions and social conflicts with resulting acceleration of economic uncertainty. Deterioration was most severe in El Salvador where GDP declined by 9 percent for the second straight year. Economic activity also declined in Costa Rica by 1.5 percent and reached a virtual standstill in Guatemala and Honduras. As a result, per capita GDP was down in all four nations in 1981. Per capita GDP also declined in Panama to 2.1 percent in 1981 although the growth rate in Panama had reached 4.5 percent in 1981, above the regional average for Latin America. Inflation continued to be a problem in Central America as well, although the average rate of increase of consumer prices in Central American and Caribbean nations declined slightly to 15.5 percent in 1981 from 17 percent in the prior year. Among the five nations covered by the subject agreements, in 1981, inflation increased dramatically in Costa Rica (60 percent), while increasing to 10.2 percent in Guatemala, 10 percent in Honduras, 13.3 percent in El Salvador, and under 6 percent in Panama.

14. The economies of most of the countries of the Caribbean basin have been adversely affected by depressed prices of the goods they export and a rise in costs of goods they import. This has resulted in severe shortages of foreign exchange. Moreover, Latin America is facing one of its most critical periods since the war. The most optimistic forecasts expect the current recession to last for the major part of 1983 with moderate recovery only beginning by the end of 1982. The down turn in Central America is furthermore exacerbated by political tension and organized terrorism throughout much of the region. Because of shortages of foreign exchange, the governments of Costa Rica, Guatemala, Honduras, Nicaragua, and El Salvador have imposed import controls and many exporters to these nations now require confirmed letters of credit before shipping. Panama, with political stability and no exchange controls, is an exception. The outlook in that country is for continued growth in 1982.

15. Mr. Adam's detailed study of the economies of the five Central American nations covered by the subject agreements is similarly gloomy. Thus, Costa Rica, which has traditionally been the most prosperous nation, is now undergoing a severe financial crisis. High prices for oil imports, reduced coffee prices, years of large deficits in the public sector, and external borrowing have combined to bring the economy of Costa Rica to a standstill. Foreign exchange reserves have declined, foreign debt is significant, and inflation is steep. Exports and imports from and to Costa Rica have generally been in decline as a result of these negative factors. Panama, unlike the other four countries studied, is apparently the only bright spot. Its economy grew by 4.5 percent in terms of real GDP in 1981 and prospects for continued real

growth are good. Unlike other economies in the region, Panama is primarily a service-oriented economy and the Canal, banking, tourism, and the Colon Free Zone account for 60 percent of GDP. Construction projects also are important aids to the economy. Based on 1981 data, U.S. exports to Panama are rising by only 21 percent while imports from Panama are declining by about 10 percent. Guatemala's economy is on the brink of stagnation. Economic growth declined to only 1 percent in terms of real GDP in 1981 because of sharp drops in commodity prices, deterioration of the regional Central American Common Market, and internal violence. Inflation began to rise in 1981 and agricultural exports fell largely due to lower world coffee prices and pesticide-contaminated beef. U.S. exports to Guatemala were up by only 1 percent in 1981 over the prior year while imports from that nation were declining at a rate of 20 percent in 1981. Honduras has been relatively stable politically but it also suffers from capital flight and balance of payment deficits, falling prices of exports, high cost of oil, investor fears of regional instability, and a dismal real GDP growth rate of 0.5 percent in 1981. Honduras remains the poorest and least sophisticated country in the region and is not as well equipped as most of its neighbors to sustain an economic crisis. Based on 1981 data, U.S. exports to Honduras were off by 7.9 percent while imports were rising by 3.3 percent. The near-term prospects for Honduras are not bright with export growth stagnant and shortages of capital for investment combined with political uncertainties. The economy of El Salvador has been deteriorating with unemployment up to 25 percent or more, decline in GDP, and a need for foreign assistance to repair damaged highways, bridges, and power equipment caused by the current upheaval in El Salvador. Output dropped by almost 10 percent in 1981 while per capita GDP was also down by 12 percent in 1981. The economy of El Salvador may fall by an additional 5 to 7 percent in 1982 without the infusion of massive foreign assistance. Capital outflows have been a continuing problem. Exports fell in 1981 while imports declined in volume but not in value because of increased cost of oil, leaving the country with a trade deficit of $110 million in 1981. Based on 1981 data, U.S. exports to El Salvador rose by nearly 13 percent over 1980 while imports plunged nearly 40 percent.

16. The countries of Central America are small and except for Costa Rica, relatively underdeveloped. The region as a whole has been projected to grow rapidly in the future in terms of trade and income with variances among individual countries. However, this optimistic forecast may now be completely obsolete because of the current political turmoil in the region. The trade of most of the countries in Central America is forecast to increase more rapidly than their growth rates. However, the total volume of trade in the region is not large, total regional exports and imports, exclusive of Mexico, expected to reach

only 14 million and 33 million tons by 1980. According to Mr. Adam (Table 2 to his testimony) the total volume of trade for the five subject countries for the year 1981, as annualized on the basis of the first six months' results, amounts to only something in the neighborhood of 1 million short tons.

17. The transportation problems of these countries are as diverse as their economies. Many of the Central American countries have poor inland transportation and port systems with varied requirements and government responses to these conditions. Puerto Barrios, in Guatemala, has very limited breakbulk handling equipment and inadequate inland transportation. Port congestion is expected to become even worse. However, plans to construct a modern port adjacent to Barrios have been announced. Port congestion at Puntarenas, Limon, and possibly Golfito, in Costa Rica has led to a rerouting of cargoes destined for that country via the port of Balboa in Panama. There is an indication that two projects are underway to cope with this problem, but their status is uncertain given the current negative outlook for the Costa Rican economy. According to a MarAd report, a new container terminal is planned for Acajutla in El Salvador. Plans there are to improve the current inadequate rail system to the port prior to the completion of the container terminal. Honduras has been expanding Puerto Castilla to cope with increased agricultural and lumber exports and Panama may invest up to $200 million in container port development at both ends of the Canal Zone. The latter project is designed to spur private economic activity in the Canal Zone when it is incorporated into Panama.

D. *Proponents' Carryings in the Trade and Overall Trade Developments*

As mentioned, a main purpose of this investigation was to give the parties an opportunity to develop more recent evidence to show proponents' actual experience under the agreements as amended by the Commission's orders of approval, effective November 10, 1980. Since the parties to the agreements were required by the Commission's order to formulate new joint tariffs in place of their individual tariffs as one of the conditions of approval and since this task required several months to complete, resulting in the filing of the joint tariffs in February 1981, and since the proponents were required to refile for approval in July of 1981 under the Commission's regulations, proponents' experience under the approved agreements, as amended, was rather limited at the time the Commission considered whether to extend its approval beyond the November 1981 expiration date established by the Commission in its original orders of approval. Since this proceeding commenced on December 23, 1981, the parties have been diligently assembling updated data in order to bring the proceeding to a reasonably prompt conclusion. However, the record developed still does not cover a full year's actual results under the new tariffs, one reason being that Census data which Mr. Adam used to prepare his trade analyses were not available for the full year 1981. Instead, as he explained, Census provided data covering only the first six months of 1981 and when necessary to show yearly comparisons, Mr. Adam was forced to double, *i.e.*, annualize these data. (See Adam's testimony, p. 25, footnotes 13 and 14.) Therefore, to some extent, it is still somewhat premature to make trade analyses which will reflect actual experience under the amended agreements as they have been operating under the conditions required by the Commission and under the new joint tariffs. (*Id.*, p. 25 n. 14). Moreover, as Mr. Adam indicates and as proponents have noted, Census data for the first six months of 1981, the latest data available at the time Mr. Adam prepared his testimony are "unadjusted" whereas previous year's Census data have been "adjusted" by the Commission's Office of Data Systems.[6] Notwithstanding the limited period of time for which data were available and the need to utilize Census data which are not precisely correlated to common carrier operations as they are understood by the Commission or possibly to the exact trade area covered within the port-and-point scope of the agreements, it appears that such data are the best available and in the absence of any superior source, one must work with them. Furthermore, although perhaps not as precise as one would ideally wish, they can be used to seek trends in the subject trades and to make approximations of the experience of the proponents in these trades. In other cases the Commission has recognized that mathematical precision is not possible or that indirect evidence is all that is available. This occurs frequently in so-called rate cases but even in section 15 cases. *See, e.g., United States v. F.M.C.*, 655 F.2d 247, 253-254 (D.C. Cir. 1980); *Agreement No. 57-96,* 19 F.M.C. 291, 303 (1976); *Svenska,* cited above, 390 U.S. at 249. In some instances, furthermore, data are derived from carrier proponents' own records and when used to determine trends merely from these data, the problems associated with Census data would obviously not apply.

18. Quarterly reports covering the first half of 1981, submitted by proponents in response to the request of one of the Commissioners who voted to approve the agreements (Teige), show that cargo movements in tonnage terms under Agreement No. 10105 (Guatemala/Honduras/El Salvador) exceed those under Agreement No. 10045 (Panama/Costa

[6] Although there has been no oral examination of Mr. Adam which would explain the meaning of the "adjustments," it is well known that Census data are not precisely correlated to common carrier cargo within the meaning of the Shipping Act. Some filtering out of irrelevant cargo might therefore be necessary. In this case, moreover, Census data reflect cargo moving by countries of origin and destination (Adams Table No. 2, footnote 1). Since this case involves agreements covering only Caribbean ports, some cargo moving via Pacific ports to and from the five subject countries will be picked up in the Census data and, accordingly, the data will be gross figures. However, since the carrier members of the agreements have inland intermodal authority in the Central American countries, the Census data will reflect the total pool of cargo for which the agreement members can compete. (See Proponents' Opening Brief, p. 8).

Rica) by a ratio of 2.6 to 1 (201,616 tons vs. 77,548 tons). The fact that Sea-Land does not serve Panama under Agreement No. 10045 accounts for some of this differential. Moreover, the unbalanced nature of the trades is apparent with the combined southbound cargo of Agreements 10045 and 10105 exceeding the northbound cargo by a ratio of 3.3 to 1 (214,211 tons vs. 64,953 tons), Miami being the principal port in the southbound trades under both agreements. As noted above, overall, the trade between the U.S. South Atlantic and Gulf and the countries involved is fairly small.

19. Data furnished by proponents covering the full year 1981 as well as 1980 and 1979 indicate a slight growth from 1979 to 1980 with a rather substantial drop in 1981 except for El Salvador which experienced a slight recovery in 1981 which may be attributable to the political situation there in that year. The following table reflects proponents' predominant southbound carriage for the past three years. Sea-Land is stated in TEU's, Pan Atlantic and CCT are stated in tons:

	Guatemala	*El Salvador*	*Honduras*	*Costa Rica*	*Panama*
		1981			
CCT (Tons)	38,267	14,853	25,570	26,521	49,307
Pan Atlantic (Tons)	20,000	18,404	10,606	20,296	22,178
Sea-Land (TEU)	1,806	515	1,230	1,888	----
		1980			
CCT (Tons)	39,733	13,491	34,369	39,912	53,735
Pan Atlantic (Tons)	24,440	10,060	14,805	27,816	27,644
Sea-Land (TEU)	3,315	280	1,554	2,214	----
		1979			
CCT (Tons)	43,356	22,750	36,488	36,065	45,310
Pan Atlantic (Tons)	18,084	18,900	12,295	21,909	31,466
Sea-Land (TEU)	1,608	350	1,677	2,349	----

Overview of the Trade 1979-1981

The following section represents Mr. Adam's trade analyses for the years 1979 through 1981 derived from Census data and therefore subject to the qualifications discussed above concerning unadjusted data for 1981, annualization of 1981 data where appropriate, and use of trade and liner definitions which are not identical to those terms as used by the Commission. Nevertheless Mr. Adam's studies do show trends which are sometimes corroborated by proponents' own data and since they all derive from the same common cource, they are internally comparable. Therefore they do provide an approximation of the trade situation of some help to the Commission in evaluating any impact of the agreements, albeit tentative.

20. In the subject trades total U.S. liner exports, in tonnage terms, were up slightly from 1.3 million tons in 1979 to 1.4 million tons in 1980 before dropping off sharply to less than 1.0 million tons in 1981. During this period, the percentage share held by the rate agreement member carriers of the total export tonnage to the five countries, as a group, also rose significantly from 37 percent in 1979 to 49 percent in 1980 before dropping off again to 39 percent last year. The percentage shares of the member carriers of total exports broken down by Agreements 10045 and 10105, respectively, tend to follow the same pattern indicated for the overall export trade; rising from 48 and 32 percent shares of the tonnage in 1979, to 56 and 46 percent in 1980, and down again to 34 and 42 percent shares by 1981. It is interesting to note that the share of the member carriers of U.S. tonnage exports to Panama in 1981 amounts to only 24 percent—well below their shares of the other countries' trades that year. The member carriers' share of U.S. exports to El Salvador did not follow the general trend of dropping off in 1981. The member carriers' share of U.S. exports to that nation rose steadily from 49 percent in 1979 to 55 percent in 1980 and an impressive 61 percent in 1981.

21. U.S. liner exports, in terms of value, rose from $1.4 billion in 1979 to $1.8 billion in 1980 before falling off sharply to $926 million last year. The percentage share of the member carriers of total U.S. exports to the group of countries, by value, appears to have followed the same path indicated for total tonnage movements except that the shares for the three years are very much larger; 68 percent in 1979, 75 percent in 1980, and slightly off to a 70 percent share in 1981. The percentage shares of the member carriers of total exports, by value, broken down by the respective Agreements 10045 and 10105, rise from 73 and 65 percent in 1979 to 76 and 74 percent shares in 1980. By 1981. the member carriers' share of 10045 had declined to 61 percent but continued to rise to a 77 percent share for Agreement 10105. The member carrier percentage shares of U.S. exports to the individual countries presents somewhat differing trends. Their shares of dollar exports to Panama and Costa Rica rise from 68 and 79 percent in 1979 to 71 and 82 percent in 1980 before dropping off again in 1981 to levels of 54 percent and 74 percent, respectively. This follows the general up and down trend for the overall export trade. However, the member carriers' percentage shares of the dollar export trade to Guatemala, Honduras, and El Salvador rise steadily from a 60-71 percent range in 1979 to 71-77 percent in 1980 and to a very impressive range of 74-83 percent in 1981.

22. The inbound side of the trade presents a very different picture. Total U.S. liner imports in tonnage terms are much smaller than total U.S. liner exports to the group of five countries. Furthermore, total imports decline sharply from a level of 559-568,000 tons in 1979-80 to only 275,000 tons in 1981. During this same period, the rate agreement member carriers' share of total import tonnage declined from 68 percent in 1979 to 66 percent in 1980 and only 52 percent in 1981. The member carriers' share of tonnage imports under Agreement 10045 follows the general trend in the export trade. Here, their shares rise from 69 percent in 1979 to 79 percent in 1980 before dropping off to 65 percent last year. These same carriers' share of U.S. imports under Agreement 10105, in terms of tonnage, follows the general downward trend for their share of all U.S. imports, dropping from 68 percent in 1979 to 61 percent in 1980, and only 49 percent by 1981. The similar trends indicated for the member carriers' shares of total U.S. tonnage imports, and those under Agreement 10105, may be explained by the fact that the cargo movements under this agreement tend to be two to four times as large as those under Agreement 10045. The inbound trade from Panama exhibits a different pattern from the up and down trend for the member carriers' share under Agreement 10045. Their share of total tonnage imports from Panama rises sharply upward from 27 percent in 1979 to 44 percent in 1980 and to 66 percent in 1981. However, the tonnage involved in the Panama trade is quite small compared with that moving inbound from Costa Rica--the other country under Agreement 10045. In the instance of Agreement 10105, the member carriers' percentage shares of the inbound tonnage from all three countries--Guatemala, Honduras, and El Salvador--appear to be dropping off sharply in 1981 from high levels in the preceding two years. Their share of the El Salvador tonnage trade inbound actually falls to only 27 percent in 1981 from a level of 65 percent in 1979.

23. Total U.S. liner imports, in value terms, are much smaller than U.S. dollar liner exports to the group of countries. Moreover, total imports, by value drop off dramatically from a level of about $1 billion in 1979-80 to only $414 million in 1981. The percentage shares of the member carriers of total imports, in value terms, actually remained fairly stable in a 65-68 percentage range for all three years, 1979-81. This of course, is a very different trend from that experienced in the tonnage trade, inbound, where the member carriers' share dropped from 68-52 percent between 1979 and 1981. The share of the member carriers of dollar imports under Agreement 10045 rises from 79 percent in 1979 to 84 percent in 1980 and remains stable at 85 percent in 1981. These carriers' share of dollar imports under Agreement 10105 does not follow the same downward trend as their share of tonnage imports under this agreement, but remains at a very stable level of 60-62 percent in 1979-81. Again, the similar trends for member carrier shares

of total U.S. dollar imports, and those under Agreement 10105, may be explained by the fact that cargo movements, in value terms, under this agreement are also two to four times as large as those under Agreement 10045. The inbound trade, by value, from the individual countries does not present a very different trend from that for the member carrier shares of each of the agreements. The carriers' shares of dollar imports from Panama and Costa Rica basically follow the stable trend indicated for Agreement 10045, remaining at very high levels—89 and 83 percent—in 1981. The percentage share of the member carriers of dollar imports from Guatemala, under 10105, remains at a stable level of 65-68 percent for the entire period, 1979-81. Their share of imports from Honduras, in value terms, rose from 58 percent in 1979 to 66 percent in 1980 before dropping off to 63 percent last year. In the case of El Salvador, the members' share of dollar imports declined sharply from 64 to 37 percent between 1979 to 1981.

Major Commodities in the Liner Trade [7]

24. In the inbound side of the trade, it is apparent that the major commodities, as a group, moving under Agreements 10045 and 10105 are declining in both value and volume terms. The totals for 1981 are off by 59-64 percent from the preceding year. During these two years, the shares of the major import commodities held by the member carriers under these respective agreements are also declining in tonnage terms; down from 78 to 60 percent for 10045 in 1981 and from 56 to 42 percent for 10105 last year. On the other hand, the members' shares of this import cargo in value terms rose sharply from 66 percent in 1980 to 85 percent in 1981 under 10045 but appear to have stabilized in the past two years at levels of 57-59 percent for 10105.

25. The principal liner commodites ranked in tonnage terms moving inbound under both agreements during 1979-81 consist of beef, bananas, and coffee. The member carriers' shares of coffee imports are rising rapidly under Agreement 10045 in value and volume terms. Their shares of beef imports under 10045 appear to have stabilized at high levels, while their shares of total banana imports have dropped dramatically from levels of 69 and 78 percent to 20 and 22 percent, in value and volume terms, between 1980 and 1981. The members' shares of total beef imports under 10045, in value and volume terms, stabilized at very significant 84 percent level in 1981—the same levels for 1979. Their shares of total coffee imports under 10045 have risen from 67-69 percent to an impressive 94 percent between 1979 and 1981 in both value and volume terms. The shares of the member carriers of beef and coffee imports under Agreement 10105 are either rising, or have stabi-

[7] For purposes of comparison with prior years, 1979-80, the totals for the major commodities moving under each agreement were doubled to obtain approximate annual trends.

lized at reasonably high levels, while their percentage shares of total banana imports are down from 100 percent of the value and volume in 1979 to 13 and 23, respectively, in 1981. These carriers' shares of beef imports under 10105, by value and volume, appear to have stabilized in a range of 86-94 percent for the entire period, 1979-81, while their share of total coffee imports under this agreement are rising at a steady pace from around 47 percent in 1979 to 55 percent last year in both value and volume terms.

26. The combined totals for the major import commodities moving under each of the agreements indicate the aforementioned declines, in value as well as volume terms, of approximately 60 percent in 1981 compared with the preceding year. The share of the member carriers for the combined agreements has also declined from 70 to 47 percent of the tonnage during 1979-81. However, based on value, it has stabilized at a level of about 64 percent of total imports of the major commodities for the same years.

27. It is obvious that the combined totals for the major export commodities moving under both agreements were declining in 1981—by 13 percent of the tonnage and 36 percent of the value—in comparison with the prior year. The composite share of the member carriers of these commodities—moving under 10045 and 10105—was also down to 19 percent by volume in 1981 from 22 percent the preceding year. In value terms, however, their share of the major commodities for the combined agreements was actually rising steadily from 23 percent in 1979 to 39 percent in 1980 and 45 percent last year. The member carriers' share of the export commodities moving under the agreements was down slightly from the 1980 levels, in volume terms, to 14 percent for 10045 and 22 percent for 10105 in 1981. This is somewhat in contrast to the trend on the inbound side where the much larger member shares of the import tonnage under these agreements were down very sharply in 1981. However, in value terms, the shares of the members of the principal commodity exports moving under the individual agreements were rising at a steady pace between 1979 and 1981. Their shares rose from 27 to 35 percent under 10045 and from 22 to a very impressive 52 percent of the value of major commodity exports under 10105 between those years.

28. The principal outbound liner commodities in both agreement trades include thermoplastic resins, lubricating oils and greases, animal feed, Kraft paper and paperboard, inorganic compounds, wheat and meslin, and iron and steel products. The latter two commodities, while important in these trades, reflect only minor shares held by the member carriers. Resins was an important commodity to the members in both agreement trades in 1979-81. The members' shares of total movements of resins under 10045, in value and volume terms, were up from 46-47 percent to 60-64 percent between 1979-81. Their shares of value and

volume movements of this commodity under 10105 were up to a remarkable 95 percent in 1981 from 44 percent of the volume and 49 percent of the value of shipments in 1979. The members' share of total movements of lubricating oils and greases under these agreements also were rising significantly from about 15 percent of the value and volume under 10045 in 1979 to about 36 percent by 1981. Their shares of this important commodity were even more impressive under 10105 rising from 19 to 62 percent in volume terms between 1979 and 1981 and from 21 to 71 percent of the value during this same period. The shares of the members of movements of inorganic compounds under 10045 were also impressive rising from 18 to 38 percent of the tonnage and 29 to 41 percent of the value from 1979 to 1981. Under 10105, the members' share of movements of inorganic compounds also increased from 25 to 30 percent of the volume during 1979-81—and the tonnage involved was much larger than that under 10045. Their share of the value movements of these chemicals under 10105 increased from 26 to 49 percent between these two years. Another major commodity where the member registered rising shares was Kraft paper and paperboard. Under 10045, the members' shares of this commodity rose from less than one percent in volume terms and 4 percent, by value, in 1979 to 5 and 11 percent shares of a rapidly declining trade for this item by 1981. The situation was much the same under 10105 where the members' shares increased moderately from 6 percent of the tonnage and value trades for Kraft paper and paperboard in 1979 to 12 percent by volume and 20 percent of the value of these shipments in 1981. However, total shipments of paper and paperboard under 10105 were down by more than 80 percent in 1981 compared with the prior year. Finally, movements of animal feed under 10045 offered another instance where the members' value and volume shares were rising dramatically from 4 percent in 1979 to 39 percent of the tonnage and 52 percent of the dollar value in 1981 at a time when total exports of this commodity were declining by almost 90 percent. Total movements of animal feed under 10105 also declined in 1981 compared to shipments that moved in 1979 leaving members' shares of 14 percent of the volume and 20 percent of the value last year—just about where their shares stood in 1979.

Rate History Under the Agreements

29. There is some indication, according to Sea-Land, that overall rate levels in the subject trades were depressed prior to the time that the agreements were expanded in November 1980. Moreover, on a few major commodities, namely, waste paper, paperboard, lubricating oils and products, and resins, Sea-Land still believes rates to be depressed. (Adam, p. 50). Sea-Land has also expressed the opinion that operations to and from Guatemala, Honduras, and El Salvador are not profitable

and that the Costa Rican trade is only marginally profitable. However, there is no evidence of complaints from shippers about rate levels, rate instability, or service. Proponents Pan Atlantic and CCT, while generally agreeing with Sea-Land, do not maintain that overall rate levels are depressed although acknowledging that a few rates are depressed on relief cargo, synthetic resins, and paper products because of competition in the trades. Moreover, according to the Commission's staff, rates on major moving commodities remained firm through the second quarter of 1981. Since approval of the expanded agreements, there have been two general rate increases under Agreement No. 10045 (Panama/Costa Rica) and three under Agreement No. 10105, counting a recent general rate increase of 8 percent in February 1982. The second of these increases under the agreements, however, consisted of the incorporation of a bunker surcharge in the base rates. There is no evidence that these rate increases have caused the member lines to lose cargo. Moreover, according to Pan Atlantic, if cargo would be lost because of any rate increase, the carrier would restudy the matter and re-evaluate the rate. (Answer to Interrogatory No. 22, attached to the Coleman/Tapia testimony).

Utilization of Intermodal Authority and the Effect of Overlapping Conferences

30. Because of peculiar problems relating to inadequate port facilities in Central America and the need for rapid inland movement, the natural flow of cargo is one of through inland movement and the joint tariffs reflect this situation. For example, El Salvador has no Caribbean port and all rates to that country are by necessity intermodal. The same is true also for rates to Guatemala City which is inland. There is no intermodal authority within the United States. There is no evidence in this record which undermines or contradicts the findings on which the Commission relied when granting intermodal authority in its orders of September 15, 1980, in which the Commission acknowledged the inadequacy of port facilities, shipper demand for an intermodal service, the establishment of inland customs facilities to expedite inland movement, the recognition of actual cargo flows, the enabling of proponents to compete with outside carriers offering through services, and the consistency of such intermodal service with proponents' ro-ro and containership services. (See *Conditional Approval of Agreement No. 10045-3,* cited above, 20 SRR at 440.)

31. There is no evidence in this record that Sea-Land is participating in two different agreements, namely, No. 10045 (Panama/Costa Rica) and No. 3868 (Atlantic and Gulf/Panama Conference). As a condition for approval of expanded Agreement No. 10045, proponents were instructed to amend their agreement to provide specifically that "Sea-Land Service, Inc. shall not participate in this Agreement with respect

to any ports in Central America within the scope of the Atlantic and Gulf/Panama Canal Zone, Colon and Panama City Conference (Agreement No. 3868) as long as it is a member of that Conference." (*Conditional Approval,* cited above, 20 SRR at 442). The parties have complied with all of the Commission's conditions of approval and the evidence is that Sea-Land does not participate in the Panama section of Agreement No. 10045. (Tapia/Coleman testimony, p. 9). There is also no evidence that Sea-Land is participating in the Panama Conference in any way which affects its activities in Agreement No. 10045.

The Uniform Tariffs

32. As mentioned earlier, by order of the Commission when it approved the expanded agreements, the parties were supposed to file joint tariffs to replace what would otherwise be three individual tariffs. Such tariffs were prepared over nearly three months' time and were filed in February 1981. The tariffs have brought uniformity in the method of rate quotations. They publish rates on a weight or measurement basis from all South Atlantic and Gulf ports (except Miami). Before, rates were quoted in a wide variety of ways, e.g., by long or short tons, measurement tons, cubic feet, hundredweight, lumpsum, and various per trailer rates. Moreover, all port accessorial charges are identical (except for local wharfage charges in the Gulf) at U.S. and foreign ports. For example, the terminal service charge at Santo Tomas is the same regardless of whether the cargo originates in Jacksonville, Miami, or New Orleans. This was not the case before the expanded agreements were approved nor did shippers know that quoted rates were for the identical services. The benefits of a uniform tariff and the problems stemming from previous individual carrier tariffs were acknowledged by the Commission when it approved the expanded agreements. (*Conditional Approval,* cited above, 20 SRR at 439).

DISCUSSION AND CONCLUSIONS

As mentioned earlier, the Commission instituted this proceeding in order to determine whether the two subject agreements which the Commission had conditionally approved on September 15, 1980, continue to merit approval under the standards enunciated by the Supreme Court in *F.M.C. v. Aktiebolaget Svenska America Linien,* 390 U.S. 238, 243 (1968) (*Svenska*). The Commission furthermore stated that in making its determination as to continued approvability it intended to consider, among other things, four specific factors, namely, the impact of the agreements on rates and cargo shares of the parties, the impact of the agreements on overall rate stability and service in the trades, the utilization of intermodal authority, and the effect, if any, of overlapping conferences. Under the *Svenska* test, the Commission weighs and balances the evidence to determine whether an agreement is required by a serious transportation need, is necessary to secure important public benefits, or will serve a valid regulatory purpose to offset the presumption that agreements which run counter to our national philosophy favoring free and open competition are contrary to the public interest. This test was enunciated by the Commission in two previous decisions [8] and met the approval of the Supreme Court and has been followed by the Commission with court approval ever since in this type of case. See, e.g., *F.M.C. et al. v. Pacific Maritime Association, et al.*, 435 U.S. 40, 53-54 (1978).

In applying the *Svenska* test, other decisions of the Commission and courts have established a number of corollary principles. Thus, it has been held that although proponents must bring forth evidence in support of justification under the *Svenska* test, the scope and depth of proof required for approval varies from case to case depending upon the degree of invasion of the antitrust laws. *Agreement No. 8760-5 - Modification of the West Coast United States & Canada/India, Pakistan, Burma & Ceylon Rate Agreement,* 17 F.M.C. 61, 62 (1973); *Agreement No. 57-96 - Pacific Westbound Conference Extension of Authority for Intermodal Services,* 19 F.M.C. 289, 300 (1975). The Commission has also held that an agreement representing an extension of existing authority rather than a totally new agreement would be held to a less stringent standard of proof. *Agreement No. 57-96,* cited above, 17 F.M.C. at 300. In determining how anticompetitive are the effects of any particular agreement, moreover, the court has recognized that the effects on competition may be more severe under an agreement that is not *per se* unreasonable under the antitrust laws, i.e., that anticompetitive effects are measured by actual impact on transportation, not by theoretical concepts of *per se* unreasonableness under antitrust laws. *See, United States Lines, Inc. v. Federal Maritime Commission,* 584 F.2d 519 (D.C. Cir. 1978). Finally, in a number of cases, the Commission has granted approval of agreements but has limited the term of approval to anything from one year to three or five years for various reasons, e.g., to ensure that a conference will utilize the new intermodal authority or to assess the impact of an agreement when data are not conclusive or there has been insufficient operating experience. See, e.g., the conditional orders of approval in this case, *Conditional Approval of Agreement No. 10045-3,* cited above, 20 SRR 437 (one-year term of approval to assess operating results); *Dart Containerline Ltd.,* 21 SRR 605, 609 (1982) (three-year approval of a joint service to give parties an opportunity to conduct operations and demonstrate need beyond that period); *Agreement No. 57-96,* cited above, 19 F.M.C. at 295 (18-month approval of intermodal authority to ensure that conference would utilize it); *Agreement No. 10140-8-Extension of U.S. Gulf/United Kingdom Rate Agree-*

[8] See *Mediterranean Pools Investigation, 9 F.M.C. 264 (1966); Investigation of Passanger Travel Agents,* 10 F.M.C. 7 (1966).

ment, 18 SRR 1563 (1979) reversed and remanded in *United States v. F.M.C.,* 15 SRR 851 (D.C. Cir. 1980) (48-hour rate agreement with intermodal carriers approved for an additional 18 months to facilitate monitoring of proponents' performance and reduce likelihood of abuses); *Atlantic & Gulf/East Coast of South America Conference,* 13 F.M.C. 121 (1969) (conference agreement to file intermodal tariffs approved for 18 months to ensure no blockage of intermodalism by conference); *Agreement No. 10116-1—Extension of Pooling Agreement in U.S. Pacific Coast/Japan Trades,* 21 F.M.C. 775, 782 (1979) (pooling agreement approved for one-year term and then extended *pendente lite* to allow proponents to furnish evidence of need, benefit, or purpose); *American-Flag Common Carrier Charter Agreement,* 21 SRR 189, 190 (1981) (cross-chartering cooperative arrangement approved for five years "to better evaluate their competitive effects in light of actual operating results and current trade conditions"); *Agreement Nos. DC-38 and DC-31-1 Association, Puerto Rico Trades - 1968,* 17 F.M.C. 251, 260-261 (1974) (agreement to establish uniform terminal and accessorial charges and self-policing approved for two-year period and then extended for one year to permit parties to accomplish its purposes); *Agreement No. 10286,* 21 F.M.C. 676 (1979) (pooling agreement approved for three years to develop information showing whether it is effective).

Contentions of the Parties

Both Hearing Counsel and proponents agree that the subject agreements deserve continued approval. The only issue between these parties concerns the recommended term of approval, proponents urging indefinite approval while Hearing Counsel urge a three-year period.

Proponents contend that the agreements provide a "safety-net of stability" in the trades which proponents require in view of outside competition from "controlled" and numerous other carriers who temporarily serve the trade. They argue that the agreements are the only stabilizing element in a politically and economically unstable trade area. They contend that they offer the only regular commercial services which have consistently served the trade over a number of years and that they face not only numerous competing lines but lines which are government-owned or "controlled" and which can compete on the basis of marginal pricing. Proponents point out that they have made substantial investments in the trade amounting to $100 million overall especially in regard to refrigerated equipment and storage facilities which are essential to the businesses of the shippers in this trade. They point out that there have been two general rate increases for one agreement and three for the other since the agreements were expanded to cover rising costs, demonstrating rate stability, that intermodal authority within Central American countries has been implemented, and that there is no effect from Sea-Land's membership in both Agreement No. 10045 and in No. 3868 (the Panama Conference). Because of the fact that trade data from the Census Bureau are not available beyond the first six months of 1981, proponents argue that one cannot determine the impact of the agreements on the cargo shares of the parties at this time. They cite various facts to show that the proponents continue to meet the *Svenska* test, namely, by maintaining continued service with substantial investments, by publishing uniform rates and rate quotations in a joint tariff, by carrying out the only self-policing system under Commission General Order 7 in the trade area, and by enabling Central American exporters to use their services to export major perishable commodities requiring refrigeration so as to earn hard currency which in turn generates American exports to the countries involved.

As to the term of approval, proponents take strong exception to Hearing Counsel's recommended term of three years. Proponents argue that they have demonstrated that their agreements meet the *Svenska* test and that they should not be modified by limiting their term of approval except upon substantial evidence or a substantial likelihood that some provision of their agreements will violate the Act. They point out that the Commission maintains continuing surveillance over all section 15 agreements and can easily institute an investigation seeking to disapprove the agreements under section 15 if they fail to meet the continuing standards of approvability, citing *Agreement No. 9025; Dockage Agreement,* 8 F.M.C. 381, 386 (1965). Proponents contend that there is no evidence of violation or likelihood of violation of the Act if the agreements are approved indefinitely and that the Commission should therefore not modify the agreements by limiting their term of approval.

Hearing Counsel agree that the agreements have shown that they furnish benefits and serve valid regulatory purposes under the *Svenska* standards. They cite the Commission's own findings in *Conditional Approval of Agreement No. 10045-3,* cited above, 20 SRR 437, in which the Commission itself found that the agreements provided benefits and served valid purposes in bringing uniformity to the proponents' tariffs and in enabling the parties to combat trade instability which had been demonstrated in the past and which existed potentially in the future. Hearing Counsel expressly acknowledge that "there still exist today the very conditions which prompted the Commission to conclude that the potential for future rate instability existed in the subject trades" and that "indeed, subsequent political and economic turmoil may have exacerbated them." (Opening Brief of Hearing Counsel, pp. 3-4). Hearing Counsel's only major dispute with proponents, as I have noted, concerns the propriety of granting indefinite approval. Hearing Counsel rely upon their expert staff witness's opinion that "pertinent analysis of market share data for the period 1979-1981 may be both inappropriate and premature at this time given the fact that the agreements have been in operation such a very short time." (*Id.*, page 4). Therefore, Hearing Counsel believe that the record as to the effects of the subject agreements is not fully informative and that only tentative conclusions can be drawn from the necessarily incomplete data available. The unavailability of more recent trade data plus the extraordinary political upheaval presently existing in Central America, in Hearing Counsel's opinion, also make it unusually difficult to forecast future conditions. In view of the necessarily limited scope of the record regarding operational data showing the parties' experience since their agreements were expanded in November 1980 and their joint tariffs filed in February 1981, Hearing Counsel believe that the agreements, which are otherwise shown to be beneficial, should continue to enjoy approval but only for a three-year period. Hearing Counsel state that "after expiration of that term, reassessment in light of then prevailing conditions may be appropriate." (*Id.*, p. 5). In response to proponents' contention that the Commission has no basis in fact or in law to limit approval of the agreements, Hearing Counsel cite previous Commission decisions favoring limited terms of approval if supporting evidence itself was limited or if parties to agreements had not had sufficient operational experience under their agreements to show that they were having beneficial effects.[9]

Hearing Counsel explain in greater detail in their reply brief why they believe that a limited three-year term of approval is warranted. Thus, although they fully acknowledge the political and economic instability in the trade region, the probability that certain rates on important commodities are depressed, that tariff uniformity may be beneficial, and that proponents may make their investment decisions on the basis of continued approval of their agreements, they argue strenuously that the present necessarily limited record and limited period of experience under the expanded agreements simply do not justify granting unlimited approval to an essentially rate-fixing agreement. After sufficient time has elapsed, which Hearing Counsel believe to be three years, the Commission will have available a record showing detailed operational experience under the expanded agreements so that a realistic evaluation of the beneficial effects of the agreements may be made. Moreover, at that time, the Commission can see if the present chaotic conditions have continued to disturb the trade. Hearing Counsel refer to the Commission decision in *Mediterranean Pool Investigation,* cited above, 9 F.M.C. at 290, in which the Commission paid particular attention to the question of the existence of adverse trade conditions which would justify approval of an agreement designed to alleviate such conditions and the need for the Commission to have available

[9] In support of this argument to limit the term of approval under such circumstances, Hearing Counsel cite *Canadian-American Working Arrangement et al.,* 16 SRR 733, 737-738 (1976), and *Agreement Nos. DC-38 and DC-38-1 Association, Puerto Rico Trades - 1968,* cited above, 17 F.M.C. 251.

adequate information or data upon which to base an intelligent judgment as to probable future impact of the particular agreement.

What the Term of Approval Should Be

There is no question that the subject agreements deserve continued approval. There is nothing in the record developed in this proceeding which detracts from the findings of the Commission in *Conditional Approval of Agreement No. 10045-3,* cited above, 20 SRR 437, when the Commission approved both expanded agreements, with conditions, for a one-year term, effective November 10, 1980. Thus, there still is a history of past rate instability, which although it may have subsided, is still quite able to revive in view of the very substantial competition offered by 16 or so carriers who are not parties to the agreements. The Commission's conclusions in approving the expanded agreements that they "should have a stabilizing effect" and that the agreements represent "a manifestation" of a measure designed to prevent or correct rate instability, a legitimate Shipping Act objective (20 SRR at 439), are still valid today, although the limited record cannot conclusively show that such beneficial effects have resulted in view of the limited operating experience since approval of the expanded agreements. The Commission had also concluded that uniform tariffs would be beneficial but was not convinced that the three-party agreements would solve the problem of multiple rate quotations and methods trade-wide because of the presence of so many outside carriers. (20 SRR at 439). This statement is still true but since the joint tariffs have only been filed in February 1981 and operational data from Census runs to only June 1981, it may be premature to conclude that the agreements will never succeed in attracting additional members or in encouraging outside carriers to publish their own uniform methods of quoting rates and services. This record shows further that the additional benefits and purposes which the Commission found would be produced and served as a result of the expanded agreements, namely, the utilization of needed intermodal inland service within Central America to alleviate the congested port problems there and to meet the needs of Central American shippers for fast-flowing containerized services (20 SRR at 440) are still present a little over one year after approval of the expanded agreements. Because the agreements were expanded from two to three parties with the addition of Sea-Land in November 1980, furthermore, they subscribed to the fully developed self-policing system mandated by the Commission's General Order 7, 46 CFR 528, and have employed a neutral body known as The Adherence Group (T.A.G.) to ensure that the parties adhere to clean practices. This is the only such system in the trades and, in Sea-Land's opinion, has caused a decline in the number of allegations of malpractices.[10] Thus, in addition to the previous benefits found by the Commission, the addition of a full self-policing system must be counted as an important public benefit even if the system applies only to the three carriers who are members of the two agreements. This benefit can be added to the benefits flowing from the new joint tariff and the implementation of inland intermodal authority in the Central American republics which occurred after the expanded agreements were approved.

Having noted that the previous benefits found by the Commission are still present and that several new benefits have followed approval of the expanded agreements, I now address the question of whether there is any evidence in the present record relating to the four specific factors set forth in the Commission's Order of Investigation (p. 3) which would detract from the previous findings that the agreements as expanded are producing benefits and serving valid regulatory purposes. As mentioned above, the Commission wished to consider these four factors together with other evidence when determining whether to grant the agreements continued approval. I find nothing in the present record which would warrant a finding that these benefits and purposes are being offset by harmful consequences.

The four factors deal with the effects of the agreements following approval in November 1980, specifically, on rates and cargo shares, overall rate stability and service, utilization of intermodal authority, and on the existence of an apparently overlapping conference in the Panama trade of which Sea-Land is a member. The latter two factors do not appear on this record to cause any concern whatsoever. Following approval of the expanded agreements, joint tariffs were filed in February 1981 which implement inland intermodal authority within the Central American republics. Thus, there are rates to or from Guatemala City and El Salvador, among other points, which are either inland or have no Caribbean ports, thus requiring inland transportation. Approval of the agreements has therefore in no way stifled the development of the inland services which shippers need and which the Commission found to be warranted. (20 SRR at 440). As to the last factor, *i.e.*, the effect of Sea-land's membership in both Agreement No. 10045 (Panama/Costa Rica) and in Agreement No. 3868 (Panama Confer-

[10] There is no direct evidence that malpractices among the three parties have been rampant, only evidence that allegations have been made and references sent to T.A.G. for appropriate action. However, in view of the substantial volume of outside competition and the declining cargo base and bad year in 1981, the basic elements conducive to malpractices are present. The court and the Commission have recognized that direct evidence of malpractices may not always be available but evidence of allegations combined with underlying trade problems conducive to malpractices may be substantial evidence justifying findings of malpractices which agreements may be approved to correct. See *United States v. F.M.C.*, 15 SRR 927, 934-935 (D.C. Cir. 1980), affirming *Agreement No. 10286, Italy-U.S.A. North Atlantic Pool Agreement*, 21 F.M.C. 676, 679 (1979) (pooling agreement approved for three years to combat malpractices shown by hearsay evidence and evidence of underlying overtonnaging).

ence), this record shows no overlap whatsoever because Sea-Land does not participate in the Panama section of Agreement No. 10045, a previous condition of approval which Sea-Land has met. Nor is there any evidence that Sea-Land's participation in the Panama Conference has any effect on Agreement No. 10045. This leaves the question of the post-approval effects of the expanded agreements on rates, cargo shares, overall rate stability and service. Although the record could not be developed with recent data so as to furnish conclusive answers, the data, limited as they are, and other evidence of record do provide some insights and provide no basis for disapproval of the agreements.

As noted previously, though some rates on certain commodities are considered depressed because of substantial outside competition, there is no evidence of present rate instability or complaints from shippers about rates or services. Rates remained firm at least through the first half of 1981. Furthermore, in the face of all of this outside competition, the parties have been able to institute two general rate increases under Agreement No. 10045 and three under No. 10105 to cover rising costs, the second of these increases, however, merely incorporating a previous fuel surcharge into the base rate structure. There is no evidence of specific losses of cargo to outside competitors because of these general increases but there is evidence that in the event any loss might occur, the particular rate will be re-evaluated. As to effects on service, approval of the expanded agreements has not resulted in curtailment of service. On the contrary, if anything, it has led to uniform intermodal services among the three parties as published in their joint tariffs and has done nothing to encourage the parties to discontinue their investments in the subject trades, which disapproval may do. It is true that the agreements comprise only three carriers out of 20 or so that come and go in these trades. Therefore one cannot expect that the expanded agreements will promptly cure any diaparate rate structures that may exist in the trades. (Cf. Commissioner Teige's concurring opinion in *Conditional Approval of Agreement No. 10045-3,* cited above, 20 SRR at 442 and Commissioner Day's dissent, 20 SRR at 444.) However, as expanded and modified by the Commission, the agreements have led to uniformity in method of rate quotation among the three carriers enjoying significant shares of the carryings in the trade and may, by example, have beneficial effects on outside carriers, possibly even to the extent of persuading them to join the agreements. In any event the failure of the expanded agreements to attract new member carriers or to completely eradicate all differing rate structures published by 16 or so outside carriers does not detract from the other benefits these agreements have produced since approval in November 1980, e.g., the uniform tariff, self-policing system, and uniform intermodal services. Moreover, as more fully discussed below, the experience of the parties under the expanded agreements and under their February 1981 joint tariffs has not been sufficient, in light of the limited trade data available, to come to firm conclusions even if there are at present no signs in this record that outside carriers will be joining the agreements in the near future.[11]

The most difficult question to answer on this record is what has been the effect of the agreements on cargo shares of the parties in the subject trades. There are two reasons for this difficulty. First, the agreements, as modified by the Commission, were approved in November 1980 and the joint tariffs under which the parties were required to operate as one of the conditions of approval were not filed until February 1981. Second, although the agreements have operated under the new tariffs only for over a year now, data showing cargo carryings in the trade were not available from the Census Bureau beyond June 1981, and this data, as noted before, are unadjusted to correlate with Shipping Act common carrier terms. Hence, the record contains only about four months actual historical data covering the life of the new joint tariffs and a little over one half of the previous one-year term of approval granted by the Commission to the expanded agreements, effective November 10, 1980. It is for this reason that Hearing Counsel argue that a firm, conclusive answer to the question as to how the expanded agreements have affected cargo shares cannot be given at this time and, as noted above, why Mr. Adam, the Commission's economist, believes that "any pertinent analysis of market share data for the period 1979-81 may be both inappropriate and premature at this time. . . ." (Adam's testimony, p. 25 n. 14). However, although it is extremely difficult to discern trends after the approval of the expanded agreements, there are some tentative observations that can be made. Thus, it appears that 1981 was a bad year showing a decline in overall trade levels for liner cargo both northbound and southbound and that proponents' percentage shares of the liner trade also declined in 1981 in terms of tonnage. These negative results for 1981 offset the increases that the trade and proponents had enjoyed in 1980 over 1979. A detailed narrative of the various trade analyses performed by Mr. Adam showing cargo carryings overall, proponents' shares in terms of tonnages and cargo value, etc., is provided in my numbered findings of facts above, paragraphs 20 through 28. It is not necessary to repeat the many detailed analyses shown by Mr. Adam and discussed in those paragraphs. However,

[11] It should be noted, however, that despite the presence of the two expanded agreements, two previous member lines have left the trades, Armasal and Uiterwyk Lines. Armasal went bankrupt and Uiterwyk departed, presumably for more lucrative trades. It cannot be established on this record, therefore, that the agreements will preserve shaky carriers. Nor for that matter can it be conclusively argued that the three member carriers have made their subtantial investments in the trade only because of the presence of the two agreements or that they would not have provided independent intermodal services absent approval of the agreements. What the carriers would do to their investments and services if the agreements were to be disapproved is a matter open to conjecture although they strongly suggest that approval of the agreements has been a motivating factor in their continued presence in the trade.

among the many observations are the following: that in the predominant (over two to one) southbound trade, total tonnages fell to less than one million tons after rising from 1.3 million in 1979 and 1.4 million in 1980; that proponents' share of this tonnage dropped off to 39 percent in 1981 after 37 percent in 1979 and 49 percent in 1980; that in terms of value, similarly, total exports (southbound) dropped to $926 million in 1981 after rising to $1.4 billion in 1979 and $1.8 billion in 1980; that proponents' shares of these exports also declined to 70 percent in 1981 after rising from 68 percent in 1979 to 75 percent in 1980; that proponents' shares in terms of value to Panama and Costa Rica also declined in 1981 to 54 percent and 74 percent respectively but rose to Guatemala, Honduras, and El Salvador to a very impressive range of 74-83 percent in 1981; that on the northbound trade (imports), total overall tonnages declined sharply to only 275,000 tons in 1981 from 559-568,000 tons in 1979-1980; that proponents' shares of import cargo in tons dropped to only 52 percent in 1981 from 68 percent in 1979 and 66 percent in 1980; that proponents' shares of imports from Panama rose to 66 percent in 1981 but fell sharply from Guatemala, Honduras, and El Salvador, dropping to only 27 percent in 1981 for El Salvador; that, by value, total imports dropped to only $414 million in 1981 from a level of about $1 billion in 1979-1980; that unlike tonnages, proponents' percentages shares by value of imports remained fairly stable in a 65-68 percentage range for the three years 1979-81; that proponents' shares of imports in value from Panama and Costa Rica remained at very high levels, 89 and 83 percent in 1981, respectively; that their shares also remained stable from Guatemala (65-68 percent) for 1979-81; that their shares, however, dropped from Honduras and El Salvador in 1981 (63 percent and 37 percent respectively); that major commodities imported declined in both value and tonnages, dropping by 59-64 percent in 1981 from the preceding year; that proponents' shares of these commodities also dropped in tonnage terms to 60 percent for Agreement No. 10045 and to 42 percent for Agreement No. 10105 in 1981; that proponents' shares of this cargo in value terms rose to 85 percent for No. 10045 in 1981 and stabilized at levels of 57-59 percent under No. 10105 in the past two years; that combined totals for the major import commodities moving under each of the agreements declined approximately 60 percent in value as well as in tonnages in 1981; that proponents' shares for these commodities declined to 47 percent of tonnages in 1981 but remained stable at about 64 percent in value terms; that combined totals of major exports (southbound) declined in 1981 by 13 percent in tonnages and by 36 percent in value compared to 1980; that proponents' shares of major exported commodities dropped to 19 percent by volume in 1981 from 22 percent the preceding year but that in value terms their share rose to 45 percent of these commodities in 1981.

It is difficult to discern patterns and trends from all of the above data especially since one analysis from time to time seeks to contradict another. Moreover, as mentioned, the limited period of time covered by the data and their unadjusted nature coupled with the unstable political climate in 1981 render predictions rather shaky and tentative. Nevertheless Mr. Adam concludes that while there has been little signicant change in proponents' overall market share of the subject trades during 1979-81, a drop-off in their shares of the southbound and northbound trades is apparent between 1980 and 1981 in both value and tonnage terms. This drop-off, moreover, reflects a corresponding decline in total trade levels, leaving the proponents with "declining shares of a smaller trade pie." (Adam, p. 36). He also concludes that there are some exceptions to the general decline in total trade and proponents' shares, for example, an increase in proponents' shares in exports in 1981 in terms of value of shipments under Agreement No. 10105 and a more impressive share of exports in terms of value than in tons. As for imports, he notes the same decline in 1981 for the total trade and for proponents' shares, although based on value of imports, proponents' shares seem more stable for the period 1979-81. As for major imported commodities, Mr. Adam notes the usual decline in 1981 but also a stable or rising percentage share for proponents during 1980-81 in terms of value. He sees a possible trend for proponents to concentrate on high-value imports such as beef and coffee rather than lower-value items such as bananas. Exported major commodities show usual declines in 1981 as do the proponents' shares. However, in terms of value, proponents' shares increased significantly from 1979 to 1981.

Hearing Counsel, although recognizing the difficulty of drawing firm conclusions from limited data, note a decline in overall trade by tonnages southbound in 1981 after rising in 1980 over 1979 and a corresponding decline in proponents' shares although by value, Hearing Counsel note a rise slightly under Agreement No. 10105 in exports (southbound). Thus, there is a rise-and-fall pattern which overall trade and proponents' percentage shares seem to follow in tonnages and sometime by value. As to imports (northbound), Hearing Counsel note a steady decline overall by value during 1979-81 and by proponents' percentage shares. Generally, then, Hearing Counsel reason that if proponents' shares rise when trade rises and fall when trade falls, "it may be reasonable to expect the Agreements' hoped-for stabilizing effect on the trade to increase when trade levels rise" but if trade fell, so too would the agreements' effect fall. (Opening Brief of Hearing Counsel, pp. 6-7).

I agree with Hearing Counsel that only limited and tentative conclusions can be drawn from the necessarily limited and unadjusted Census data presently available and agree with proponents that the Census data are unadjusted and limited in time and must therefore be treated with caution. However, although it may be premature to make predictions or draw firm conclusions from early tentative trends, nothing in the preliminary data offsets evidence that the agreements have benefits and serve purposes apart from the effects they are having on the trades concerning cargo carryings and shares, namely, by causing uniform tariffs with simplified rate and service quotations, by implementing uniform intermodal services, and by establishing a full self-policing system under General Order 7. Although one may argue that the individual member lines of the agreements could furnish intermodal services and simplify their individual tariffs without the need for the agreements, only by virtue of approval of the expanded agreements could there be a single uniform tariff, a single uniform type of intermodal rate quotation, and a self-policing system complete with a neutral body as enforcer. As the Commission stated in its Order of Investigation (p. 3), it would consider the merits of continued approvability of the subject agreements not merely by reference to factors such as cargo shares and effects on the trade but by other matters as well, and as both parties assert, correctly in my opinion, separate benefits do flow from continuation of these expanded agreements. Since this is so, I see no basis to disapprove either agreement, certainly not on the tentative, inconclusive data and trends shown by unadjusted Census data which cover only the first six months of 1981, i.e., only about four months after the filing of proponents' joint tariffs in February 1981. With demonstrated benefits and with no firm, probative evidence of harmful trends developing in the trades as well as no firm evidence that the agreements will affect or have affected the numerous outside competitors and no protests from outside carriers or complaints from shippers, there is no reason to deny proponents continued approval of their agreements. The only remaining question, however, is how long should the term of approval run. Although this question may seem difficult to answer because proponents' arguments favoring approval without time limits have some appeal, in the last analysis there is simply too much Commission precedent in support of limiting approval to three years so as to allow more reliable data to accumulate consistent with the Commission's manifest desire to "assess the impact the expanded agreement has had on the trade." (*Conditional Approval of Agreement No. 10045-3,* cited above, 20 SRR at 439.)

As noted earlier, Hearing Counsel contend that the limited data presently available do not support a grant of indefinite approval of the subject agreements because trends and effects cannot be clearly discerned at this time or relied upon with assurance. In such cases Hearing Counsel note that the Commission has granted only limited terms of approval and Hearing Counsel therefore urge a three-year term to enable the Commission to develop further evidence which will support an intelligent evaluation of the agreements' effects on the trades. Proponents note an absence of any evidence which would support a finding that the subject agreements violate any provision of the Shipping Act and, without such evidence, argue that the Commission has no basis in law or fact to modify the agreements by imposing time limits. As I have discussed earlier, however, the Commission has quite a long history of modifying agreements by limiting them to specified terms ranging from one to five years and very often does this when the evidence is not yet available by which the beneficial effects of agreements can be determined with assurance or when parties to agreements have not yet had an opportunity to demonstrate that their agreements will actually produce the desired beneficial effects. In some cases the Commission has even gone so far as to state that it has a "policy" of imposing time limitations on approval of certain types of agreements, e.g., intermodal agreements or agreements in which evidence of actual operating results and current trade conditions is not yet available. See, e.g., *Agreement No. 57-96*, cited above, 19 F.M.C. at 305-306 ("Hearing Counsel's proposal [to limit term to 18 months] is consistent with Commission policy to avoid granting indefinite and unlimited approval . . . in the intermodal field . . ." and limited approval will "enable the Commission to pinpoint any problems which may develop with the implementation of Agreement No. 57-96."); *American-Flag Common Carrier Charter Agreement*, cited above, 21 SRR at 190 ("The Commission has a policy of requiring most cooperative working arrangements to terminate on a specific date in order to better evaluate their competitive effects in light of actual operating results and current trade conditions."); *Agreement No. 10286, Italy-U.S.A. North Atlantic Pool Agreement*, cited above, 21 F.M.C. at 680 ("A three year period will allow the parties sufficient time to begin pool operations and to develop information which may establish its predicted efficacy."); *Agreement Nos. DC-38 and DC 38-1 Association, Puerto Rico Trades*, cited above, 17 F.M.C. at 260 ("The additional one-year period [added to a previous two-year period of approval], we believe, is sufficient to allow PROSA to take whatever steps are necessary to refine its demurrage collection system . . . and otherwise accomplish the objectives of the Agreement.")

The above cases have similarities to those in the present case. Thus, like the pooling agreement in *Agreement No. 10286*, neither proponents nor the Commission's staff have been able to develop sufficient data to establish the agreements' predicted efficacy. Like the chartering agreement in *Common Carrier Charter Agreement*, there is a need for actual operating results and updated evidence of trade conditions so that the Commission can "better evaluate their competitive effects." Like the agreement in *Agreement No. DC-38*, there has not been sufficient time to determine whether all of the predicted benefits of the agreement will result. Of course, proponents contend that since there is no evidence of harm or violations of law which have resulted from approval of the expanded agreements, there is no basis to limit the term of approvability, which proponents believe to be tantamount to a modification of their agreement requiring specific findings of harm or violations of law. However appealing this argument seems to be, unfortunately for proponents the Commission has not agreed with it when the Commission believes that parties to agreements have not yet been able to demonstrate that their predicted benefits will result or have not had sufficient time to operate. Thus, in *Agreement Nos. DC-38 and DC-38-1, etc.,* cited above, the presiding judge had refused to impose any time limitation on the subject agreement which had previously been approved for a two-year trial period on the same ground argued by proponents here, namely, that the agreement had shown that it produced benefits and served needs but that if circumstances changed, the Commission could at any time cancel or modify the agreement under the procedures established by section 15 of the Act. (17 F.M.C. at 261). As noted above, however, the Commission added another year's approval to permit the parties to accomplish the objectives of the agreement, among other reasons because the parties had not sufficiently demonstrated that the agreement was operating properly or that conditions in the trade warranted unconditional, indefinite approval (17 F.M.C. at 260-261), notwithstanding the fact that the Commission found that the agreement was "required by a serious transportation need and is necessary to secure important public benefits." (17 F.M.C. at 260).

In the present case proponents have shown and Hearing Counsel do not dispute that there have been benefits flowing from the expanded agreements, namely, the uniform tariff, uniform rate quotations and implementation of uniform intermodal authority, and the establishment of a full self-policing system. While other asserted benefits, such as the continued heavy investment in and commitment to the trade and beneficial effects on curbing rate instability are more conjectural or have not yet been shown by operating results in the trades, there is no denying the former, proven benefits and there is no offsetting evidence of harm or violation of law. Therefore, as did the Commission in *Agreement Nos. DC-38 and DC-38-1,* cited above, and in so many other cases also cited above, I conclude that the agreements should be approved for a term of three years from the date of service of the Commission's final action in this proceeding if the Commission finalizes, adopts, or otherwise agrees with my conclusion.[12] Assuming that such Commission

[12] Although Hearing Counsel urge a three-year term of approval, they do not specify when this term is to commence. I have therefore followed the Commission's example of extending approval from the date of the Commission's decision (allowing for the parties to comply with certain conditions) as was done with respect to the present agreements. (See *Conditional Approval of Agreement No. 10045-3,* cited above, 20 SRR 437.)

action would occur some time in September 1982, this would extend the lives of the agreements until September 1985, and would enable the Commission's staff to obtain trade data from Census covering at least the full four year period 1981-1984 despite the six months-or-more time lag which seems to delay the availability of Census data. Such a time period, when tacked onto the 1979-1980 period presently shown in this record, will provide a six-year period in which the Commission's staff can seek to discern trends for the Commission's use in determining the merits of continued approvability beyond that time.

ULTIMATE CONCLUSIONS

The two subject 48-hour rate agreements which had been expanded and approved by the Commission prior to the institution of this proceeding for a one-year term and then further approved *pendente lite,* deserve continued approval for a term of three years following the Commission's final decision in this case. The proceeding was begun in order to permit the parties to develop further evidence concerning the effects of the agreements on the subject trades because sufficient time had not yet elapsed under the agreements to discern such effects. The Commission also expressed interest in determining if intermodal authority had been utilized and whether the existence of an overlapping conference in Panama had any effects. However, these factors were only to be considered among others when determining the merits of continuing approval of the agreements.

The record developed by the parties indicates that benefits have flowed from approval of the expanded agreements in November 1980, such as the publication of a uniform tariff containing uniform methods of rate quotations, the implementation of joint intermodal authority under such tariffs, and the establishment of a full self-policing system under the Commission's General Order. Furthermore, there has been no evidence developed showing harm to shippers or other carriers. Although the record shows that the joint intermodal authority has been utilized and that there is no adverse effect because of Sea-Land's membership in one of the agreements as well as in the separate Panama Conference, the record concerning impact of the agreements on rates, cargo shares, and overall rate stability is less conclusive. There appears to be some additional rate stability as shown by several general rate increases which the parties to the agreements have been able to institute to cover rising costs. However, because of the limited period of time since the expanded agreements have been operating under their joint tariff and because of the unavailability of trade data published by the Census Bureau more recent than the first six months of 1981, and certain infirmities in the Census data, it is too early to come to any firm conclusions or to discern trends in the trade relevant to the issue of continued approvability. However, the data appear to indicate that 1981 was a bad year in the trade overall and that the parties' shares of the trade in terms of tonnages declined in that year to only 39 percent in the predominant export, southbound trade and 52 percent in the import, northbound trade. Their shares declined in value as well, to 70 percent of exports, while remaining fairly stable for imports at 65-68 percent, although there are some exceptions to this general picture. It is therefore still premature to attempt to assess the impact of the two agreements in terms of cargo shares or overall rate stability. A more realistic appraisal should await development of several years operating experience especially since only three carriers out of the 20 or so operating in the trade area involved are parties to the two agreements.

It should be noted that the Commission's findings made in September 1980, when the Commission first approved the expanded agreements, that there was a potential for rate instability caused by the presence of so many outside carriers and that the subject agreements "should have a stabilizing effect" are still true today and may possibly be even more valid in view of current upheaval in the region. In numerous previous agreements, furthermore, the Commission has granted limited terms of approval, frequently three years, to allow parties to show by actual experience that their agreements will produce the desired beneficial effects when experience under the agreements has not been sufficiently lengthy. In this case such a course of action is even more warranted when one considers that the critical data necessary to assess trade-wide impacts come from the Census Bureau and through no fault of the parties to the agreement, are not available for more recent periods of time, and when one considers that, limited though the data may be, they show no harmful trends developing in terms of competitive effects on outside carriers.

(S) NORMAN D. KLINE
Administrative Law Judge

FEDERAL MARITIME COMMISSION

DOCKET NO. 80-63

WEST COAST OF ITALY, SICILIAN AND ADRIATIC PORTS, NORTH ATLANTIC RANGE PORTS CONFERENCE (TARIFF RULE NO. 26)

Conference tariff rule filed to replace a rule found violative of Shipping Act sections 17 and 18(b)(1) is cancelled for noncompliance with the Commission's earlier order in this proceeding.

The practice of withholding cargo delivery from a *consignee* until a private penalty is paid to the ocean carrier is an unreasonable practice within the meaning of Shipping Act section 17 when liability for the penalty attaches upon the preparation and submission of incorrect shipping documents by the *shipper.*

Stanley O. Sher and John R. Attanasio for the West Coast of Italy, Sicilian and Adriatic Ports, North Atlantic Range Ports Conference.

John Robert Ewers, Joseph B. Slunt, and *Deana E. Rose* for the Bureau of Hearings and Field Operations.

SECOND REPORT AND ORDER

August 3, 1982

BY THE COMMISSION: (ALAN GREEN, JR., *Chairman;* THOMAS F. MOAKLEY, *Vice Chairman;* JAMES JOSEPH CAREY, RICHARD J. DASCHBACH AND JAMES V. DAY, *Commissioners*)

This is a Commission-instituted proceeding directed at tariff provisions employed by the member lines of the West Coast of Italy, Sicilian and Adriatic Ports, North Atlantic Range Ports Conference (WINAC or Respondents) which assess a penalty charge for incorrect freight descriptions in the amount of twice the difference in freight due. These provisions were originally contained in WINAC Tariff Rule 26, which was cancelled by the Commission's August 21, 1981, Order.[1] Revised provisions were republished by WINAC as Tariff Rule 27 and filed with the Commission on September 30, 1981. A further show cause order was issued against Rule 27 on December 30, 1981.

Tariff Rule 27 states that the "cargo interests" are liable for penalty charges, but creates a possessory cargo lien to collect these charges

[1] WINAC Tariff Rule 26, 24 F.M.C. 121 (1981), *appeal pending* D.C. Cir. No. 81-2066. The Commission found former Rule 26 deficient for its indefiniteness and for permitting penalties to be collected from persons other than those actually responsible for the cargo misdescription (*i.e.,* "the party at fault"). WINAC's enforcement of a cargo lien by means of a private sale was also found unreasonable. Rule 27 now provides for a public sale of withheld cargo and this matter is no longer in controversy.

only from the consignee. Use of the lien is limited, however, to situations where the carrier has first attempted to collect the penalty from the shipper and has "reasonable ground to believe the consignee is at fault." The point presently at issue is whether Rule 27 permits the ocean carrier to withhold cargo delivery from a consignee which has not prepared or submitted incorrect shipping documents unless the consignee assumes responsibility for penalty charges, and, if so, whether this practice is consistent with the August 21, 1981 Order and section 17 of the Shipping Act, 1916 (46 U.S.C. § 816).[2]

Positions of the Parties

A. *Respondents*

The member lines of the WINAC Conference contend that Rule 27 fully protects innocent U.S. consignees because: (1) the carrier must attempt to collect from the shipper before charging the consignee; [3] (2) the carrier must possess "reasonable grounds" to believe the consignee is at fault; [4] and (3) the consignee may secure release of the cargo by posting a bond if the consignee believes itself to be innocent.[5]

Respondents also claim that Rule 26/27 has caused no unfairness or injustice in actual practice, because cargo sales under the lien provisions and reparations claims seeking the return of incorrectly assessed penalties have been infrequent.

Respondents argue that the collection of penalty charges is a matter of private contract which, unlike the collection of government imposed civil penalties, is not subject to due process standards concerning the determination of "guilt." Alternatively, Respondents claim that: (1) Rule 27 is "basically fair" in the due process of law sense; (2) the imposition of an absolute duty of accuracy would be unreasonable; and

[2] The second paragraph of section 17 provides that:

> Every [ocean] carrier and every other person subject to [the Shipping 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. Whenever the board finds that any such regulation or practice is unjust or unreasonable it may determine, prescribe, and order enforced a just and reasonable regulation or practice.

[3] Respondents state that the consignee will be charged if the shipper "refuses to pay." February 18, 1982 *Memorandum* at 12.

[4] Respondents state that they have assessed penalties against a consignee only when there was "some evidence" of collusion between the consignor and consignee. February 18, 1982 Memorandum at 13. The type of evidence involved is not described, but Conference Secretary Giovanni Ravera states that he knows of no case in which a "forwarder refused to pay a penalty charge except where the forwarder claimed to have had instructions from the receiver." Affidavit of February 15, 1982 at 4; Affidavit of November 14, 1980 at 13. Thus, it appears that the evidence of collusion customarily relied upon has been the forwarder's (or shipper's) statement that the U.S. consignee insisted upon the use of an incorrect cargo description.

[5] Although the procedures which allegedly protect consignees were not stated in WINAC's tariff Rule 27 took effect on September 30, 1981, the Respondents maintain that these procedures were nonetheless available under Rule 26 as well. February 18, 1982 Memorandum at 12-15.

(3) injured consignees may obtain reparations in an FMC complaint proceeding.[6]

Respondents further contend that: (1) the Commission found their penalty charges to be lawful in principle; (2) commercial law recognizes the use of a possessory cargo lien to collect any lawful charges due an ocean carrier; [7] and (3) a consignee may be assessed certain charges without regard to whether the consignee is guilty of misconduct.[8] It would allegedly be unfair to deny the Respondents a cargo lien covering penalty charges because a lien is the only effective means of collecting such charges, and a direct collection procedure would jeopardize Respondents' ongoing relationship with European shippers. Respondents therefore assert that the option of posting a bond to secure cargo delivery provides a reasonable balance between carrier and consignee interests, especially because Respondents believe a consignee is involved in *all* instances where *freight collect* shipments are misdescribed.[9]

B. *Hearing Counsel*

The Bureau of Hearings and Field Operations (Hearing Counsel) believes Rule 27 complies with the August 21, 1981, Order in all respects, and states that Rule 27

> . . . provides a reasonable basis for determining the party responsible for misdescriptions and for protecting the interests of the "innocent consignee"

Hearing Counsel also argues that Respondents' collection of private penalty charges from consignees for misdescriptions performed by shippers—in circumstances where the carrier "reasonably believes" the consignee was attempting to obtain transportation at less than tariff rates—simply reflects the carrier's statutory duty to make diligent efforts to apply its tariff correctly and is a reasonable method of overcoming certain obstacles imposed by Italian customs laws to inspecting cargo at the port of loading.[10]

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[6] Respondents also state that the need for absolute accuracy in determining when a consignee is "at fault" described in the Commission's "Further Order to Show Cause" is not specifically required by the August 21, 1981, Order.

[7] *E.g., The Eddy,* 72 U.S. 481 (1967). The courts have upheld the use of a cargo lien to collect misdescription penalties. *North-German Lloyd v. Elting.*, 96 F.2d 48 (2d Cir. 1938).

[8] Respondents refer to *Louisville & Nashville R.R. Co. v. Central Iron Co.*, 265 U.S. 60 (1924), a case involving a consignee's liability for freight undercharges on freight prepaid shipments.

[9] February 15, 1982 Affidavit at 3-4. Respondents state that 80% of their cargo moves freight collect, but offer no evidence supporting their claim of consignee involvement in the 149 misdescriptions discovered in 1979, beyond the general observation that the consignee benefits from any reduction in freight charges on freight collect shipments.

[10] This proposition is accompanied by citations to *United States v. Sea-Land Service, Inc.*, 424 F.Supp. 1008, 1011 (D.N.J. 1977), *appeal dismissed,* 577 F.2d 730 (3d Cir. 1978), *cert. den.* 439 U.S. 1072 (1979); *Prince Line v. American Paper Exports,* 55 F.2d 1053 (2d Cir. 1932); *Rates from U.S. to Philippines,* 2 U.S.M.C. 535, 542 (1941); *Ford Co. v. M.C.R.R. Co.*, 19 I.C.C. 507, 511 (1910).

Discussion and Conclusion

A major source of confusion in this proceeding to date has been the Respondents' ambiguous use of the phrase "party at fault." At one point, Respondents agreed with Hearing Counsel to amend former Rule 26 so that penalties would be assessed only against:

> . . . the party responsible for the misdescription or error ("Party at Fault").[11]

The Commission's August 21, 1981, Order erroneously stated that the above *proposed* language was included in the February 12, 1981, version of Rule 26.[12]

Respondents do not claim that Rule 27 limits the collection of penalties from consignees which are "at fault," but merely argue that the new rule reasonably balances the competing interests involved. Accordingly, the Commission concludes that Rule 27 is inconsistent with the August 21, 1981, Order, and with sections 17 and 18(b)(1) of the Shipping Act, 1916, by making "the cargo interests" rather than "the party at fault" liable for penalties; by permitting the carrier to withhold cargo delivery unless the consignee pays penalties for misdescriptions over which it may not have any control; and for not revealing that penalties are only assessed when cargo misdescriptions are discovered after the vessel sails.

Respondents largely reargue points addressed in the August 21, 1981, Order and have still failed to demonstrate that cargo misdescription conspiracies between U.S. consignees and European shippers are commonplace on freight collect shipments. The record contains no specific evidence demonstrating that even one U.S. consignee has conspired with a European shipper to misdescribe cargo.

Respondents' claim that *all* freight collect consignees are guilty of conspiracy in misdescription cases has already been rejected by the Commission. *See* 24 F.M.C. at 124-125. Although the consignee may benefit financially from any undetected undercharges resulting from cargo misdescriptions performed by the shipper, this benefit alone cannot support the conclusion that a conspiracy exists. Consignees may benefit from inadvertent clerical errors as well as intentional misdescriptions of shippers.[13] In addition to a showing of benefit to the

[11] *See* December 31, 1980 Memorandum of Hearing Counsel at 3-4. Respondents ignored this representation in drafting Rule 27, however, which refers more broadly to circumstances where the "consignee is at fault."

[12] The August 21, 1981, Order held that carrier-imposed penalties may be asserted "only against the parties at fault - either ultimately or in the first instance through the use of a cargo lien device . . . ." 24 F.M.C. at 129.

[13] Even if one accepted Respondents' assertion that all misdescriptions in freight collect situations are the result of a conspiracy, there would be no justification for Rule 27's imposition of a cargo lien against the consignee on freight prepaid shipments.

consignee, it is necessary, at minimum, to show that the misdescription was willful, and that the consignee had knowledge of the misdescription and condoned it. Absent *prima facie* evidence of these elements, it is unreasonable for the conference to shift the burden to the consignee to obtain a bond or pursue a reparation action, or both, in order to prove its innocence.

The "reasonable belief" requirement added by Rule 27 is, in light of indications the Respondents will consider the consignee to be "at fault" whenever the shipper refuses to cooperate, an inadequate source of protection for the consignee.

In any case where a conspiracy did exist, both the shipper and the consignee would clearly violate section 16, Initial Paragraph of the Shipping Act, 1916 (46 U.S.C. § 815), a statute which imposes civil penalties for *knowingly* obtaining, or attempting to obtain, transportation at less than tariff rates. Intentional misdescriptions of this nature would be more effectively deterred if the carrier furnished reliable evidence of collusion between shipper and consignee to the Commission for prosecution than by randomly collecting private penalties from some consignees and not others.[14] Reliance on the enforcement scheme established by the Shipping Act adequately protects Respondents' interests because each misdescribed container they discover produces additional freight revenues and the verification charge provided by Rule 27.[15]

Respondents' claim that they actually administer their penalty system in a more flexible, presumably fairer, fashion than is revealed by the language of Rule 27 merely illustrates noncompliance with section 18(b)(1). The Conference Secretary's affidavits indicate that when a carrier discovers a misdeclaration in Europe, the error is simply corrected after consultation with the shipper and penalties are assessed only when the discrepancy is detected *after the vessel sails.*[16] This

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[14] The record does not support a finding that the Respondents' penalty system effectively curtails malpractices in the Italian trade. *See* November 14, 1980 Affidavit at 2-3. *See also United States v. Federal Maritime Commission,* 655 F.2d 247 (D.C. Cir. 1980), regarding the evidence used to justify Agreement No. 10286. Because the Commission lacks personal jurisdiction over European shippers and forwarders without a physical presence in the United States, civil penalty enforcement in conspiracy cases would be concentrated against U.S. consignees against whom there is hard evidence of intentional misconduct. This type of enforcement should minimize the strain on Respondents' ongoing commercial dealings with European entities, the fear of which now leads them to forego the collection of penalties for misdescriptions discovered prior to vessel sailing. Commission enforcement should also be more effective in resolving any problem of *consignee* recidivism which may exist. It may not deter *shipper* recidivism, but neither does the essentially voluntary penalty collection method Rule 27 employs in the case of shippers. If Rule 27 and its predecessors have actually deterred shipper misconduct, such deterrence has only been an indirect result of the pressure placed upon consignees by the cargo lien device. Direct enforcement efforts (*e.g.,* legal action) are apparently not taken against shippers.

[15] The verification charge is intended to recover the cost of inspecting a typical container and is set at $100 per container plus $25 per ton if it is necessary to unpack the container.

[16] *See* November 14, 1980 Affidavit at 9 concerning the Respondents' practice of not imposing penalties against the shipper if the error is discovered prior to sailing.

important fact is not revealed by Rule 27 at all and further indicates that Respondents' use of a cargo lien to collect penalties places the economic burden of misdescription enforcement on U.S. consignees. A tariff provision may not impose liability for misdescription penalties while leaving the type of misdescription and the persons against whom the penalty will be collected to the discretion of the ocean carrier. Such details must be clearly stated in the tariff.

THEREFORE, IT IS ORDERED, That for the reasons stated above and in the Commission's previous orders in this proceeding, Rule 27 of the West Coast of Italy, Sicilian and Adriatic Ports, North Atlantic Range Ports Conference Tariff FMC No. 3 is cancelled, such cancellation to take place 30 days from the service date of this Order;

IT IS FURTHER ORDERED, That, effective 30 days from the service date of this Order, the member lines of said Conference shall cease and desist from publishing tariff matter purporting to authorize or otherwise engaging in activities which:

(1) impose private carrier-imposed penalties against consignees on the basis of a presumption that consignees which benefit from a misdescription are parties to a conspiracy to misdescribe cargo;

(2) fail to notify shippers exactly when or where cargo tendered for shipment must be verified to result in the assessment of private, carrier-imposed penalties; or

(3) impose a cargo lien to collect private, carrier-imposed penalties against consignees.

and

IT IS FURTHER ORDERED, That this proceeding is discontinued.

(S) FRANCIS C. HURNEY
Secretary

FEDERAL MARITIME COMMISSION

TITLE 46 - SHIPPING

CHAPTER IV - FEDERAL MARITIME COMMISSION

[GENERAL ORDERS 13 AND 38; DOCKET NO. 81-51]

PARTS 531 AND 536 - TIME LIMIT FOR FILING OF OVERCHARGE CLAIMS

August 5, 1982

ACTION: Final Rule

SUMMARY: This amends the Commission's tariff filing requirements to prohibit carriers from imposing certain time limits on shippers' overcharge claims filed with the carriers. The final rule proscribes limits on claims to a period of less than two years after accrual of the cause of action. The two-year period is intended to coincide with the period prescribed in section 22 of the Shipping Act, 1916 for reparations awarded for injuries from violations of the Act. The final rule also prohibits tariff provisions requiring that overcharge claims based on alleged errors in weight, measurement, or description of cargo be filed with the carrier before the cargo leaves the carrier's custody. The effect of the amendment will be to prevent unnecessar administrative proceedings where there is no dispute among the parties, to avoid the unfair and unreasonable burdens imposed on shippers as a result of such rules; and to ensure that violations of section 18(b)(3) of the Shipping Act, 1916 do not go unredressed because of limitations in carriers' tariffs.

DATE: Effective November 8, 1982

SUPPLEMENTARY INFORMATION:

This proceeding was instituted by Notice of Proposed Rulemaking published in the *Federal Register* on August 28, 1981 (46 F.R. 43472) to amend the Commission's tariff filing regulations to prohibit carriers from barring shippers' filing of overcharge claims with the carriers less than two years after accrual of the cause of action. The amendment was intended to obviate unnecessary administrative proceedings before this agency and to further various objectives of the Shipping Act, 1916, *i.e.,* the section 14 Fourth (46 U.S.C. § 812) proscription of unfair treatment of shippers in the adjustment and settlement of claims; the section 15 (46 U.S.C. § 814) requirement that conferences adopt and maintain reasonable procedures for promptly and fairly hearing and considering shippers' requests and complaints; and the prevention of uncorrected violations by carriers of section 18(b)(3)'s (46 U.S.C. § 817) prohibition against freight overcharges.

Thirty-five comments to the proposed rule have been received.[1] Of the 23 responses from shippers, shipper organizations and an attorney, all but one expressed full and unqualified support for the proposed rule. Of the twelve responses from carriers and conferences, nine were in opposition to the proposed rule and three were partially supportive.

Positions of the Parties

The shippers and parties representing shipper interests generally submitted brief comments of full support for the proposed rule, citing the reasons set forth in the Notice: avoidance of unnecessary administrative proceedings; preventing would-be claimants from becoming discouraged and letting violations go uncorrected; conformity with the two-year statute of limitations in the Shipping Act, 1916; and correction of unfair or unreasonable limitations which conflict with provisions in the Shipping Act.

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[1] Parties filing comments were: Ocean Freight Consultants, Inc.; Emerson Electric Co.; Transportation Committee of the Rubber Manufacturers Association; The National Industrial Traffic League; Australia-Eastern U.S.A. Shipping Conference, The "8900" Lines Agreement, Greece/U.S. Atlantic Agreement, Iberian/U.S. North Atlantic Westbound Freight Conference, Italy, South France, South Spain, Portugal/U.S. Gulf and the Island of Puerto Rico (Med-Gulf) Conference, Marseilles North Atlantic U.S.A. Freight Conference, Mediterranean-North Pacific Coast Freight Conference, North Atlantic Mediterranean Freight Conference, U.S. Atlantic & Gulf/Australia-New Zealand Conference, U.S. North Atlantic Spain Rate Agreement, U.S. South Atlantic/Spanish, Portuguese, Moroccan and Mediterranean Rate Agreement, and the West Coast of Italy, Sicilian and Adriatic Ports/North Atlantic Range Conference (WINAC); Pacific Westbound Conference, Pacific-Straits Conference, Pacific/Indonesian Conference and Malaysia-Pacific Rate Agreement; United States Atlantic & Gulf-Haiti Conference, United States Atlantic & Gulf-Jamaica Conference, and Southeastern Caribbean Conference, of the Associated Latin American Freight Conferences; Atlantic & Gulf-West Coast of South America Conference and East Coast Colombia Conference, of the Associated Latin American Freight Conferences; Japan/Korea-Atlantic and Gulf Freight Conference, Japan-Puerto Rico & Virgin Islands Freight Conference, New York Freight Bureau, Philippines North America Conference, Thailand Pacific Freight Conference, Thailand-U.S. Atlantic & Gulf Conference, Trans-Pacific Freight Conference of Japan/Korea, Trans-Pacific Freight Conference (Hong Kong) and Agreement Nos. 10107 and 10108; the Far East Conference and Inter-American Freight Conference; the Motor Vehicle Manufacturers Association; the Latin America Pacific Coast Steamship Conference and Pacific Coast River Plate Brazil Conference; E. I. du Pont de Nemours & Company; The Society of the Plastics Industry, Inc.; Gulf United Kingdom Conference, Gulf European Freight Association, Continental/U.S. Gulf Freight Association, U.K./U.S.A. Gulf Westbound Rate Agreement (the "Gulf-Europe Carrier Associations"); United States Lines, Inc.; Sea-Land Service, Inc.; American West African Freight Conference; FMC Corporation; Merck Chemical Manufacturing Division; Uniroyal, Inc.; Hooker International Division; Pacific Coast European Conference, North Europe-U.S. Pacific Freight Conference, and Pacific/Australia-New Zealand Conference; Monsanto Company; Traffic Service Bureau, Inc.; CPC International Inc.; Caterpillar Tractor Co.; William Levenstein, Esq.; Joy Manufacturing Co.; Singer Products Co., Inc.; Johnson & Johnson International; Grain Processing Corporation; Exxon Chemical Supply Company, Inc.; Union Carbide Corporation; and The Shippers National Freight Claim Council, Inc.

Additional comments included that abolition of the six-month rule was necessary because audits - both those performed internally and those contracted out to professional auditors - are time-consuming undertakings which often cannot be completed within the six-month period provided in tariffs. One commentator, CPC International, Inc., alleged that the six-month rule rewards carriers who purposely "drag their feet" in providing information which may give rise to overcharge claims. Another shipper commentator, Emerson Electric Co., requested that the Commission go further in its rules by requiring that the carrier acknowledge receipt of overcharge claims within ten days and dispose of the claims within an additional 120 days.

Emerson also emphasized its opposition to tariff rules requiring that errors in weight or measurement be brought to the carrier's attention before the cargo leaves the carrier's custody. Emerson argues that these types of claims are easily settled between shippers and carriers because they generally consist of computation errors and are easily supported by export packing lists or other data, and that as a practical matter, inland shippers in particular cannot comply with this tariff rule.

Caterpillar Tractor Co., although supporting a proscription of the six-month rule, favors the weight/measurement tariff restrictions, arguing that they deter rebating and encourage shippers to provide accurate weight/measurement data.

Carriers and conferences opposing the proposed rule generally take note of the Commission's previous endeavors in this area, none of which resulted in the complete proscription of the six-month rule. They argue that there is no reason for the Commission to be trying again; that the tariff rules are reasonable, fair, and nondiscriminatory; and that they do not violate any provisions of the Shipping Act. A few carrier commentators argue that the Commission is without authority or jurisdiction to promulgate the proposed rule in the absence of evidentiary findings of Shipping Act violations. Other points made by some carrier interests include that the six-month rule prevents rebating because it avoids informal, unsupervised settlement of claims; that abolition of the six-month rule will impose administrative recordkeeping burdens on carriers; that the Commission's policy of awarding "high" interest on grants of reparation already works a significant hardship on carriers and encourages delay on the part of shippers with overcharge claims; that abolition of the six-month rule will "invite excessive audits"; and that section 18(b)(4) of the Shipping Act authorizes the Commission to reject tariffs only if they fall short of statutory technical or ministerial requirements. Several carrier commentators express particular opposition to the explanation in the Notice that the amended rule is intended to prohibit tariff rules allowing claims of weight/measurement errors only when the cargo is in the carrier's custody. These carriers argue that errors of this kind are impossible to verify once the cargo has left the carrier's custody, and that carriers would be left at the mercy of potentially unscrupulous shippers and shippers' auditors.

Some carriers suggest amendments to the proposed rule, as an alternative to outright adoption. These include specifying when the cause of action begins to accrue (some suggest the date of sailing as opposed to date of payment of freight charges); allowing a time limit for filing of overcharge claims of something less than two years; exempting claims alleging weight, measurement or description errors from any rule restricting carrier-imposed time limits on claims; including any intended restriction on carrier-custody requirements or administration fees in the final rule itself; modifying and streamlining the Commission's regulations concerning overcharge claims; eliminating awards of interest on reparation when an overcharge claim is resolved within the statutory period; and establishing certain required standards by which a claimant must adduce its case. One group of conferences which supports the proposed rule[2] specifically inquires as to whether the rule will be effective prospectively or whether potential claimants who may already be time-barred by a six-month rule will now be able to file their complaint with the carrier if the two-year period has not yet passed. The "Gulf-Europe Carrier Associations," which support the proposed rule in part, request oral argument.

Discussion

The Commission is not unmindful of previous proceedings which addressed the subject of the six-month rule. The Commission's determination in those proceedings not to promulgate rules similar to that proposed in the instant rulemaking does not preclude it from doing so at this time. In those decisions,[3] the Commission determined that the proposed rules were not supported by either the facts or law. At any rate, the Commission in rulemaking is not confined to the redress of demonstrated evils as distinct from the prevention of potential ones.[4] Thus, it is not necessary for the Commission to make specific findings of Shipping Act violations prior to adopting substantive rules, providing that the rules are in furtherance of general Shipping Act objectives. *New York Freight Forwarders and Brokers Assn. v. Federal Maritime Commission,* 385 F.2d 981 (D.C. Cir. 1967); *Pacific Coast European Conference v. Federal Maritime Commission,* 350 F.2d 197, 203-204 (9th Cir. 1965); *Austasia Container Express - Possible Violations of Section*

[2] United States Atlantic & Gulf-Haiti Conference, United States Atlantic & Gulf-Jamaica Conference, and Southeastern Caribbean Conference.

[3] *Proposed Rule Covering Time Limit on the Filing of Overcharge Claims,* 12 F.M.C. 298 (1969), 10 F.M.C. 1 (1966); *Carrier-Imposed Time Limits on Presentation of Claims for Freight Adjustments,* 4 F.M.B. 29 (1952).

[4] *Pacific Coast European Conference v. Federal Maritime Commission,* 376 F.2d 785, 790 (D.C. Cir. 1967).

18(b)(1) and General Order 13, 19 F.M.C. 512, 521 (1977), *rev'd on other grounds, Austasia Container Express v. Federal Maritime Commission,* 580 F.2d 642 (D.C. Cir. 1978). The comments received pursuant to the Notice of Proposed Rulemaking have convinced the Commission that proscription of carrier-imposed time limits is necessary to meet several Shipping Act objectives. At the same time, the arguments against the proposed rule have not been persuasive.

It is not the case, as argued by United States Lines, Inc., that section 18(b)(4) of the Act would prohibit the Commission's proposed exercise of rulemaking power. That statutory provision and the court opinion cited [5] state that only technical defects constitute proper grounds for *rejecting* a tariff. The Commission's proposed action does not involve administrative rejection of newly-filed tariffs; it would proscribe certain tariff provisions as contrary to Shipping Act objectives. The Commission's statutory mandate to implement rules and regulations to carry out the provisions of the Act is not obstructed by section 18(b)(4). *See* 46 U.S.C. 841a.

The Commission disagrees with the argument that evidentiary hearings would be required prior to adoption of the proposed rule. All interested parties have been given sufficient opportunity to provide facts and arguments by commenting on the proposed rule. Moreover, the parties advocating evidentiary hearings have not indicated that there were indeed any factual matters which they have offered to adduce in opposition to the proposed rule. The parties have not raised any issues in their comments which would require or even be served by evidentiary hearings. Under these circumstances, hearings would only delay the process of proscribing tariff rules found to be inconsistent with Shipping Act objectives. This proceeding has been conducted in a procedurally correct manner.

Several carrier commentators indicate that because adoption of the rule will result in more claims being decided by the carriers themselves as opposed to the Commission, there will be a greater likelihood of ill will, discrimination, conflict, prejudice, and rebating. The Commission does not believe that reliance on carriers and shippers to resolve disputes will necessarily result in unlawful activity, either in the form of false shipper claims or unwarranted reparations by carriers. It rejects the proposition that both carriers and shippers need as much supervision as possible because they will act in bad faith at every opportunity, or at least will be tempted to yield to pressure to do so. The Commission expects parties subject to the Shipping Act to comply with it, and will vigorously make use of the statutory remedies for violations of the Act.

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[5] *Pennsylvania v. Federal Maritime Commission,* 392 F.Supp. 795 (D.D.C. 1975).

Moreover, the argument for continued Commission resolution of claims after six months appears to be inconsistent with the accusation of a few of the same commentators that the proposed rule constitutes unnecessary government regulation. The proposed rule reflects an awareness that the business community is capable of handling its own affairs within the confines of the law and without unnecessary government supervision. The alleged recordkeeping and administrative burden that would be imposed on carriers if the proposed rule is adopted is not readily discernible. The documents which a carrier would need to respond to an overcharge claim filed with the carrier do not appear likely to differ from those the carrier would rely upon in defending the claim before the Commission. Nor would the administrative burden of responding to direct claims be likely to exceed that of being a respondent in an informal docket proceeding before the Commission. The real administrative burden is imposed on the Commission as a result of the time-limit rules, for they impede the orderly operation of Commission business by unnecessarily diverting Commission resources from other regulatory functions of the agency.

The "excessive audits" alleged to result from abolition of the six-month rule would cause no hardship to carriers. Shipper audits would have a significant effect on carriers only to the extent they result in successful overcharge claims, in which event they must be viewed as an appropriate means by which section 18(b)(3) violations are corrected.

The Commission's policy of granting interest on awards of reparations is beyond the scope of this proceeding. It should be pointed out, however, that award of interest is intended to make whole the shipper for the carrier's use of the shipper's money; it is neither intended to be nor does it actually constitute a hardship or penalty on the carrier. There is, therefore, no merit to one commentator's suggestion that carriers be exempted from the interest requirement if a claim is resolved within the statutory period. Nor is award of interest an incentive to shippers to delay filing their overcharge claims. Interest rates are computed on the basis of six-month U.S. Treasury bill monthly rates for the period in question,[6] and interest is therefore no boon to shippers.

A few commentators claim that the proposed rule would more easily enable a carrier to "stonewall" a claim until the two-year statute of limitations has expired, because claims transmitted just prior to the expiration of the two-year period would be subject to potentially time-consuming consideration by the carrier instead of automatic rejection on the basis of a time-limit rule. Emerson Electric Co. requests that the Commission establish requirements that carriers acknowledge receipt of claims within 10 days and dispose of claims within 120 days. Again, the

[6] 46 C.F.R. § 502.253.

Commission is not persuaded that the perceived threat of unscrupulous carriers justifies the rejection of the proposed rule, nor are additional safeguards against such abuses necessary. Since 1979, Commission regulations have required carriers to acknowledge written overcharge claims within 20 days of receipt and inform claimants of their rights under the Shipping Act, including section 22's two-year statute of limitations. *See* 46 C.F.R. §§ 531.5(b)(8)(xvi) and 536.5(d)(20).

Some commentators request the Commission to specify a date certain at which the cause of action will accrue under the proposed rule. Sea-Land notes that for purposes of overcharge claims, the Commission has found section 22's statute of limitations to begin to run from the date of delivery of cargo to the carrier, the date of shipment, or the date of payment of freight charges, whichever is later. A few commentators request that, in the interest of uniformity and clarity, a date certain be established, such as the date the ship sails. These commentators appear particularly concerned that use of date of payment of freight charges as a criterion encourages late payment and discriminates in favor of late payors by providing them an expanded period in which to file claims with the Commission.

Although the Commission does not wish to encourage late payment of freight charges, the basis for payment as a factor in determining when a cause of action accrues is a rational one: a shipper is not injured until it has paid the unlawful charges. *See Fiat-Allis France Materiels de Travaux Publics, S.A. v. Atlantic Container Line,* 22 F.M.C. 544 at 552 (1980). Although the formulas for determining when a cause of action accrues under section 22 have included date of delivery of the cargo to the carrier,[7] date of time of shipment,[8] and even the date of billing,[9] all have included the date of payment of freight charges. The Commission will not, however, issue a definition on the matter in this particular rulemaking. The bases for determining accrual of a cause of action under section 22 have derived from Commission decisions, not only in the context of section 18(b)(3) proceedings, but in other matters arising out of the statutes the Commission administers. The Commission will continue to let this matter develop through the adjudicatory processes.

A related question raised by one commentator is whether "potential claimants who may already be time-barred by a six-month rule" will be able to file claims directly with a carrier. Once this final rule takes effect, shippers with overcharge claims which have already been reject-

[7] *See Sun Company, Inc. v. Lykes Bros. Steamship Co., Inc.,* 20 F.M.C. 68 at 69, n. 7 (1977); *see also* 46 C.F.R. § 502.302, in the Commission's Rules of Practice and Procedure for the informal adjudication of small claims.

[8] *See Fiat-Allis France Materiels de Travaux Publics, supra,* at 552.

[9] *See United States v. Hellenic Lines, Ltd.,* 14 F.M.C. 254, 260 (1971).

ed on the basis of a six-month rule but which are not yet barred by the two-year statutory limit can still be submitted directly to the carrier.[10]

Several carrier commentators oppose the abolition of carrier-custody rules, and emphasize the difficulty in verifying the weight, measurement or description of cargo after it has left their custody. A few suggest that if the Commission proscribes carrier-custody rules, it should at least establish minimum standards of documentary proof necessary for shippers to meet their burden in asserting this type of claim.

The variations on claims of this nature, and the different means by which weight, measurement and description can be proven, render prohibitive the establishment of specific, enumerated standards of proof. Any such list of documents would, on the one hand, be likely to omit means of proof which in certain circumstances would suffice to make a shipper's case, while on the other hand, include standards which in certain circumstances would be insufficient. Because of the carrier's difficulty in satisfying itself of the validity of claims of this nature, it is incumbent on shippers to document their claims with original or certified documents such as bills of lading, packing lists and weight or measurement certificates. Proscription of carrier-custody rules is not tantamount to a *carte blanche* to shippers to submit and expect payment on all and any weight/measurement/description claims; a claim unsupported by convincing documentation should be denied. Claims are not to be honored on the basis of trust or good will. Documentation must be of sufficient credibility to avoid rebates or inaccurate claims. Shippers can expect carriers to require them to meet the same heavy standard of proof which the Commission would apply.[11]

A survey of the 189 informal docketed proceedings which were noticed for filing or assignment during calendar year 1981 also reveals the impact of the operation of the six-month rule. In 94 of those proceedings (or 49.7% of the time), the records reflect that the shipper claimants were denied their initial claim filed directly with the carrier on the basis of a six-month rule.[12] Of those 94 proceedings, 56 (or 59.6%) were cases in which the respondent carriers offered no defense on the merits; in most cases the carrier concurred that there was an erroneous assessment of freight charges. Additionally, in another 20 proceedings (10.6% of the 189), the shipper's initial claim with the

[10] As heretofore discussed, however, shippers should be aware that a claim filed directly with the carrier does not toll the statute of limitations, and claims should be filed with the Commission if the carrier's processing of the claim is likely to extend to the termination of the two-year period.

[11] The proposed rule referred to carrier-custody rules only in the Supplementary Information section. In the interest of clarity, the final rule adopted herein specifically proscribes carrier-custody rules. The final rule also incorporates a suggestion of the Gulf-Europe Carrier Associations, by adding the words "for private settlement" to distinguish between claims filed with the carrier and those filed with the Commission.

[12] Or a carrier-custody rule or "administrative fee" requirement.

carrier was apparently but not expressly denied on the basis of a time-limit rule (either by a general denial of the claim or the claim being ignored), and an informal docketed proceeding was then initiated in which again the carrier did not dispute the merits of the claim.[13]

The percentage of *undisputed* informal docketed proceedings before the Commission as a result of six-month or carrier-custody rules is therefore at least 39.7%.[14] This requires a considerable expenditure of Commission resources at a time when budgetary restrictions have caused a reduction in Commission staffing and the Commission's other regulatory demands remain pressing. Avoidance of the waste of these resources is hardly an abdication of the agency's regulatory responsibilities, as suggested by some carriers. Rather, it constitutes a recognition that carriers should meet their responsibility where possible to correct freight overcharges without requiring initiation of federal proceedings on the matter, especially where there is no dispute between the parties on the merits of the overcharge claim. Time-limit rules effectively and prematurely transform what is essentially a commercial activity - i.e., resolution of overcharge claims - into a governmental function. It is significant that in addition to shipper support for the proposed rule, there were also favorable comments received from some carriers and conferences.[15]

Conclusion

The Commission is satisfied that the operation of carrier-imposed time limitations on overcharge claims discourages and deters the exercise by shippers of their right to seek reparation pursuant to section 18(b)(3) of the Act. Comments from carriers explaining that six-month rules do not alter shippers' right to seek reparations prompt the Commission to express its cognizance that while not *per se* contrary to section 22's two-year time limit, the rules have the *de facto* effect of restricting shippers' rights under section 22. Despite some commenta-

[13] The remainder of the proceedings were those in which the initial claim filed with the carrier was denied because there was some dispute on the merits of the claim; those in which the initial claim was filed too late in the 2-year period for the carrier to respond to or resolve the claim or else the claim was ignored; and those in which the record does not reflect whether an initial claim was ever filed with the carrier.

[14] This figure is a conservative one because it probably underrepresents the number of undisputed cases attributable to the rule. Many of the proceedings regarded for the purposes of this study as "disputed" were those in which the carrier offered only a *pro forma* argument to the settlement officer - usually extolling the wisdom of its time-limit tariff provisions and complaining about shippers not fulfilling their responsibility to ensure that cargo is described accurately - without ever addressing the evidence presented by the claimant in support of its claim. Also excluded from the tally of undisputed claims attributable to the six-month rule were a dozen proceedings in which the carrier did not contest the merits of the claim but in which the record did not indicate with certainty whether a claim was initially filed with the carrier.

[15] Several commentators have suggested changes in overcharge claim regulations which are outside the scope of this rulemaking. The Commission has referred these matters to its staff for consideration in connection with possible future rulemakings.

tors' claims that time-limit rules are intended to encourage potential claimants to file their claims more promptly, the rules are unlikely to have this effect. Shipper commentators have noted that weight/measurement/description errors are rarely detected before the cargo has left the carrier's custody, and audits are time-consuming exercises, perhaps hindered at times by slow carrier response to inquiries, and cannot often be completed in time for a claim filing in conformity with a six-month rule. As noted in one comment and confirmed by a review of the 1981 proceedings, most claims are filed with the Commission well toward the latter end of the two-year statute of limitations. Thus, the sole object of these rules would appear to be for the convenience of the carriers themselves, not the operation of the claim system as a whole.

Moreover, the alleged benefit to the carriers is not readily apparent. Whatever difficulties carriers might have in evaluating the merits of non-prompt overcharge claims are not abated when shippers are forced to pursue those claims before the Commission, and do not justify rejecting those substantial number of claims in which there is agreement on the merits. It is difficult to comprehend why a carrier would construct grounds for rejecting a claim when the same claim will require a carrier defense in another forum—unless the carriers are relying on shippers not to pursue the matter to that other forum. When this occurs, the overpayment of any freight charges goes uncorrected, and the time-limit rules thereby provide the opportunity for violations of section 18(b)(3) to continue unredressed. Adoption of the proposed rule is therefore necessary to meet the objectives of section 18(b)(3).

Six-month and carrier-custody rules are also found to conflict with the objectives of section 14 Fourth of the Act, which states that a carrier shall not "unfairly treat . . . any shipper in the matter of . . . the adjustment and settlement of claims." As heretofore noted, the time-limit rules impose unnecessary burdens on shippers to file their claims with the Commission. Concomitant with this burden are the expenditures such filings entail. The rules preclude without justification the commercial or private resolution of some claims, and result in the initiation of more costly governmental proceedings instead. The Commission concludes that these unjustified impositions constitute unfair treatment to shippers in the adjustment and settlement of claims, contrary to section 14 Fourth of the Act.

Section 15 of the Act (46 U.S.C. § 814) requires that conferences "adopt and maintain reasonable procedures for promptly and fairly hearing and considering shippers' requests and complaints." The carriers commenting on the proposed rule have offered no reasonable justification for their time-limit tariff provisions. The burden of filing overcharge claims with the Commission when the carrier does not contest the substance of the shipper's complaint is particularly unfair and unreasonable. And it is uncontrovertible that the rules have the effect, if not also the design, of precluding the prompt consideration of complaints by carriers in many instances. Thus, the rules contravene the objectives of section 15 as well.

The proposed rule indicated the Commission's intention to prohibit the assessment of an "administrative charge" for the processing of overcharge claims. At least one uncontested claim was brought before the Commission last year because of the invocation of this "modified six-month rule." Although a less severe sanction than an outright bar on acceptance of claims, the assessment of a claim fee constitutes a penalty upon seeking correction of a statutory violation. An administrative fee was defended by virtually none of the commentators to the proposed rule.. The Commission concludes that such fees, like the other time-limit tariff provisions, and for the same reasons, are contrary to sections 14 Fourth, 15 and 18(b)(3). In the interest of clarity, administrative fees have been specifically proscribed in the rule adopted herein.[16]

Finally, the Commission finds that this rulemaking is exempt from the requirements of the Regulatory Flexibility Act (5 U.S.C. 601). Section 601(2) of that Act excepts from its coverage any "rule of particular applicability relating to rates . . . or practices relating to such rates . . . ." As the proposed rule clearly relates to rates and rate practices, the Regulatory Flexibility Act requirements are determined to be inapplicable.

List of subjects in 46 C.F.R.: Maritime Carriers, Tariffs.

THEREFORE, IT IS ORDERED, That pursuant to section 4 of the Administrative Procedure Act (5 U.S.C. § 553) and sections 14 Fourth, 15, 18(b)(3) and 43 of the Shipping Act, 1916 (46 U.S.C. §§ 812, 814, 817, and 841a), Parts 531 and 536 of 46 C.F.R. are amended as follows:

1. In Section 531.5(b)(8)(xvi), add the following new language immediately after the subdivision heading.

§ 531.5 Contents of Tariffs.

* * * * *

(b) * * *

(8) * * *

(xvi) *Overcharge Claims.* No tariff in the domestic offshore commerce shall limit the filing of overcharge claims with a carrier for private settlement to a period of less than two years after accrual of the cause of action, nor shall the acceptance of any overcharge claim be conditioned upon the payment of a fee or charge. No tariff in the domestic offshore commerce shall require that overcharge claims based on alleged error in weight, measurement or description of cargo be filed before the cargo has left the custody of the carrier.

[16] The Gulf-Europe Carrier Associations' request for oral argument is denied.

* * * * *

2. In section 536.5(d)(20), add the following new language immediately after the subparagraph heading.

§ 536.5 Contents of Tariffs

* * * * *

(d) * * *

(20) *Overcharge Claims.* No tariff in the foreign commerce shall limit the filing of overcharge claims with a carrier for private settlement to a period of less than two years after accrual of the cause of action, nor shall the acceptance of any overcharge claim be conditioned upon the payment of a fee or charge. No tariff in the foreign commerce shall require that overcharge claims based on alleged error in weight, measurement or description of cargo be filed before the cargo has left the custody of the carrier.

* * * * *

By the Commission.

(S) FRANCIS C. HURNEY
Secretary

FEDERAL MARITIME COMMISSION

DOCKET NO. 80-12

DART CONTAINERLINE COMPANY, LTD. - POSSIBLE VIOLATIONS OF SECTION 16 SECOND PARAGRAPH AND 18(B)(3), SHIPPING ACT, 1916

NOTICE

August 9, 1982

Notice is given that no appeal has been taken to the June 30, 1982 dismissal of the investigation in this proceeding and that the time within which the Commission could determine to review has expired. No such determination has been made and accordingly, the dismissal has become administratively final.

(S) FRANCIS C. HURNEY
Secretary

FEDERAL MARITIME COMMISSION

DOCKET NO. 80-12

DART CONTAINERLINE COMPANY, LTD. POSSIBLE VIOLATIONS OF SECTIONS 16 SECOND PARAGRAPH, AND 18(B)(3), SHIPPING ACT, 1916

DISMISSAL OF PROCEEDING

Finalized August 9, 1982

On February 28, 1980, the Commission instituted this proceeding based on allegations that the respondent Dart Containerline Company, Ltd., had paid rebates to at least one shipper in the westbound trade from the Iberian Peninsula to the United States.

After the institution of the proceeding, Hearing Counsel "evaluated the availability of witnesses and other evidence to support the Commission's claim." [1] This evaluation led Hearing Counsel to submit a proposed settlement on June 23, 1980.[2] I rejected this settlement proposal and gave Hearing Counsel the option of going to trial or submitting a new proposal for settlement which would contain sufficient information to insure that the Commission's criteria for the settlement of civil penalty cases had been met. (See Rejection of Settlement served September 18, 1980.) After the proposed settlement was rejected Hearing Counsel advised me that they did not intend to submit a new proposal for settlement but would serve formal discovery requests on respondent.[3] On October 29, 1980, I set a schedule for discovery and required Hearing Counsel to submit a schedule for the final disposition of the case. In a status report submitted pursuant to my order, Hearing Counsel advised that its discovery efforts against Dart had been unproductive and after evaluation of the availability of witnesses and other documentary evidence and the resources available to secure such evidence, Hearing Counsel said it had nothing to contribute to the proceeding. Hearing Counsel did not say what disposition was to be made of the case.

On March 24, 1981, Dart moved to dismiss the case on the ground that the record contained no proof that Dart had committed any viola-

[1] The "allegations" were based on copies of bills of lading, debit notes and bank drafts which showed that for freight charges a shipper was billed $58,286.90 rather than $100,245.78 which should have been billed under the applicable tariff.

[2] Orderly procedure and a more efficient use of resources would dictate that this "evaluation" be made before the institution of the proceeding. Indeed, such an evaluation would seem to be a prerequisite to any determination to recommend the institution of any proceeding.

[3] *I had suspended discovery pending the settlement negotiations.*

tions of the Shipping Act. Hearing Counsel filed a reply to Dart's motion stating that it had no objection to granting it and I dismissed this proceeding by order served April 14, 1981. However, on August 14, 1981, the Commission rejected my dismissal and remanded the case for further development of the record.

The additional efforts of Hearing Counsel to obtain evidence to support the allegations against Dart are chronicled in their Memorandum in Support of Motion to Dismiss the end result being that they were unable to obtain any additional evidence. Because of this Hearing Counsel now moves to dismiss the proceeding.

In their memorandum supporting the motion Hearing Counsel argue that to require that they "continue this proceeding would not only be an exercise in futility but would be contrary to established law and practice." Their argument is based upon their role as "prosecutors" in proceedings brought to assess civil penalties.[4] With citations to authority Hearing Counsel urge that (1) as prosecutor Hearing Counsel is the "absolute judge of whether a prosecution should be initiated and the first and presumptively last judge of whether a pending prosecution should be terminated," (2) a prosecutor's recommendation to terminate or dismiss a case on the basis that there is insufficient evidence to sustain the charges should be accepted unless it appears that the exercise of the prosecutor's discretion is not in the public interest, and (3) a recommendation to dismiss is against the public interest if the given reason for dismissal is not grounded in fact or is not made in good faith or is designed to harass the defendant by the commencement of another prosecution at a different and more favorable time and place. Hearing Counsel says none of the latter factors are present here so the case should be dismissed.

[4] Senate Report 96-147, 96th Cong. lst. Sess. April 9, 1979 at pp. 18 and 19; House Report 232 96th Cong. lst Sess. June 4, 1979 at pp. 16 and 17, also reprinted in *U.S. Code Congressional and Administrative News*, at pp. 1407 and 1498 (1979).

There is no need to ground dismissal of this proceeding on Hearing Counsel's role as prosecutor and the law attendant to that role. The more immediate ground is that Hearing Counsel has satisfied the Commission's directives on remand. They have pursued all available avenues for obtaining evidence and have come up empty-handed and there is no reason to doubt their position that there is insufficient evidence available to establish or prove the specific allegations of rebating.[5]

The proceeding is dismissed.

(S) JOHN E. COGRAVE
Administrative Law Judge

[5] This case is a prime example of the consequences which result from delay in instituting a proceeding. The violations are alleged to have occurred in November and December of 1973 but this proceeding was not instituted until February of 1980. It is readily understandable that witnesses cannot be found or their memories have faded and the records have been destroyed in the ordinary course of business.

FEDERAL MARITIME COMMISSION

DOCKET NO. 82-18

UNITED STATES ATLANTIC & GULF/SOUTHEASTERN CARIBBEAN CONFERENCE

v.

TROPICAL SHIPPING & CONSTRUCTION CO., LTD.

NOTICE

August 9, 1982

Notice is given that no appeal has been taken to the July 6, 1982 dismissal of the complaint in this proceeding and that the time within which the Commission could determine to review has expired. No such determination has been made and accordingly, the dismissal has become administratively final.

(S) FRANCIS C. HURNEY
Secretary

FEDERAL MARITIME COMMISSION

DOCKET NO. 82-18

UNITED STATES ATLANTIC & GULF/SOUTHEASTERN CARIBBEAN CONFERENCE

v.

TROPICAL SHIPPING & CONSTRUCTION CO., LTD.

NOTICE OF DISMISSAL

Finalized August 9, 1982

This order confirms the ruling made at the prehearing conference held June 22, 1982. At the prehearing, complainant withdrew its complaint and the proceeding was then dismissed.

(S) JOHN E. COGRAVE
Administrative Law Judge

FEDERAL MARITIME COMMISSION

DOCKET NO. 79-9

PRUDENTIAL LINES, INC.

v.

CONTINENTAL GRAIN COMPANY

ORDER ADOPTING INITIAL DECISION

August 20, 1982

The proceeding is before the Commission on Exceptions to the Initial Decision of Administrative Law Judge Norman D. Kline.

Briefly stated, the controversy arose as a result of a sale of grain by Continental Grain Company (Continental) to the Government of Egypt under the P.L. 480 Program.[1] When the Peralta Shipping Company (agent for the Government of Egypt) nominated Prudential Lines, Inc. (Prudential), LASH vessels to carry a portion of the grain, Continental refused the nomination on the ground that the contract of sale approved by the United States Department of Agriculture (USDA) precluded LASH barges from loading the grain sold to Egypt. The grain was ultimately loaded at the Norfolk & Western Elevator in Norfolk, Virginia (N & W Elevator) on two U.S.-flag deck ships of the Farrell Lines and on three foreign-flag vessels.

The complaint filed by Prudential alleged that: (1) Continental's refusal to permit the loading of Prudential's LASH barges constituted a violation of sections 16, First and 17 of the Shipping Act, 1916;[2] (2) Continental's failure to include in its terminal tariff all its rates, charges, rules and regulations violated General Order 15 of the Commission's Rules and Regulations, 46 C.F.R. § 533; and (3) Continental's participation with other grain terminal operators subject to the Shipping Act in an arrangement restricting access to the terminal to certain types of vessels without having first obtained Commission approval violated

[1] Agricultural Trade Development Assistance Act of 1954, 68 Stat. 455. Pursuant to P.L. 480, the United States Government provides financial aid to assist eligible foreign nations in the purchase and transportation of agricultural commodities. The P.L. 480 Program is administered by the United States Department of Agriculture.

[2] Section 16, First prohibits any person subject to the Act "to subject any particular person, locality or description of traffic to any undue or unreasonable prejudice or disadvantage." 46 U.S.C. § 815, First.

Section 17 provides that every common carrier by water in foreign commerce 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. . . ." 46 U.S.C. § 816.

section 15 of the Act and General Order 15 of the Commission's Rules and Regulations. By reason of these alleged violations, Prudential seeks reparation in the amount of $1,032,135.

The Initial Decision found that although Continental, as operator of the N & W Elevator, was "an other person" subject to the Shipping Act, 1916 (46 U.S.C. § 801, *et seq.*), in refusing to permit the loading of LASH barges at the N & W Elevator it was acting in its capacity as a merchandiser of grain,[3] and, as such, was engaging in an activity not subject to regulation under that Act. Exceptions to the Initial Decision and Replies to Exceptions have been filed by Prudential, Continental and the Commission's Bureau of Hearings and Field Operations (Hearing Counsel). The Commission heard oral argument.

DISCUSSION

The Exceptions of the parties are essentially a restatement of the arguments and contentions already advanced before the Presiding Officer and properly disposed of by him. For the reasons set forth below the Commission adopts the Initial Decision of the Presiding Officer.[4]

A. *Jurisdiction In Personam*

Continental excepts to the Presiding Officer's finding that as operator of the N & W Elevator Continental furnished terminal facilities in connection with four common carriers by water.[5] While Continental does not challenge the common carrier status of those carriers with respect to the carriage of general cargo, it contends that none was a common carrier of bulk grain from the N & W Elevator; that is, none advertised calls at the Elevator as part of its regularly scheduled service, and none held itself out to carry grain in bulk at published rates available to all.

Evidence of record supports the finding that the four named carriers[6] whose vessels loaded grain at the N & W Elevator held themselves out by a course of conduct to perform common carrier service and accept goods for carriage on their vessels, from whomever offered, to the extent of their ability to carry.[7] The Commission therefore rejects Continental's argument to the contrary.

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[3] Consideration of Prudential's request for reparation was deferred until after the determination of the jurisdictional issue.

[4] Arguments and contentions not specifically discussed have nevertheless been carefully considered and found to be without merit.

[5] Section 1 of the Shipping Act, 1916, subjects to regulation under that Act:

> . . . any person carrying on the business of . . . furnishing . . . terminal facilities in connection with a common carrier by water. 46 U.S.C. 801.

[6] These are: Icelandic Steamship Co., Prudential, Central Gulf Lines, and Farrell Lines (hereinafter referred to as "the Carriers"). The Carriers operated under tariffs on file with the Commission.

[7] The Carriers maintained on file with the Commission tariffs of freight rates and charges by which they held themselves out to carry a wide range of commodities for the general public. The tariffs

Continued

The Commission is also not impressed with Continental's contention that the vessels which called at the N & W Terminal loaded grain under individually negotiated contracts and were therefore engaged in "contract" as opposed to "common" carriage.[8] As stated in the Initial Decision, the Shipping Act regulates carriers, not types of carriage. In *Grace Line, Inc. v. Federal Maritime Board*, the court rejected the carrier's argument that because it had always transported a specific commodity on a "contract" basis, it was, as to that commodity, a "contract carrier" not subject to the Shipping Act.[9]

In an attempt to limit the holding in *Grace Line*, Continental asserts that the Initial Decision fails to recognize that because a mixture of "common" and "contract" cargo is not unlawful *per se* the Commission may exercise jurisdiction over contract carriage only "when necessary to prevent evasion of a carrier's duties with respect to common carriage." Neither the Shipping Act nor decisions interpreting that Act recognize such a limitation. Indeed, the court in *Grace Line, supra*, when confronted with the very issue being raised here, declined to so narrow the definition of "common carrier" in section 1 of the Shipping Act. 280 F.2d, *supra*, at 792.[10]

Moreover, the absence of published rates for the carriage of Continental's grain did not alter the common carrier status of the Carriers who loaded grain at the N & W Elevator. Because of the exemption

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listed specific ports of loading and discharge on the United States Atlantic Coast and in foreign countries; sailing schedules advertised in trade publications listed the dates on which vessels would call at specific ports, including the Port of Norfolk, Virginia. Moreover, Continental in its loading list characterizes two vessels of the Icelandic Steamship Co. which most frequently loaded grain at the Elevator as "liner." There is evidence that the vessels were only partially loaded with grain so that space was available for other types of cargo.

[8] The Commission's jurisdiction over grain elevator terminals which handle grain exclusively, and where grain is loaded into vessels operated by common carriers by water was upheld in *Agreement Nos. 8225 and 8225-1, Between Greater Baton Rouge Port Commission and Cargill, Inc.*, 5 F.M.B. 648 (1959), *affirmed sub nom., Greater Baton Rouge Port Commission v. U.S.*, 287 F.2d 86 (5th Cir. 1961), *cert. denied*, 364 U.S. 985 (1962); *see also Rates of Pacific Northwest Elevators Association*, 11 F.M.C. 369 (1968); *Investigation of Wharfage Charges on Bulk Grain at Pacific Coast Ports*, 8 F.M.C. 653 (1965).

[9] *Grace Line, Inc. v. Federal Maritime Board*, 280 F.2d 790, 793 (2d Cir. 1960), *cert. denied*, 364 U.S. 933 (1961), affirming *Banana Distributors, Inc. v. Grace Line, Inc.*, 5 F.M.B. 615, 622 (1959), where the Commission in applying Shipping Act standards to the so-called "contract carrier" portion of the voyage stated:

> . . . the Act confers jurisdiction over *carriers*, specifically over "common carriers," as distinguished from the type of *carriage*, i.e., common or contract . . . .

Upon review, the court ruled that a common carrier by water "does not cease to be such because it makes an exception as to a part of the goods it accepts." To the same effect is *Flota Mercante Grancolombiana v. FMC*, 302 F.2d 887 (D.C. Cir. 1962).

[10] Continental no longer relies on the decision in *Fall River Line Pier, Inc. v. International Trading Corp. of Virginia*, 399 F.2d 413 (1st Cir. 1968), in support of its argument that even if the Carriers were identified as common carriers, the low incidence of such carriage would not be of sufficient consequence to warrant assertion of jurisdiction over the N & W Elevator. The Presiding Officer, however, properly distinguished facts of that case from those in the instant proceeding.

Moreover, section 1 of the Shipping Act makes subject to the Act a person "furnishing . . . terminal facilities in connection with *a* common carrier by water." (emphasis added). It would appear, therefore, that jurisdiction attaches as soon as the terminal services one common carrier.

from tariff filing requirements contained in section 18(b)(1) of the Shipping Act, the four carriers were under no obligation to publish rates for the carriage of bulk grain. Nor did such carriage transform them into "contract carriers." [11] As mentioned in the Initial Decision, the legislative history of section 18(b)(1) [12] clearly indicates that the exemption was enacted to enable common carriers to compete with "tramp" operators. Limited as it is to the carriage of cargo in bulk, it leaves unchanged the obligation of the carrier with respect to the carriage of non-exempt cargo.[13]

The evidence of record thus supports the finding in the Initial Decision that Continental, as operator of the N & W Elevator, furnished terminal facilities in connection with common carriers by water and is, therefore, "an other person" subject to the Shipping Act, 1916.

B. *Subject Matter Jurisdiction*

Prudential excepts to the Presiding Officer's conclusion that the LASH barge exclusion originated in a grain selling and trading context and was not therefore subject to Shipping Act jurisdiction. Prudential believes that this exclusion was based solely on terminal considerations, that is, Continental's perception that LASH barges are slower in loading and clearing berth than other vessels, which when considered with the fact that Continental both imposed the restriction and operated the terminal at which the grain was loaded, is sufficient to establish Commission jurisdiction.

Vessel terms are linked to the range of options available to a grain trader in the execution of its obligations under the contract of sale, and may thus affect the price at which grain is traded.[14] In a regular commercial setting, if a purchaser of grain nominates a vessel other than a breakbulk vessel to load the grain, such nomination may be acceptable if an adequate premium can be negotiated. In the context of the P.L. 480 program, a change of vessel terms would have required in

[11] Continental's reliance on *United States v. Stephen Bros. Lines*, 384 F.2d 118 (5th Cir. 1967) and *Investigation of Tariff Filing Practices of Containerships*, 7 F.M.C. 305 (1962) is misplaced. The Carriers here held themselves out by published tariffs and advertising to serve indiscriminately all shippers on their advertised routes.

[12] P.L. 87-346, 75 Stat. 76.

[13] The Carriers maintained sailing schedules advertised in leading trade publications which indicated that the vessels served regular routes, and listed the dates at which the vessels would call at specified ports, including the port of Norfolk. Such advertising, not limited to specific terminals, was sufficient notice to the operators of all wharves, piers and terminals in the Port of Norfolk, as well as to all shippers, including Continental, of the carrier's readiness to accept cargo wherever tendered within the Port of Norfolk complex. Notwithstanding its obligation to operate the N & W Elevator as a public terminal, Continental is the sole shipper from that facility.

[14] As fully explained in the Initial Decision, in the normal course of marketing, grain traders frequently execute their contracts of sale by transferring their contractual obligations to other grain trading companies (commercials) which in turn may pass them on to other commercials in a "string" of transactions. To facilitate such transfers, grain merchandisers, whether or not they operate grain terminals, utilize standard commodity sales contracts which often contain vessel terms.

this instance a renegotiation of the contract with the Government of Egypt and further approval by USDA. Thus, even though it affected the operation of the N & W Elevator, Continental's refusal to permit the loading of LASH barges was based primarily on grain trading factors.[15] The vessel restriction placed in the contract of sale was but one of the conditions upon which Continental sold grain to the Government of Egypt at the price agreed upon.

Hearing Counsel recognizes that the inclusion of the restrictive provision in the commodity sales contract does not fall within the gambit of the Commission's authority, but believes that Continental's refusal to accept the nomination of Prudential's vessels in performance of that contract was in furtherance of its interests as operator of the N & W Elevator.[16] Hearing Counsel, in reliance on a line of cases involving the Commission's authority to regulate the implementation of collective bargaining agreements by persons subject to its regulatory authority, maintains that Continental, as operator of the N & W Elevator, is not necessarily insulated from its Shipping Act obligations because the contract of sale is not subject to scrutiny under that Act.

The Presiding Officer correctly distinguished the facts upon which the decisions involving collective bargaining agreements rest and properly found them inapplicable to the instant case. We therefore affirm his findings and conclusions on this issue.

Moreover, it should be noted that the effect of carrier implementation of rules originating in collective bargaining agreements designed to require the refusal of containers to certain shippers and the unloading and reloading of certain already loaded containers (50 mile rules) was to directly impose on shippers terms and conditions affecting basic common carrier obligations to furnish services to all on a reasonable and nondiscriminatory basis. *See, e.g., Council of North Atl. Shipping Ass'ns. v. FMC*, 672 F.2d 171, 188 (D.C. Cir. 1982), *petition for cert. filed* (U.S. May 29, 1982) (No. 81-2196).[17] Other cases in which the Commission has asserted jurisdiction over labor-related matters have likewise involved the imposition by carriers and other regulated persons

[15] The contract of sale did not specify the N & W Elevator as the port of loading but rather specified ports within a certain range. Nor is it known whether when it entered into the contract of sale Continental intended to load the grain at the N & W Elevator. Moreover, the $150,000 estimate prepared by Continental when attempting to reach an agreement with Prudential on removing the LASH barge restriction, did not reflect terminal costs but rather costs related to grain trading.

[16] In rebuttal to the Presiding Officer's finding that in the absence of a proper booking Continental had no obligation to grant access to the terminal to Prudential's LASH vessels, Prudential and Hearing Counsel maintain that the reason Prudential did not have a proper booking is that Continental refused the nomination of Prudential's LASH vessels from the party authorized to make that booking. Continental, however, refused the nomination in accordance with the terms of the contract of sale which was approved by USDA.

[17] *See also South Atlantic and Caribbean Line, Inc. - Order to Show Cause*, 12 F.M.C. 237 (1960), *affirmed*, 424 F.2d 941 (D.C. Cir. 1970); *United States v. Sea-Land Service, Inc.*, 424 F.Supp. 1008 (D.N.J. 1977), *appeal dismissed*, 577 F.2d 730 (3rd Cir. 1978), *cert. denied*, 439 U.S. 1072 (1979).

of certain rates and practices directly and with material effect.[18] Here, Continental's refusal to permit the loading of Prudential LASH vessels at the N & W Elevator was in compliance with its obligations under what was essentially a grain trading transaction and the effect of the grain contract vessel terms on the regulated operations of Continental is, therefore, incidental and nonmaterial.[19] *Cf. United Stevedoring Corp. v. Boston Shipping Assoc.*, 16 F.M.C. 7, 12-15 (1972).

Furthermore, the common carriers who entered into agreements with labor unions were subject to the Commission's jurisdiction when they negotiated and entered into the agreements, whereas Continental sold grain to the Government of Egypt in its capacity as merchandiser of grain, an activity outside the scope of Shipping Act regulation.

In conclusion, the Presiding Officer's findings that Continental as operator of the N & W Elevator is "an other person" subject to the Shipping Act, 1916, and that Continental's refusal to permit the loading of Prudential's LASH barges at the N & W Elevator does not fall within the ambit of the Commission's jurisdiction, are proper and well founded.

THEREFORE, IT IS ORDERED, That the Initial Decision issued in this proceeding is hereby adopted by the Commission and made a part hereof;

IT IS FURTHER ORDERED, That the Exceptions of Prudential, Hearing Counsel and Continental to the Initial Decision are denied;

IT IS FURTHER ORDERED, That the proceeding is discontinued.

By the Commission.

(S) FRANCIS C. HURNEY
Secretary

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[18] See *Volkswagenwerk v. FMC*, 390 U.S. 261 (1968); *New York Shipping Assn. v. FMC*, 495 F.2d 1215 (2nd Cir.), *cert. den.* 419 U.S. 964 (1974); *Federal Maritime Commission v. Pacific Maritime Association*, 435 U.S. 40 (1978); *Transamerican Trailer Transport Inc. v. FMC*, 492 F.2d 617 (1974); *New York Shipping Ass'n v. FMC*, 571 F.2d 1231 (1978); *New York Shipping Ass'n v. FMC*, 628 F.2d 253 (1980).

[19] *See* note 15, *supra*.

FEDERAL MARITIME COMMISSION

DOCKET NO. 79-9

PRUDENTIAL LINES, INC.

v.

CONTINENTAL GRAIN COMPANY

Complainant, Prudential Lines, Inc., a common carrier by water operating LASH vessels, alleges that respondent Continental Grain Company, a grain seller and trader, which operates a marine terminal facility at Norfolk, Virginia, known as the N & W Elevator, is subject to the jurisdiction of the Shipping Act, 1916, by virtue of its terminal operations allegedly conducted in connection with common carriers by water. Prudential further alleges that Continental refused to permit Prudential LASH barges to load a shipment of grain at the N & W Elevator on a particular shipment of wheat in July of 1978 and demanded a penalty from Prudential as a condition to permitting LASH barges to load the shipment, actions which are allegedly in violation of sections 16 First and 17 of the Act. On the basis of the evidence developed and applicable principles of law, it is found that:

(1) Continental's operations at the N & W Elevator are those of an other person subject to the Act because the record shows that Continental has served common carriers at the Elevator, that Continental publishes a terminal-tariff filed with the Commission which does not specifically exclude common carriers and even defines "liners," and that its lease requires it to operate a public terminal. Continental's claim that the vessels calling were not in common carriage or that, even if so, they called infrequently, has no legal significance.

(2) Continental's practice of preferring non-LASH vessels which resulted in the exclusion of such vessels in this case, is a practice which is apparently common in the grain industry among major grain traders and sellers. The practice, having originated in that industry, while not totally removed from consideration of marine terminal-efficiencies, is based upon numerous factors which grain sellers and traders consider when formulating their contracts of sale and is thus outside the scope of the Shipping Act or this Commission's expertise. Allegations that major grain companies have concertedly agreed to discriminate against LASH vessels lie within the jurisdiction of the antitrust laws, not the shipping laws.

(3) In the last analysis Prudential is asking the Commission to hold Continental liable for monetary damages because Continental adhered to its rights under its contract of sale of grain and Prudential was seeking to obtain a booking because the buyer's shipping agent had, without authority, induced Prudential to bid on the shipment. While Prudential may have been adversely affected, it cannot obtain relief against a seller of grain merely because the seller also operates a marine terminal and cannot use that fact to project the Commission into the midst of a grain selling practice.

John F. McHugh and *Robert F. Ambross* for complainant Prudential Lines, Inc.

David G. Freidman, Robert H. Huey, Lewis E. Leibowitz, and *Joseph D. Sander* for respondent Continental Grain Company.

John Robert Ewers, Aaron W. Reese, and *Charles C. Hunter* for Office of Hearing Counsel.

INITIAL DECISION [1] OF NORMAN D. KLINE, ADMINISTRATIVE LAW JUDGE

Adopted August 20, 1982

This proceeding began with the filing of a complaint by Prudential Lines, Inc., served on February 26, 1979, in which complainant alleges that respondent Continental Grain Company, a grain merchandiser and trader operating a marine terminal and grain elevator at Norfolk, Virginia, had excluded Prudential's LASH barges from carrying a shipment of grain which Continental had contracted to sell and deliver during July 1978, refusing to allow Prudential's LASH barges to load the grain at its Norfolk terminal. More particularly, the complaint alleges that on or about June 14, 1978, pursuant to a purchase authorization issued by the Department of Agriculture under the Agriculture and Development Act of 1954 (Public Law 480), an agency of the Egyptian Government issued an invitation to wheat suppliers for 50,000 tons of wheat. Some time thereafter in late June of 1978, Continental bid on the offer and was accepted but, in accepting, specified that LASH barges would not be permitted at the Norfolk Elevator. Nevertheless, on June 26, 1978, the Egyptian Government agency, through its ship broker, Peralta Shipping Agency, invited bids to carry the purchased grain without restricting carriage to any particular type of vessel. The complaint continues alleging that on June 27, 1978, Prudential submitted a bid in response to Peralta's invitation to carry a large portion of the wheat which Prudential believed to be the lowest bid. However, on June 28, 1978, Peralta advised Prudential that Continental, as the successful bidder, had excluded in its bid the use of LASH service at its grain elevator in Norfolk. However, Peralta agreed to keep open its negotiations with Prudential to enable Prudential to reach some type of agreement with Continental. In subsequent meetings between representatives of Prudential and Continental which took place between June 28 and July 5, 1978, Continental allegedly informed Prudential that it would refuse to load LASH barges at the Norfolk Elevator because the slower loading rate for LASH barges compared to bulk vessels adversely affected the productivity and profitability of the Norfolk Elevator. Thereafter Prudential offered to pay a penalty to Continental if its LASH barges were not loaded at a rate equal to that of bulk vessels, up to approximately $50,000 but Continental allegedly advised Prudential that Prudential would have to pay $150,000 outright for the right to have its barges loaded. Meanwhile on June 30, 1978, Peralta agreed to book on Prudential's LASH barges subject to Continental's removing its restrictions on LASH service by July 5, 1978.

[1] This decision will become the decision of the Commission in the absence of review thereof by the Commission (Rule 227, Rules of Practice and Procedure, 46 CFR 502.227).

However, since Continental had not removed the restrictions on that date, Peralta again issued an invitation for ocean transportation and Prudential again bid to carry subject to Continental's removing the LASH restriction, this time by July 7, 1978. However, Continental again refused to lift the restriction. Thereafter, on July 10, 1978, Peralta, for the third time requested bids for ocean transportation of the wheat but this time Peralta excluded LASH service from the invitation. Notwithstanding such exclusion, Prudential again bid to carry and included in its bid an offer to pay a penalty of up to approximately $51,000 if it failed to match the bulk carrier productivity rate. However, in the face of Continental's refusal to permit LASH vessels to handle the shipment, Peralta did not accept Prudential's bid to carry. Consequently, the wheat was ultimately shipped on a foreign-flag bulk vessel which loaded at the Norfolk Elevator without restriction or penalty.

Prudential alleges further that Continental is a marine terminal operator which publishes a tariff setting forth the various rates, charges, rules and regulations concerning the use of vessel berths at its Norfolk Elevator as well as an Elevator Tariff which governs receiving of commodities at the Norfolk Elevator and delivery to barges and vessels. Neither tariff, however, placed any restrictions on the loading of LASH barges. In view of these alleged facts, Prudential asserts that Continental had no right to demand penalties for loading LASH barges which were not published in Continental's tariffs. Prudential claims that this exclusion by Continental subjected Prudential to undue or unreasonable prejudice or disadvantage and gave an undue and unreasonable preference and advantage to Prudential's foreign-flag competitors, all in violation of section 16 First of the Shipping Act, 1916. Moreover, according to Prudential, Continental's repeated refusals to load LASH barges at its Norfolk Elevator in accordance with its marine terminal tariff and its proposal to load barges only if Prudential would pay Continental a charge not specified in such tariff constituted a failure to file with the Commission a tariff showing all its rates, charges, rules and regulations applicable to the Norfolk Elevator, and, furthermore, constituted a wilful failure by Continental to establish and observe fair and reasonable rules and regulations with respect to its Norfolk Elevator, all in violation of section 17 of the Shipping Act, 1916 (which requires terminal operators subject to the Commission's jurisdiction to "establish, observe, and enforce just and reasonable regulations and practices relating to or connected with the receiving, handling, storing, or delivering of property.") Prudential alleges, furthermore, that in seeking a penalty from Prudential before allowing it to load the wheat, Continental was not protecting any interest it had as a seller and shipper of grain but rather was acting solely to enhance its position as an elevator operator in a manner contrary to its terminal tariff. Finally, Prudential alleges that by reason of the foregoing conduct of Continental, Prudential lost revenue and paid lay-up expenses for one of its LASH vessels, the *LASH PACIFICO,* in an amount totalling some $1,032,135, for which injury Prudential seeks reparation together with such additional amounts that the Commission may determine to be proper together with an appropriate cease and desist order.

By answer dated March 19, 1979, Continental denies many of the material factual allegations made by Prudential and denies that Continental subjected Prudential to any undue or unreasonable disadvantage or had otherwise violated law. Continental admits that it imposed restrictions on the loading of LASH barges in its terminal tariff and in its contract of sale, but it asserts that the Commission lacks jurisdiction over the subject matter of the complaint.

On April 4, 1979, the Office of Hearing Counsel, Bureau of Hearings and Field Operations (then known as the Bureau of Investigation and Enforcement) petitioned for leave to intervene, asserting important and novel jurisdictional questions concerning the practices of Continental at its elevator and their belief that Continental subjected Prudential to undue and unreasonable prejudice. Hearing Counsel's petition was granted. On January 28, 1980, the Council of American-Flag Ship Operators (excluding its member Prudential), Delta Steamship Lines, Inc., and Waterman Steamship Corporation also petitioned for leave to intervene. The Council, which consists of six American carriers operating U.S.-flag vessels, some of which are LASH or SEABEE barge-carrying types, wished to intervene because of their belief that the jurisdictional issues were of great importance and its belief that Continental's restrictive activities fell within the Commission's jurisdiction and may have been violative of sections 16 and 17 of the Act. However, the Council wished to limit its participation to argument on the jurisdictional issues. On that basis its petition was granted. (See Intervention Granted, March 19, 1980.) However, several months after the trial-type hearing was conducted in this proceeding, the Council and the named lines requested permission to withdraw as intervenors, advising that they no longer wished to participate. Their request was granted on December 22, 1980. (See Request for Order Dismissing Intervenors Granted, that date.)

Some time after the answer was filed, the parties began prehearing inspection and discovery which became rather extensive and consumed many months. Several rounds of interrogatories and requests for production of documents were served and depositions were taken of various knowledgeable persons. The parties exhibited diligence in compiling materials through the discovery process for the purpose of narrowing issues and curtailing the scope of trial-type hearings. In addition, during the discovery process, Continental sought to have the complaint dismissed on jurisdictional grounds, a request which had to be denied because of an incomplete factual record on which to decide complicated and novel jurisdictional issues. After several conferences with the parties were held at which they reported on their progress toward drafting as much of a stipulated record as possible, discovery was virtually completed some time in early 1980 and trial-type hearings scheduled first in March and then in May of 1980. (See notices issued February 1, February 26, March 19, and April 23, 1980.) However, prior to commencement of the hearings, the parties requested an opportunity to begin intensive discussions which they hoped would lead to a comprehensive settlement which would resolve the past controversy and establish new rules for the future, in other words establish a complete commercial resolution. On their representation that such discussions would require much time and would involve complex problems and because of their demonstrated diligence and good-faith efforts to cooperate, I granted them permission to conduct their negotiations but required periodic status reports and imposed a cutoff date for either settlement or commencement of hearings. (See Notice of Final Postponement of Hearing and Order to Report Periodically Regarding Status of Settlement Negotiations, May 7, 1980.) Despite long and hard efforts to fashion a commercial settlement, which occupied the parties from late April through some time in August, they were unable to reach settlement and were therefore forced to proceed into trial-type hearings which began on September 3, 1980, and, with brief interruptions, ran until September 18, 1980, in New York City. The evidentiary record which was developed at that hearing ultimately amounted to 1454 pages of hearing transcript and 99 exhibits. Thereafter, at the request of the parties, who demonstrated a need for more than the normal time for preparation of post-hearing briefs in a case of this size and complexity, especially complainant which had only limited legal resources, a three-stage briefing schedule was established which concluded on April 6, 1981. (See Admission of Late-Filed Exhibits, Closing of Record, and Establishment of Briefing Schedule, October 3, 1980, and Briefing Procedure Adjusted, December 22, 1980.)

FACTUAL BACKGROUND

The following findings of fact are drawn from the proposed findings of fact in the parties' posthearing briefs and statements. Record references contained therein are omitted. The findings are quite detailed and provide a detailed factual background. However, particularly critical findings and additional findings are also discussed in the next section entitled "'Discussion and Conclusions" to the extent that they are necessary to any particular discussion and conclusion. Therefore, the present section is designed to provide an in-depth background which will place the subsequent discussion in a more meaningful context.

The proposed findings of the parties are rather lengthy and often divergent. In some instances they dwell on areas of tangential relevance or are essentially related to situations which seem relevant to laws other than the Shipping Act, for example, Prudential's lengthy proposed findings regarding an understanding among major grain companies to prefer non-LASH vessels in their contracts of sale. I have considered all of these findings and, for the sake of confining the case to material issues under the Shipping Act, have referred to extraneous proposed findings in the following discussion entitled "Discussion and Conclusions." In thus fashioning the numbered findings, I have followed ample case authority which holds that I need not refer to every proposed finding of fact and need only make material findings sufficiently clear to enable one to understand my reasoning and conclusions. See *Adel International Development Inc. v. PRMSA*, 23 F.M.C. 477, 480 (1980); *Colorado Interstate Gas Co. v. Federal Power Commission*, 324, U.S. 581 (1945); *Minneapolis & St. Louis Ry. Co. v. United States*, 361 U.S. 173 (1959); *Gilbertville Trucking Co. v. United States*, 196 F. Supp. 351, 359 (D. Mass. 1961), modified on other grounds, 371 U.S. 115.

CONTINENTAL GRAIN COMPANY

1. Continental Grain Company (Continental) is a large international merchandiser of grain. In its capacity as such, it purchases and markets grain throughout the world.

2. Continental's World Grain Division is responsible for marketing on an international level grain that is originated throughout the world. Continental's North American Grain Division is responsible for marketing on an international level grain that is originated in the United States and Canada. These divisions constitute the exporting arm of the corporation. They are headquartered in New York, N.Y., and will hereinafter be referred to as Continental (New York).

3. Within Continental's North American Grain Division are six regional offices headquartered in Chicago, Illinois, St. Louis, Missouri, Minneapolis, Minnesota, Portland, Oregon, Kansas City, Missouri, and Winnipeg, Manitoba. These regional offices are responsible for marketing grain that is originated in their respective regions. Each regional office is a profit center within the corporation.

4. Continental's regional offices do not market grain on an international level. If the grain originated by these regional offices is to be sold for export to a foreign government or corporation by Continental, the regional offices must first transfer title to the grain to Continental (New York).

5. In addition to selling grain to Continental (New York), the regional offices trade with one another and with entities outside the corporation.

6. In order to facilitate its grain merchandising activities, Continental operates grain elevators throughout the United States. Included among these grain elevators are "export elevators" at which Continental loads grain for export throughout the world.

7. Included among the export elevators currently operated by Continental on the Atlantic and Gulf coasts of the United States are facilities located in Norfolk, Virginia, Savannah, Georgia, Westwego and Reserve, Louisiana, and Beaumont, Texas. The export elevators located in Reserve, Louisiana, and Beaumont, Texas, do not handle soft red winter wheat. In July, 1978, the Savannah, Georgia, facility was not operating as an export elevator and the Westwego, Louisiana, facility, due to a dust explosion in December, 1977, that crippled the elevator, was only partially operational.

8. The export elevator operated by Continental in Norfolk, Virginia, is the Norfolk and Western Grain Elevator (N&W Elevator). The N&W Elevator reports to the Continental regional office headquartered in Chicago, Illinois.

CONTINENTAL'S GRAIN TRADING ACTIVITIES

9. In order to facilitate its international grain merchandising activities, Continental (New York) maintains an "export book" which references all of the pending commodity purchase and international sales contracts entered into by the corporation. The export book reflects on average approximately 1,500,000 to 1,750,000 tons of grain purchased and 2,000,000 tons of grain sold.

10. The commodity sales contracts which Continental (New York) references in its export book generally require delivery during a specified future range of dates. In the normal course of business, a commodity sales contract may be entered into upwards to a year in advance of the range of dates designated for the execution of that contract.

11. Export contracts provide for a delivery period--a range of dates during which the grain can be delivered--of anywhere from 15 to 60 days. A typical delivery period is 30 days.

12. By entering into a commodity sales contract, Continental (New York) is not marketing an identifiable lot of grain which has been set aside for the express purpose of executing the contract of sale. The merchandising of grain is an extremely fluid process in which the "matching" of physical grain to a commodity sales contract does not occur until a relatively short period of time before the dates designated for the execution of that contract.

13. Because grain is fungible, its price is determined by supply and demand at any given place and time. Export and other sales contracts are for future delivery. Because so many factors influence supply and demand, and because those factors change quickly, prices change quickly and grain trading is an extremely risky business.

14. In order to reduce this risk, grain traders "hedge" by using the futures market. Futures contracts are standard contracts for delivery of grain in the future at designated warehouses. These contracts rarely result in actual delivery of grain; rather, they are traded on an exchange and are "liquidated" when the delivery period comes by making payments representing the difference between the contract price and the actual market price at that time. Trading in contracts for future delivery of the commodity itself is called "cash" trading.

15. "Cash" sales are usually "hedged" with a corresponding purchase of futures for the same delivery period. This hedging limits the maximum possible loss or profit on that one transaction, as the case may be. Similarly, "cash" purchases are offset with a corresponding sale of futures. Profit or loss on the thousands of transactions made by Continental is thus determined by four factors: the price of the purchase contract ultimately used to cover the sale; the price of the corresponding futures sale; the price of the cash sale; and the price of the corresponding futures purchase.

16. Grain is traded on the basis of these "premiums," that is, the difference between the "cash" and futures price for a given delivery month. These premiums reflect the varying perceptions of traders about supply and demand conditions.

17. The standard commodity sales contract entered into by Continental (New York) designates a port at or a coastal range in which the grain sold must be loaded. The terms of delivery specified therein are generally F.O.B. (Free on Board) a designated port or a port within a specified coastal range. Title to the grain sold pursuant to such terms of delivery passes at the end of the loading spout of the export elevator at which the grain is loaded.

18. As a rule, the decision by Continental (New York) as to the port at which the grain will be delivered is not made until after the purchaser of the grain advises Continental (New York) of the identity and readiness to load of the vessel that the purchaser has selected to carry the grain. Such notice is normally provided at least ten days prior to the vessel's estimated time of arrival. Continental is generally not obligated to designate the loading port until the vessel is within 72 hours off the coast of the United States. The designation of the specific loading facility at which the grain will be delivered may be and has been made even after the vessel is in port.

19. The majority of the commodity purchase contracts referenced in the export book maintained by Continental (New York) have been acquired from competing grain merchandisers, hereinafter referred to as other "commercials." The remainder have been acquired "in-house," i.e., from Continental's regional offices. The percentage of purchase contracts involving soft red winter wheat that have been acquired from

other commercials is higher than the percentage of purchase contracts involving other grains that have been acquired from other commercials.

20. Continental (New York), at its option, may execute a commodity sales contract by transferring its contractual obligations to another commercial. Such a transfer may be effectuated by applying a commodity purchase contract acquired previously by Continental (New York) from another commercial to the contract of sale for export. A transfer of contractual obligations may also be accomplished by acquiring a new commodity purchase contract from another commercial through the broker network and applying that contract to the commodity sales contract.

21. If Continental (New York) elects to transfer its contractual obligations to another commercial by either applying a commodity purchase contract referenced in its export book to the commodity sales contract or by repurchasing the necessary grain from that commercial, the grain sold for export by Continental (New York) would be loaded at an export elevator operated by that other commercial unless that commercial elected to transfer its contractual obligations to yet another commercial.

22. Continental (New York) also has the option of executing a commodity sales contract by purchasing the necessary grain in-house. This option would entail applying a commodity purchase contract previously acquired from one of Continental's regional offices to the commodity sales contract or obtaining a new commodity purchase contract for application to the contract of sale from one of these offices. The regional offices, in turn, would originate or would have already secured the necessary grain from the interior or would purchase or would have already obtained that grain from another commercial.

23. If Continental (New York) elects to execute a commodity sales contract by purchasing the necessary grain in-house, the grain sold for export would be loaded at an export elevator operated by one of Continental's regional offices if the Continental regional office from which Continental (New York) purchased the grain had originated the grain from the interior, as opposed to having applied a commodity purchase contract acquired from another commercial.

24. The market conditions that prevail at a given moment determine whether it would be more advantageous for Continental (New York) to execute a commodity sales contract by transferring its contractual obligations to another commercial or by purchasing the necessary grain in-house.

25. In the normal course of marketing grain, commercials, including Continental (New York), frequently execute commodity sales contracts by transferring their contractual obligations to other commercials. This exchange of commodity purchase and sales contracts creates "strings"

of contracts through which contractual obligations pass from the initial seller to the ultimate buyer. Such strings may involve numerous parties.

26. The ability of Continental (New York) to execute commodity sales contracts by transferring its contractual obligations to other commercials is an important aspect of its grain merchandising activities. The degree of flexibility so allowed is essential to the effective management of Continental (New York)'s substantial export book.

27. In order to allow for the direct flow of contractual obligations from the initial seller through the string to the ultimate buyer, the terms of the contracts of purchase and sale which comprise the string must be in conformity with one another.

28. The standard commodity sales contract limits the class of contractually acceptable types of vessels to self-trimming break bulk vessels (bulk carriers). It is a custom of trade in the grain merchandising industry that unless a contract specifies otherwise, a bulk carrier is assumed to be the only type of vessel which may be loaded. Tankers, deck ships and LASH barges are perceived by the industry to be, to a greater or lesser degree, nonconventional types of vessels.

29. The rationale for the custom of trade referred to above is the grain merchandising industry's perception that the efficiencies of loading a bulk carrier are far superior to those of loading other types of vessels.

30. If a commodity sales contract authorizes the loading of a nonconventional vessel, a contract of purchase which does not allow for such a loading could not generally be applied to execute that contract of sale absent renegotiation of the terms of the contract of purchase and the assessment of some form of premium.

31. Execution of a commodity sales contract which sanctions the loading of nonconventional vessels by means of a transferral of the contractual obligations to another commercial would generally be rendered more difficult, and in some instances virtually impossible, by the inclusion of that authorization.

32. In order to execute a commodity sales contract which authorizes the loading of a nonconventional vessel by repurchasing the necessary grain from another commercial, Continental (New York) would generally have to pay a substantially higher price for the grain so purchased.

33. An offer of grain on terms authorizing presentation of a LASH vessel would be made at a higher price than an offer authorizing other vessels.

34. In recent years, U.S. grain exports have increased dramatically, as people throughout the world have looked to U.S. grain suppliers as a source of food. From 1962 to 1978, annual exports of wheat, corn, sorghum, barley, oats and rye increased by 162 percent, from 35.5 million metric tons to 92.7 million metric tons. Annual exports of wheat alone increased during the eight-year period from 1970 to 1978 by 61

percent, from 20.2 million metric tons in 1970 to 32.5 million metric tons in 1978. This growth in exports has created heavy utilization of export facilities.

THE P.L.-480 PROGRAM

35. A major foreign aid program run by the U.S. government is a program authorized by the Agricultural Trade Development and Assistance Act of 1954, 68 Stat. 455, as amended, commonly known as the "P.L.-480 program," under which the U.S. government finances sales of agricultural commodities to eligible foreign governments.

36. The P.L.-480 program is administered by the U.S. Department of Agriculture (USDA). USDA issues a purchase authorization to the government of the purchasing country, indicating the amount which may be spent for commodity purchases, and containing additional terms relating to those purchases. USDA approval is required for commodity sales contracts entered into by foreign governments pursuant to the program.

37. In a P.L.-480 sale, the foreign buyer issues a tender, or an invitation for bids, to sell the commodity and to charter vessels for the ocean transportation of the commodity. All bids are opened in public on the due date. The foreign buyer then decides what bids to accept, and submits those bids to USDA for approval.

38. Pursuant to Section 901(b) of the Merchant Marine Act of 1936, 46 U.S.C. § 1241(b)(1), at least fifty percent of the commodities purchased by each country under the P.L.-480 program must be transported on U.S. flag vessels.

39. An amendment to the P.L.-480 regulations in 1977 changed the prior procedure to require that all purchases under the program be made through public invitations for bids, that the bids be made public and that the lowest responsive bid be accepted. Because of this requirement, P.L.-480 sales represent a departure from normal commercial practice in which individual exporters and buyers are free to negotiate and re-negotiate the terms of export sales contracts.

40. Leo Wallace, the USDA official responsible for approving commodity bids under the P.L.-480 program since 1975, stated: "As we started getting some experience with this new procedure, . . . it became clear that many exporters were basing their prices on bulk carriers, excluding certain types of vessels." Because of this development, it became difficult for USDA to insure that the fifty percent cargo preference requirement was met, given the U.S. flag fleet, "consisting of mostly other than bulk carriers, which are better suited to the carriage of bulk grain."

41. Later in 1977, USDA began including in its purchase authorization forms a provision forbidding commodity sellers to make offers precluding specific types of vessels from lifting the cargo. Wallace

stated that this "effort to avoid exclusions . . . was not working" because:

> [T]he primary result was that the prices offered, including all types of vessels, included a risk factor for loading to slower moving vessels and it appeared that this would be on all offers, not just half of them . . . [T]here was a risk factor that would run anywhere from zero to four, five dollars a ton for the risk of loading slow moving ships so that we had to come up with something else.

42. In the spring of 1978, USDA began inserting in its purchase authorization forms a provision allowing export offers to preclude certain types of vessels from lifting the cargo if the exclusion was approved by USDA.

43. Sometime after June, 1978, as a matter of policy, USDA began to request that exporters make separate offers for each type of vessel that could be presented to lift the grain, although exclusions of particular vessel types were still permitted if approved by USDA. As a result, many offers now contain separate commodity prices for carriage by bulk carriers, tankers, deck ships and LASH and Seabee barges. Commodity offers permitting carriage by LASH and Seabee barges are consistently made at a price higher than offers for any other type of vessel.

44. In a normal commercial contract, in the absence of any provision regarding vessels, it would be implied that LASH barges could not be nominated to lift the grain. In a PL-480 contract, an explicit contractual provision to this effect is desirable, because the commodity price cannot be re-negotiated once the sale is approved by USDA, and hence no premium charged by another commercial for accepting LASH barges can be passed on to the foreign purchaser.

CONTINENTAL'S CONTRACT OF SALE OF WHEAT TO EGYPT

45. On June 14, 1978, the General Authority of Supply Commodities of the Arab Republic of Egypt (Egypt) issued, through the Egyptian Commercial Office, an "Invitation for Bids" for the supply of up to 50,000 metric tons U.S. Wheat. The Invitation for Bids was published in accordance with Purchase Authorization No. EG-7004-A issued by the United States Department of Agriculture (USDA) pursuant to Public Law 480.

46. In addition to listing the description and quantity of the wheat Egypt sought to purchase, the Invitation for Bids specified that the wheat purchased would have to be loaded during the period July 1 through July 31, 1978, and directed that all offers should designate a port at or a range of ports in which that wheat would have to be loaded. It was further specified therein that vessel nominations made by Egypt were not to be irrevocable and that substitutions of vessels for

those initially nominated were not to be subject to the seller's approval. The Invitation for Bids did not contain any provisions restricting the types or classes of vessels into which the wheat purchased could be loaded.

47. On June 21, 1978, Continental (New York) submitted an offer for the supply of wheat in response to Egypt's Invitation for Bids. Continental (New York)'s offer contained six separate bids, each of which specified a quantity and grade of wheat, a loading range or port and a price. Two of the bids designated the Gulf coast of the United States as the loading range; one specified the Atlantic coast of the United States north of Cape Hatteras (USNH), including Savannah, Georgia, but excluding Albany, New York; one designated an elevator operated by Continental in St. Louis, Missouri; another specified the Great Lakes; and the final bid designated Duluth/Superior. All of the bids specified the terms of delivery as "F.O.B. [Free on Board] unstowed, untrimmed." With the exception of the bid that designated Duluth/Superior as the loading area, all of the bids offered to supply soft red winter wheat.

48. Also included in the offer submitted by Continental (New York) was a provision specifying that unless a bid noted otherwise, the wheat offered for sale could not be loaded aboard LASH barges. The bid that designated the elevator operated by Continental in St. Louis, Missouri, as the loading facility was the only bid that authorized the loading of LASH barges. This restrictive provision was Item 7-C.

49. Item 7-C was incorporated into the offer submitted by Continental (New York) by R. Jeffrey Smith, then a Junior Merchandiser with Continental's North American Grain Division after a brief consultation with Richard Carter, then the Vice President in charge of Continental's North American Grain Division's wheat operations.

50. The bids that designated loading ranges on the Gulf and Atlantic coasts of the United States authorized the loading of tankers. Tankers could be loaded on the Gulf coast at a specified premium per metric ton of wheat purchased and on the Atlantic coast at no additional cost. These bids also allowed for loading deck ships at a premium of sorts. It was specified therein that load rate guarantees, i.e., a commitment to load the wheat purchased at the rate designated by the purchaser, would apply only to vessels capable of accepting 20,000 or more metric tons of wheat. The normal deck ship is not capable of transporting such a quantity of wheat.

51. Continental (New York) believed that it was necessary to specifically exclude LASH loadings in the offer it submitted to Egypt, as opposed to relying upon the custom of trade as to contractually acceptable vessels, because of restrictions imposed by USDA on the merchandising of grain under the auspices of the P.L. 480 Program. In a normal commercial setting, if a purchaser elected to nominate LASH barges, as

opposed to a bulk carrier, for the carriage of the grain it had purchased, that nomination might be accepted if a premium could be negotiated. Such a "price sensitive" matter could not be negotiated within the context of the P.L. 480 Program without securing the approval of USDA. Continental (New York) elected not to offer to load LASH barges at a specified premium because at the time it submitted its offer to Egypt it believed that the calculation of such a premium was impossible.

52. The prices specified in the various bids which comprised the offer submitted by Continental (New York) reflected, among other things, Continental (New York)'s perception of the commodities market, the perceived efficiencies of loading contractually acceptable types of vessels and the anticipated ability of Continental (New York) to execute a commodity sales contract that might be entered into with Egypt by transferring its contractual obligations to another commercial.

53. If Continental (New York) had included LASH barges in the category of contractually acceptable vessels, the prices specified in the bids that had excluded LASH barges would have been considerably higher to compensate Continental for the risk that no covering purchase from another commercial grain company could be made or that such a purchase could be made only at an exorbitant premium.

54. Item 7-C was included in the offer submitted by Continental (New York) in order to facilitate the transfer to another commercial of the contractual obligations that would flow from Egypt's acceptance of one or more of Continental (New York)'s bids.

55. A number of other commercials operated export elevators on the Atlantic coast of the United States in July, 1978. Cargill, Inc. operated facilities at the Ports of Albany, New York, Norfolk, Virginia, and Charleston, South Carolina; Bunge Corporation maintained an export elevator at the Port of Philadelphia, Pennsylvania; Tidewater Grain Company owned a facility at the Port of Philadelphia, Pennsylvania; Louis Dreyfus Corporation operated an export elevator at the Port of Baltimore, Maryland. In addition to Continental, a number of other commercials operated export elevators on the Gulf coast of the United States.

56. It was anticipated by Continental (New York) at the time it submitted its offer to Egypt that ports on the Atlantic and Gulf coasts of the United States would be heavily congested and that export elevators in these ranges would be fully utilized during the month of July, 1978. Continental (New York), therefore, perceived that it would have been extremely costly, if not impossible, to execute a contract of sale for export which authorized the loading of LASH barges by transferring Continental (New York)'s contractual obligations to another commercial.

57. It was further anticipated by Continental (New York) that if it authorized the loading of the wheat that it had offered to sell to Egypt aboard LASH barges, any wheat sold would have had to have been loaded at an export elevator operated by one of Continental's regional offices. This meant loading at the Westwego, Louisiana, facility on the Gulf coast and at the export elevator located in Norfolk, Virginia, on the Atlantic coast.

58. By telex addressed to Continental (New York) and dated June 21, 1978, the Egyptian Commercial Office confirmed, subject to USDA approval, that it had agreed to purchase from Continental (New York) 25,000 metric tons of soft red winter wheat to be loaded in the range USNH, excluding Albany, New York, but including Savannah, Georgia, in July, 1978, and 10,000 metric tons of soft red winter wheat to be loaded on the Gulf coast in July, 1978. Egypt's provisional acceptance did not refer to the provision included in the offer submitted by Continental (New York) prohibiting the loading into LASH barges of the wheat offered in the bids that had been accepted.

59. By telex dated June 22, 1978, the Egyptian Commercial Office advised Continental (New York) that USDA had approved Egypt's purchase of 25,000 metric tons of soft red winter wheat to be loaded in the range USNH, excluding Albany, New York, but including Savannah, Georgia, during the month of July, 1978.

60. On that same day, Continental (New York) notified the Egyptian Commercial Office of its confirmation of the sale that had been approved by USDA. In that telex, Continental (New York) reiterated that LASH barges could not be utilized to load the wheat that it had sold to Egypt.

61. By telex dated June 27, 1978, the USDA advised Continental (New York) that its sale of 25,000 metric tons of soft red winter wheat to Egypt had been approved.

62. A commodity sales contract evidencing the sale and purchase of 25,000 metric tons of soft red winter wheat was thereafter entered into by Continental and the General Authority for Supply Commodities, acting on behalf of the Government of the Arab Republic of Egypt. This contract specified that the wheat traded could not be loaded into LASH barges.

63. The commodity sales contract approved by USDA contained the provision excluding LASH barges from carrying the wheat Egypt had purchased from Continental (New York).

HOW PRUDENTIAL WAS UNABLE TO OBTAIN THE BOOKING

64. On June 19, 1978, Peralta Shipping Agency, Inc. (Peralta), acting on behalf of the Egyptian Company for Maritime Transport (Martrans) of the United Arab Republic of Egypt, issued a "Freight Invitation" for

the carriage of up to 50,000 metric tons of wheat to be loaded during the period July 1 through July 25. The's Freight Invitation was issued pursuant to Purchase Authorization No. EG-7004-A. Under the terms of Purchase Authorization No. EG-7004-A, Egypt was to select the vessels that were to transport the wheat it had purchased from Continental (New York).

65. Following notification by telephone of the terms of Peralta's Freight Invitation, Prudential, by telex dated June 20, 1978, offered to transport two parcels of 7,500 metric tons of wheat to be loaded in the range "USNH, not north N.Y.," during the periods July 5 through July 15, 1978, and July 15 through July 25, 1978. Prudential specified that the wheat would be loaded on one or more of the vessels *LASH ATLANTICO, LASH ITALIA* and *LASH PACIFICO.*

66. In response to Prudential's offer, Peralta submitted a counter offer specifying a different quantity and freight rate and designating Charleston, South Carolina, as the port of loading. Following negotiations, Prudential subsequently agreed to and ultimately did carry, pursuant to a booking note dated June 23, 1978, 9,357 metric tons of wheat which were loaded by Cargill, Inc., at the port of Charleston, South Carolina, in late July, 1978. The wheat was loaded aboard and carried on LASH barges.

67. On June 26, 1978, Peralta issued another Freight Invitation for the carriage of up to 25,000 metric tons of wheat to be loaded on the Atlantic coast of the United States between July 1 and July 25, 1978. The Freight Invitation was issued pursuant to Purchase Authorization No. EG-7004-A.

68. The Freight Invitation issued by Peralta did not restrict the type or class of vessels that could be offered to carry the specified quantity of wheat.

69. Following notification by telephone of the terms of Peralta's Freight Invitation, Prudential, by telex dated June 27, 1978, offered to transport 18,000 metric tons of wheat to be loaded in the range "Savannah/Charleston not north N.Y." during the period July 15, through July 25, 1978. Prudential advised that the wheat would be loaded on one or more of three specified LASH vessels.

70. In response to Prudential's offer, Peralta submitted a counter offer specifying a different quantity and freight rate on June 27, 1978. The following morning, prior to receiving Prudential' response, Peralta notified Prudential by telephone that Continental (New York), the supplier of the wheat purchased, had, in its commodity bid, prohibited the loading of that wheat aboard LASH barges.

71. By telephone, Peralta requested that Continental (New York) authorize the loading of the wheat purchased by Egypt into LASH barges. Upon being advised that the commodity sales contract prohibit-

ed such a loading, Peralta requested that Continental (New York) discuss with Prudential the possibility of waiving that prohibition.

72. Daniel J. Cahalane, then the General Traffic Manager, Mediterranean Mid-East Division of Prudential, testified that he believed that Peralta had advised Prudential on June 28, 1978, that the loading of the wheat purchased by Egypt was to be undertaken at the export elevator operated by Continental in Norfolk, Virginia. Mr. Cahalane further testified that Peralta invariably notified Prudential of the port of loading prior to the fixture of the vessel that would transport the grain and that Peralta had, in the past, always correctly identified the port of loading. Mr. Cahalane did not indicate the initial source of the information that he had received from peralta.

73. Mr. Carter testified that he had not so advised Peralta that the wheat Continental (New York) had sold to Egypt would be loaded at the export elevator operated by Continental in Norfolk, Virginia. Mr. Carter further noted that it would have been contrary to the policy of Continental (New York) to so advise Peralta until Continental New York) was contractually obligated to do so. Mr. Smith testified that although he did not specifically recall, he strongly doubted that he would have so advised Peralta that Norfolk, Virginia, was the port at which the wheat purchased by Egypt was to be loaded. Mr. Smith did not believe that the port of loading would actually have been determined prior to the time at which Continental (New York) was contractually obligated to specify the facility at which the grain would be loaded.

74. Mr. Carter further testified that due to difficulties Continental (New York) had experienced in its prior dealings with Peralta, Continental (New York) would not have advised Peralta of the port of loading until it was contractually obligated to do so. Apparently Egypt had on previous occasions nominated vessels that were not available to transport grain it had purchased only to substitute, and perhaps substitute again, different vessels. Mr. Carter noted that due to past nominations of such "phantom" vessels, Continental (New York) would not designate a port of loading until it was assured that the vessels nominated were physically present and would actually load the grain Egypt had purchased.

75. On June 28, 1978, Mr. Cahalane in a discussion with Mr. Carter raised the possibility of loading Prudential's LASH barges at the N & W Elevator. Mr. Cahalane emphasized Prudential's belief that LASH barges could be loaded at rates comparable to those achieved by other types of vessels.

76. Mr. Carter, in turn, advised Mr. Cahalane that Continental's regional office in Chicago, Illinois, had estimated that the rate at which wheat could be loaded aboard LASH barges at the N & W Elevator would be substantially less than that which could be achieved by a bulk

carrier. Mr. Carter indicated further that by loading a vessel that could receive wheat at a slower rate, the productivity of the N & W Elevator would be negatively affected.

77. Representatives of Prudential also discussed the possibility of loading Prudential's LASH barges at the N & W Elevator with Continental personnel in Norfolk, Virginia on June 29, 1978.

78. At Mr. Carter's suggestion, Continental's Chicago, Illinois, regional office attempted to arrange with Cargill, Inc., the loading of Prudential's LASH barges at the export elevator operated by Cargill, Inc., in Norfolk, Virginia. Cargill, Inc., declined to load the LASH barges.

79. On June 30, 1978, Peralta accepted Prudential's offer to transport 17,500 metric tons of the wheat Egypt had purchased from Continental (New York). Peralta's acceptance was made contingent upon Prudential reaching an agreement with Continental (New York) by noon on July 5, 1978, that would allow for the loading of Prudential's LASH barges.

80. On July 5, 1978, Mr. Cahalane contacted Mr. Smith. Mr. Carter was on vacation at this time. Mr. Cahalane proposed a "productivity schedule" under which Prudential would pay Continental at a rate between one cent and ten cents per bushel for the cargo, depending on the extent to which the loading rate of Prudential's LASH barges actually fell below 1000 tons per hour. The proposed schedule did not include any definition of what was meant by "loading hours" and, according to Continental, did not compensate Continental for lost "elevation." Under the proposed schedule, Continental estimated that even if the LASH barges loaded at only 400 tons per hour, Prudential would pay Continental only $38,850 while Continental's estimated "loss" would total $97,125.

81. After consulting with other Continental personnel, Mr. Smith informed Mr. Cahalane that the latter's proposed schedule was not responsive to the problem of Continental's lost "elevation." When Mr. Cahalane continued to seek a solution, Mr. Smith consulted other Continental personnel and advised Mr. Cahalane that loading LASH at the N & W Elevator would force Continental to lose "elevation" estimated at $120,000, incur demurrage liability estimated at $30,000, and possible elevator overtime costs of $5,000 to $10,000. (In earlier discussions on June 28, 1978, between Mr. Cahalane and Mr. Carter, Mr. Cahalane offered to have Prudential pay Continental in advance for all stevedoring and extra labor charges expected to be incurred.) In addition, Mr. Smith advised Mr. Cahalane that confusion about USDA weight and grade inspection procedures applicable to LASH barges required some firm understanding with USDA in advance about the number of weight and grade certificates that would be required. Mr. Smith also told Mr. Cahalane that any contractual change would require USDA approval.

82. Grain is sold by Continental for export F.O.B. end-of-spout, as noted earlier. One measure of the money earned on grain bought and sold by Continental is known as "elevation." Elevation is a theoretical measure of the difference between the market value of grain as received by an elevator on the land side and the F.O.B. export market price. "Elevation" is purely a measure of this difference in market prices; it is neither a charge nor a profit and bears no relation to terminal costs. It is simply one element of the earnings on an export sale. The cost price at which grain was purchased for the Elevator and the F.O.B. price when sold for export are determined by market conditions, i.e., supply and demand.

83. Continental is concerned that its Elevator may become "plugged," i.e., that grain arrives on the land side of the Elevator faster than it can be loaded into vessels. Use of slower-loading vessels increases the risk of plugging. Plugging can result in Continental's losing sales if the grain cannot be loaded at the N & W Elevator and is instead purchased and re-sold by another company. Continental's records show a build up at the N & W Elevator in late June and early July 1978 but this was at a time when supposedly fast loading bulk vessels were in berth. The record shows that LASH barges do not load as slowly as Continental believes and that LASH barges load at about the same rates as deck ships, at least. Also, as Continental concedes, the losses which Continental feared would occur at the N & W Elevator do not pertain to the particular sale to Egypt but to other sales and, as Prudential notes, probably for other types of grain such as corn which were at the Elevator at the time in question. (Prudential's Reply Statement, p. 37 n. 1.)

84. Mr. Smith advised Mr. Cahalane that Continental would consider removing the LASH exclusion if Prudential would pay $150,000 "up front." This figure derives from cost data for the Elevator that had been provided by Continental's Chicago and Norfolk personnel and purportedly related to conditions then obtaining at the N & W Elevator and deal with profit estimates based upon the volume of bushels of grain moving through the Elevator in a specified period of time. Mr. Cahalane rejected Mr. Smith's proposal.

85. On July 5, 1978, Peralta issued another Freight Invitation for the carriage of 22,500 metric tons of the wheat that Egypt had purchased from Continental (New York). The wheat was to be loaded on the Atlantic coast of the United States between July 1 and July 25, 1978. Prudential, by telex dated July 6, 1978, offered to transport 17,500 metric tons of wheat on the terms that Peralta had agreed to previously. Peralta provisionally accepted Prudential's offer and nominated Prudential's LASH vessels to Continental (New York) on July 7, 1978. Continental (New York), by telex dated July 7, 1978, rejected Peralta's vessel nominations as "uncontractual."

86. On July 5, 1978, Peralta nominated two deck ships to transport a total of 9,000 metric tons of the wheat Egypt had purchased from Continental (New York). The vessels so nominated were the *EXPORT BUILDER* and the *EXPORT COURIER* operated by Farrell Lines. These vessels were characterized by Peralta as "U.S. Flag Liners." Peralta confirmed its vessel nominations by telex dated July 6, 1978.

87. On July 5, 1978, Continental (New York) accepted the vessels nominated by Peralta and advised Peralta that the wheat to be carried by these vessels would be loaded at Norfolk, Virginia. By telex dated July 11, 1978, Continental (New York) confirmed its acceptance of the vessels that Peralta had nominated and formally declared Norfolk, Virginia, as the port of loading.

88. On July 10, 1978, Peralta issued another Freight Invitation for the carriage of 17,000 metric tons of the wheat that Egypt had purchased from Continental (New York). The wheat was to be loaded on the Atlantic coast of the United States between July 11 and July 25, 1980. Once again, Prudential offered to transport 17,000 metric tons of wheat on the terms that Peralta bad previously agreed to. Prudential incorporated into its offer the penalty schedule that Mr. Cahalane had previously proposed to Mr. Smith.

89. Peralta did not accept Prudential's offer, but was unable to secure transportation of the remaining wheat purchased by Egypt on a U.S. Flag vessel. On July 17, 1978, Peralta issued yet another Freight Invitation. This Freight Invitation excluded LASH barges and was limited to "non U.S. Flag vessels."

90. On July 19, 1978, Peralta nominated the *SWEDISH WASA*, a British Flag bulk carrier to transport 17,000 metric tons of the wheat that Continental (New York) had sold to Egypt. By telex dated July 19, 1978, Peralta confirmed that nomination and substituted the *EXPORT CHAMPION* for the previously nominated *EXPORT COURIER*.

91. By telex dated July 19, 1978, Continental (New York) requested that Continental's Chicago, Illinois, regional office declare the port at which the grade Continental (New York) had sold to Egypt would be loaded.

92. By telex dated July 19, 1978, Continental (New York) accepted Peralta's vessel nomination and formally declared Norfolk, Virginia, as the port of loading. The wheat purchased by Egypt was transported on the *SWEDISH WASA*, the *EXPORT CHAMPION* and the *EXPORT BUILDER*. These vessels were loaded at the N & W Elevator in July and August, 1978.

93. On at least five separate occasions in 1978, prior to or contemporaneous with the events here in issue, Prudential had loaded bulk grain on LASH barges at other grain export elevators on the East Coast of the United States. These included loadings at the elevators of Cargill, Inc., in Albany, New York, and Norfolk, Bunge's terminal in Philadel-

phia, the State elevator in Charleston, South Carolina, leased and operated by Cargill, and the Davis terminal in Norfolk. Prudential's LASH barges have thus previously had access to grain elevators.

THE N & W ELEVATOR AND THE VESSELS AND CARRIERS IT SERVED

94. The N & W Elevator is a marine terminal facility at which bulk grain is loaded for export aboard vessels operating in the foreign commerce of the United States. At the N & W Elevator, grain which is delivered by truck, barge or rail is weighed, elevated, processed, graded and loaded aboard oceangoing vessels berthed at the facility.

95. Continental has leased and operated the N & W Elevator since May, 1962. Continental leases the terminal from the Norfolk and Western Railroad. Pursuant to its lease, Continental is required to operate the Terminal as a "public terminal open to all parties."

96. Continental utilized and maintained on file with the Federal Maritime Commission during the period October 1, 1974 through October 1, 1978, a marine terminal tariff entitled:

> CONTINENTAL GRAIN COMPANY - OPERATORS NORFOLK AND WESTERN GRAIN ELEVATOR, NORFOLK, VIRGINIA—RULES REGULATING AND RATES APPLYING TO LOADING OF SELF PROPELLED VESSELS

97. The following types and classes of vessels are referred to in the terminal tariff: "self-trimming bulk carriers," "vessels with no tweendeck," "liberty and other similar type vessels with one tween-deck," "vessels with more than one tween-deck," and "tankers." Notwithstanding the tariff title which refers to self-propelled vessels, non-self propelled vessels, specifically LASH barges, have been loaded and charged tariff rates.

98. The terminal tariff which governed the loading of grain aboard vessels at the N & W Elevator during the period October 1, 1974 through October 1, 1978, defined "Liner Vessels" as:

> a vessel sailing under an advertised schedule, and operated by a line maintaining regular sailings from any United States port to named ports and on which the quantity of grain to be loaded shall not exceed one half of the total dead weight tonnage of the vessel.

99. Although the tariff contains a provision that states that " 'Liner Vessels' shall be given preference" under certain conditions, the evidence of record indicates that no such preference had actually been granted. "Liners" are generally defined in the shipping industry to mean vessels that are on an advertised and regular schedule to specific ports and that are held out to the general public for carrying general cargo at regular rates.

100. Effective October 1, 1978, Continental amended its terminal tariff so as to add the following provision regarding the loading of LASH barges:

> Elevator Management reserves the right to reject LASH Barges, if, in its opinion, such vessels interfere with the normal loading process.

101. During the period of June and July of 1978, Continental also maintained on file with the United States Department of Agriculture a tariff for the Elevator as a licensed public grain warehouse containing charges including a per bushel shipping charge for weighing out and delivery of grain to "cars, trucks, barges and vessels." As a licensed warehouseman, Continental was required by a provision of the United States Warehouse Act (7 U.S.C. 254) to receive grain for storage without discrimination.

102. Continental's Port Coordinator, Cowan, indicated that the Terminal tariff was regarded as being a true tariff. The record further reveals that Continental operated its terminal in a fashion generally consistent with its tariff as to charges for services. Detailed billing records show that vessels were charged in accordance with rates published in the tariff.

103. The "Monthly Report of Ship Loading" maintained by Continental in the regular course of business at Norfolk, Virginia, indicates that grain was loaded aboard "liners" at the N & W Elevator on seventeen different occasions during the years 1977 and 1978.

104. The "liners" so loaded at the N & W Elevator during these years were the *SELFOSS* and the *BRUARFOSS* operated by The Icelandic Steamship Company (Icelandic). Subsequent to March 1, 1978, Icelandic has maintained on file with the Federal Maritime Commission Freight Tariff No. FMC-9. Icelandic Freight Tariff No. FMC-9 specifies freight rates and conditions for the carriage of a wide range of cargo shipped from U.S. North Atlantic Ports of the Portland, Maine/Norfolk, Virginia, range to Ports in Iceland. Freight Tariff No. FMC-9 cancelled "Norfolk, Virginia/Iceland Freight Tariff No. FMC-3."

105. Icelandic advertised in *The Journal of Commerce* "regular frequent sailings" of the *BRUARFOSS* and the *SELFOSS* "from Portsmouth, Virginia to Iceland direct." In these advertisements, dates were listed on which these vessels would call at the specified ports of loading and discharge. .

106. During the years 1977 and 1978, neither the *BRUARFOSS* nor the *SELFOSS* received a full shipload of grain at the N & W Elevator. Furthermore, between January 1977 and September 1979 the largest grain shipments carried by the *BRUARFOSS* and the *SELFOSS* were substantially below one half the deadweight tonnage of these vessels. Continental's loading reports refer to these vessels as "liners."

107. The *EXPORT BUILDER* and the *EXPORT CHAMPION*, the vessels on which a portion of the grain purchased by Egypt from Continental (New York) was loaded at the N & W Elevator, were operated at the time of loading by Farrell Lines, Inc. (Farrell). Farrell advertised in *The Journal of Commerce* that the *EXPORT BUILDER* and the *EXPORT CHAMPION* made "regularly scheduled calls" at U.S. Atlantic coast ports, including the Port of Norfolk, Virginia, and numerous specified foreign ports of call, including the Port of Alexandria, Egypt. In its advertisements, Farrell listed dates on which these vessels would call at the specified ports of loading and discharge.

108. Farrell is a member of the North Atlantic Mediterranean Freight Conference (NAMFC). NAMFC has maintained on file with the Federal Maritime Commission "Freight Tariff (13) FMC-8" which specifies commodity rates and conditions governing the carriage of a wide range of cargo from "North Atlantic Ports of the United States in the Hampton Roads/Eastport Range" to specified foreign ports of call.

109. In September, 1977, forty LASH barges that were ultimately carried aboard Central Gulf Line's LASH vessel *DELTA SUD* were loaded with grain at the N & W Elevator. The *DELTA SUD* loaded grain at the N & W Elevator while calling at the Port of Norfolk, Virginia, in accordance with a schedule advertised in *The Journal of Commerce* which specified various ports of call on the Atlantic coast of the United States, including Norfolk, Virginia, and on the Red Sea and the Persian Gulf.

110. Central Gulf Lines has maintained on file with the Federal Maritime Commission "Freight Tariff No. 1, FMC No. 28" which specifies commodity rates and conditions governing the carriage of a wide range of cargo between U.S. ports, including the Port of Norfolk, Virginia, and designated foreign ports of call.

111. LASH barges that were transported on Prudential's LASH vessel *LASH ITALIA* were loaded at the N & W Elevator in June, 1977. The *LASH ITALIA* was calling at the Port of Norfolk, Virginia, in accordance with a regular schedule advertised in leading industry publications. These advertised schedules designated specific ports of loading and discharge in the United States, including the Port of Norfolk, Virginia, and abroad.

112. Prudential has maintained on file with the Federal Maritime Commission "Freight Tariff 1, FMC No. 47" which specifies commodity rates and conditions governing the carriage of a wide range of cargo between U.S. Atlantic Coast ports and designated foreign ports of call on the Mediterranean Sea.

113. The *LASH ITALIA* was only authorized to carry a maximum of thirty-three out of a total complement of seventy-seven LASH barges loaded with bulk wheat. Prudential dedicated the remaining LASH barges to the carriage of general cargo. In the normal course of busi-

ness, Prudential carried parcels of grain to fill empty vessel space. This practice is done in order to "shorten the ship" when cargo is in short supply.

114. During the years 1977 and 1978, approximately 175 vessels were loaded with grain at the N & W Elevator. Twenty-one of these loadings involving the *SELFOSS*, the *EXPORT CHAMPION*, the *EXPORT BUILDING*, the *DELTA SUD* or the *LASH ITALIA*. Approximately seventy-five percent of the vessels so loaded were bulk carriers.

115. The calls made by the vessels or barges sent by the four common carriers discussed above were made pursuant to negotiated rates which are not published in their common carrier tariffs and the vessels, even if calling at the port of Norfolk regularly, do not advertise regular calls at the Elevator. In this case Prudential negotiated rates with Peralta under a particular type of contract of affreightment or booking note which, in some respects, resembles charter clauses for handling bulk commodities. Under this arrangement Prudential dedicates a certain number of barges for the grain, leaving any other barges that would be carried on the mother ship free to carry general cargo. Prudential solicited carriage of bulk grain through brokers and a forwarder who did not book general cargo. Prudential would seek to negotiate profitable rates for carriage of bulk grain but gave priority to its general-cargo business. Continental's policy is to consider vessels non-liner unless they maintain a regularly scheduled service from the N & W Elevator (notwithstanding the literal language of the terminal tariff which mentions "regular sailings from any United States port to named ports. . . .")

DIFFERENT ESTIMATES OF LOADING TIMES FOR LASH AND OTHER SHIPS

116. The parties have made different calculations of loading rates for LASH barges and for other types of ships such as deck or bulk ships. Comparisons are difficult to make because different types of grain were loaded some times and because some of the time spent by the barge or ship on berth is consumed by maneuvering or bad weather which is not reflected in tables showing actual loading times.

117. Continental's own monthly vessel loading reports (Exhibit 54) based upon actual loading time (pouring time) shows that for four LASH barge loadings (including an abnormal rainy loading on January 1974) the actual rate per hour based upon actual pouring time was 15,925 bushels per hour for the LASH barges at the Elevator compared to 14,220 bushels per hour for eight deck ships. Even if adjusted to reflect total stevedoring time spent while the barges or deck ships were at the Elevator rather than merely the actual time in pouring, comparisons between six LASH barges loading corn and wheat during 1972 through 1977 and six deck ships loading corn and soybeans show

LASH to be nearly as productive as deck ships. The average for the LASH loadings was 10.6 thousand bushels of corn or wheat per hour for LASH (11.8 thousand if the abnormal January 1974 loading is omitted) compared to 12.3 thousand bushels per hour for the deck ships. Converted to metric tons, the comparison is a range of 408.3 to 291.2 metric tons per hour (omitting the abnormal January 1974 loading) for LASH barges compared to 498 to 257 metric tons per hour for the deck ships. LASH also did better than the two liner ships *BRUARFOSS* and *SELFOSS* which averaged 7.5 thousand bushels per hour (actual pouring time) for 12 loadings between January 1977 and June 1978.[2]

118. Comparisons of loading rates for bulk ships which are believed to be the fastest loading ships for grain show that based on actual pouring time, bulk ships loaded at an average of 551 metric tons per hour during January through June 1978 whereas four LASH barges loaded at an average rate of approximately 425 metric tons per hour in 1974 and 1977. The range for the bulk vessels was 449 to 635 metric tons per hour (based on actual pouring time).

119. Other data derived from Continental's records shows that the Elevator did not load on an around-the-clock basis. In fact, the Elevator poured grain on the average only about fifty percent of the time each day. On that basis, of course, average hourly rate of loading (as contrasted to rate of loading when grain is actually pouring) is lower. Calculations drawn from Continental's records show an average loading rate on such a total-time basis to be about 263 metric tons per hour based upon total hours in a month. These data call into question Continental's estimate that the Elevator could load 1,000 tons per hour but for LASH barges, a figure Continental utilized when negotiating with Prudential for productivity payments to offset slower loading LASH barges.

[2] Continental challenges the validity of these comparisons between LASH and deck ships and also shows that there is a loss of productivity when loading LASH barges due to time spent in positioning the barges above time spent in actual pouring. Continental also asserts that the LASH and deck ship comparisons are invalid because some barges loaded wheat or corn and the deck ships loaded corn or soybeans. Continental shows that comparing LASH barges loading corn with deck ships loading corn reveals that deck ships averaged 12,375 bushels per hour (total time on berth) while LASH barges averaged only 9,990 bushels per hour. (Continental Posthearing Statement, p. 52.) The record so shows. However, if the abnormally slow LASH loading of January 1974 is omitted, the comparison becomes 12,375 bushels per hour for deck ships compared to 12,350 bushels per hour for LASH barges. Continental does show lost time in loading LASH barges when comparing actual pouring time with total time on berth. (Continental's proposed finding No. 124.) But there is also lost time for the deck ships as the various tables show. There is no comparison of deck ships and LASH barges restricted to wheat loadings as Continental asserts, if total time on berth is used. But Prudential shows that for actual pouring time, a comparison of strictly wheat loadings on three LASH loadings with wheat on four deck ships reveals that LASH did better (16,436 bushels per hour compared to 15,180 for the deck ships). (Prudential Reply Statement, p. 40.)

120. There is evidence that Continental had not employed the most efficient stevedoring techniques in loading LASH barges in their early experiences with LASH on November 1972. Prudential's personnel believe, based upon their experiences at the Albany Elevator, that Prudential had the personnel and tugboats available to load 17,500 tons of wheat at the N & W Elevator at a rate between 500 and 1,000 tons per hour. Prudential had loaded LASH barges at the Cargill elevator in Norfolk in June 1978 at an average loading rate of 463 tons per hour, total time, according to Prudential's Norfolk Terminal Manager who was specifically requested to keep track of the loading rate at a time when Prudential was negotiating with Continental about the shipment in issue.

121. Although the various calculations appear to be confusing, it appears that LASH barges do quite well compared to deck ships when actually pouring or even when total time in berth is considered. There is also considerable lost time surrounding the actual pouring which indicates loss of productivity at the Elevator generally regardless of type of vessel. Bulk ships appear to load faster as far as actual pouring rate is concerned as well as for total time in berth. The bulk ship *SWEDISH WASA*, which ultimately carried a portion of the shipment in question after the LASH vessel nominations were vetoed by Continental under the contract of sale, did load at a rate much faster than any LASH barge had experienced at the terminal (811,36 metric tons per hour based on total time on berth, not pouring time). This rate exceeded Continental's expectations as to what a bulk ship could load by over 200,000 bushels. (Continental had expected that a bulk vessel could load 400,000 bushels of wheat in a 22-hour period; the *SWEDISH WASA* loaded 655,900 bushels in that period.) Nevertheless, as Prudential notes, the total picture at the Elevator should be considered to determine the effects on other loadings if LASH barges were loaded and, at the time in question, relatively low loading generally at the Elevator (240,000 bushels per day) could lessen the impact on other loadings if LASH had been selected.

CUSTOMS IN THE GRAIN INDUSTRY REGARDING USE OF ELEVATORS FOR EXPORTING GRAIN AND VESSEL SELECTION

122. There appears to be a custom among the major grain traders to consider bulk vessels to be "conventional" and all other types of vessels (tankers, deck ship and LASH barges) to be "non-conventional." By a general trade custom or practice, grain companies exporting through their East Coast elevators expect that a bulk vessel will be presented at an elevator under their contract of sale and delivery. If a non-bulk vessel were presented, it would either be rejected or a negotiated premium in the sales price would have to be paid based upon market

differentials at the time. The reason for this custom is the grain companies' belief that non-bulk vessels load more slowly and would cause delays at the various elevators. Such delays would affect the elevators' profitability in addition to whatever effects it might have on other grain sales and on grain companies' ability to cover sales by purchasing from other grain companies.

123. Although there is evidence that grain companies may ignore the standard restrictions in their contracts of sale when attempting to buy grain from each other to cover sales, the custom in the industry appears to be that they prefer standardized contracts which exclude LASH and other non-conventional vessels to avoid possible renegotiations of prices to account for non-conventional vessels or to facilitate purchase from another grain company to cover a sale. In a sale approved under P.L. 480, such as the one in issue in this case, an explicit contractual exclusion of LASH barges is made because the commodity price cannot be renegotiated in the event that the original grain seller transfers the contract to another grain company which would demand a premium for accepting LASH barges. Incidentally, the responsible official of the U.S. Department of Agriculture approved Continental's particular offer to sell in this case with its exclusion of LASH vessels under the erroneous impression that no LASH vessels would be available to handle the shipment.

124. Continental's traders believed that conditions at the various elevators would be crowded during June 1978 and that it would be necessary to cover a sale for delivery on the Atlantic or Gulf coasts with a purchase from another grain company. The record indicates some build-up at the N & W Elevator during late June and early July 1978 while bulk vessels were on berth. However, other evidence indicates that the N & W Elevator was not over-loaded with grain at this time.

125. Notwithstanding Continental's exclusion of LASH vessels in its offer to sell which was accepted by Egypt, another grain company, Cargill, had successfully bid on part of the invitation without excluding LASH vessels. Moreover, even in Continental's contract of sale, Continental did not exclude presentation of other types of "non-conventional" vessels such as tankers or deck ships. Indeed, deck ships of Farrell Lines did carry some of the grain and there is no evidence that the sales price had to be renegotiated because of that fact. However, during the early discussions between Prudential and Continental, when Prudential's Mr. Cahalane sought to have Continental waive its contractual restrictions so as to permit LASH barges to load, Continental sought to cover the sale by purchasing grain from Cargill's Norfolk elevator at a premium which would allow LASH barges to load there. Cargill, however, refused to sell wheat for loading into LASH barges at any premium.

126. The terminal tariffs filed by the various grain companies covering elevators on the East Coast at the time in question contained no special restrictions on LASH vessels except for Cargill's tariff in Norfolk which published a special 5-cent charge per outbound bushel for loading grain into LASH barges or between deckers.

127. Another custom or practice of the grain exporting industry concerns the fact that a person desiring to export grain from the East Coast who does not own or operate an elevator has to purchase the grain at the ocean side of the export elevator. Even grain companies operating elevators must purchase grain from each other F.0.B. end-of-spout. In other words, the grain stored in East Coast elevators operated by grain companies and loaded into vessels belongs to the grain companies operating the elevators, notwithstanding the public warehousemen nature of particular elevators such as the N & W Elevator. Before 1972 there were large government stocks of grain. However, there has been a dramatic change in the grain industry to the point where the grain companies apparently control movement of grain through their elevators so that persons without elevators (e.g., private farmers) cannot simply ship their grain to an export elevator on the East Coast for subsequent export if that elevator is operated by a grain company.

DISCUSSION AND CONCLUSIONS THE ISSUE OF JURISDICTION OVER THE N & W ELEVATOR AS A TERMINAL OPERATOR

Because of the complexity of the issues concerning the Commission's jurisdiction over Continental's terminal operations and over its practices relating to the exclusion of Prudential's LASH barges from carriage of the shipment of wheat in question, the parties agreed that it would be wise to defer litigating the question of reparation, i.e., Prudential's alleged monetary damages, and to concentrate instead on determining whether jurisdiction lies in the Commission and, if so, whether Continental violated section 16 First and 17 of the Act, as alleged by Prudential. Therefore, the first issue to be determined is the question as to whether Continental is subject to the Commission's jurisdiction because of its operations at the N & W Elevator.

As to this issue, Continental contends that it does not furnish terminal facilities in connection with common carriers by water so that it cannot fall under section 1 of the Shipping Act, 1916, which defines "an other person subject to this [A]ct" as a person who "carries on the business of . . . furnishing wharfage, dock, warehouse or other terminal facilities in connection with a common carrier by water." Act, section 1, 46 U.S.C. 801. Continental argues that the vessels calling at the N & W Elevator have been operated as bulk ships in contract carriage pursuant to specially negotiated arrangements with shippers and consignees. Thus, even when ships operated by apparent common carriers such as

Icelandic Steamship Co., Prudential, Central Gulf Lines, and Farrell Lines called at the N & W Elevator, according to Continental, they did so in contract carriage or else, as in the case of 32 out of 36 loadings of non-bulk ships during 1976 through 1978 at the Elevator on the Icelandic ships *BRUARFOSS* and *SELFOSS*, it was Icelandic's owners who purchased the grain, not a shipper. None of these non-bulk ships carried under tariffs which published grain rates, contends Continental, and even Prudential, which admittedly is a common carrier otherwise, tried to book the wheat shipment under specially negotiated rates without publishing such rates in its common-carrier tariff. Also, the vessels calling at the N & W Elevator did so without advertisements showing regular calls at the Elevator. Finally, even if some of the vessels calling at the Elevator did act as common carriers when so doing, Continental argues that the common carriage involved was of minimal consequence compared to the many vessels in noncommon carriage calling at the Elevator. Hence, Continental argues that the Elevator is essentially not furnishing services in connection with common carriers, or, if so, the Elevator has minimal impact on common carriers, thereby justifying a finding that there is no jurisdiction under the Act as was held in *Fall River Line Pier, Inc. v. International Trading Corp. of Virginia*, 399 F. 2d 413 (1st Cir. 1968), and under the reasoning of *Bethlehem Steel Corp. v. Indiana Port Commission*, 21 F.M.C. 629 (1979) (Opinion on remand), affirmed per curiam, 642 F.2d 1215 (D.C. Cir. 1980).

Both Hearing Counsel and Prudential refute the above contentions with citations to evidence of record and to previous court and Commission decisions. They cite numerous cases holding that grain elevator operators who make their facilities available to common carriers by water are subject to Shipping Act jurisdiction. They point to evidence of record showing that ships operated by common carriers have called at the N & W Elevator and that Continental's terminal tariff does not exclude common carrier vessels, that its lease from the Norfolk & Western Railroad specifies that the Elevator will be operated as a "public terminal open to all parties," that it is not common carriage but common carriers that the Shipping Act specifies when defining regulated terminal operators, that common carriers do not lose that status because some of their ships or portions of the ships are operated in non-common carriage pursuant to contracts and without published tariff rates on bulk commodities, and that the doctrine by which status is determined on the basis of a count of the number of common carrier calls is not valid and is not followed by the Commission.

I find that both the evidence and the legal precedent cited confirm that Prudential and Hearing Counsel are correct in arguing that Continental's N & W Elevator must be found to be within Shipping Act jurisdiction.

The Commission has long regulated grain terminal elevators which handle grain exclusively but load grain in vessels operated by common carriers and many tariffs are filed by such elevators with the Commission. See, e.g., *Rates of Pacific Northwest Elevators Association*, 11 F.M.C. 369, 373 (1968); *California Stevedore and Ballast Co. v. Stockton Port District*, 7 F.M.C. 75, 81 (1962); *D. J. Roach, Inc. v. Albany Port District et al.*, 5 F.M.B. 333, 334 (1957); *Agreements No. 8225 and 8225-1, Between Greater Baton Rouge Port Commission and Cargill, Inc.*, 5 F.M.B. 648, 649, 653-654 (1959), affirmed under the name of *Greater Baton Rouge Port Commission v. U.S.*, 287 F. 2d 86, 90-92 (5th Cir. 1961); cert. denied, 368 U.S. 985 (1962); *Investigation Wharfage Charges on Bulk Grain at Pacific Coast Ports*, 8 F.M.C. 653, 656 (1965). In the present case, Continental claims that it is not furnishing terminal services in connection with common carriers by water. There are a number of valid answers to this contention which Prudential and Hearing Counsel have raised, however.

Much attention has been given to the type of vessel and carrier which have been shown on the record to have called at the N & W Elevator. This is because section 1 of the Act requires terminal operators to furnish their facilities "in connection with a common carrier by water." If this is critical to a determination of the Elevator's status under the Act, then the record supplies the answer. On at least 21 occasions during the years 1977 and 1978 Continental furnished terminal facilities in connection with at least six vessels that were operated by four different common carriers by water (Central Gulf, Icelandic, Prudential, and Farrell Lines). The carriers involved filed tariffs holding themselves out to transport general commodities and advertised calls at Norfolk. Evidence of record further indicates that some or all of these vessels were not fully loaded with grain and that common carriers had the practice of carrying both grain and general cargo in the same vessel to "shorten the ship," that is, to fill empty space during seasons of the year when other cargo was in scarce supply.[8] Prudential itself had loaded grain on its LASH vessels from the N & W Elevator on four prior occasions, most recently in June of 1977, and had been billed at the terminal tariff rates. Moreover, even Continental's own terminal records identify two of the common carriers' vessels which had loaded at the Elevator as "liners" and its own terminal tariff during

[8] Prudential had the practice of filling barges with grain to supplement general cargo on the same voyages which advertised calls at Norfolk. (See Prudential Opening Statement, p. 39 n. 1, and record citations therein.) Other common carriers may have done the same thing. The Icelandic ships *BRUARFOSS* and *SELFOSS* which called at the N & W Elevator and which, Continental argues, loaded grain for their owners, as the record shows (Tr. 1146), did not load enough grain to fill half their deadweight tonnage. Continental's own monthly reports of ship loadings characterize the Icelandic ships as "liners" (See Prudential Posthearing Statement, pp. 38-39, proposed findings 60 and 61 and record citations therein.)

the years 1977 and 1978 even defined "Liner Vessels" as vessels operating "under an advertised schedule" by a line "maintaining regular sailings" and on which the quantity of grain to be loaded "shall not exceed one half of the total dead weight tonnage of the vessel."

Continental does not argue that it was not serving oceangoing vessels nor does it dispute the fact that Central Gulf, Farrell, Prudential, and Icelandic may be common carriers with filed tariffs. What it does argue, however, is that regardless of the ordinary status of these carriers, they operated as non-common carriers when they sent their vessels or barges to the N & W Elevator to pick up grain. Secondarily, Continental argues that even if common carriers called at the Elevator, the low incidence of such calls meant that the Elevator was essentially not furnishing terminal facilities in connection with a common carrier under the doctrine of the *Fall River Line Pier* case, cited above. These defenses, however, do not withstand scrutiny and are outweighed by critical evidence as to the Elevator's public holding out.

The four carriers that called at the N & W Elevator (Central Gulf, Icelandic, Farrell, and Prudential) cannot reasonably be found to be other than common carriers. They operated under advertised schedules, filed tariffs, and held themselves out generally to carry commodities for the general public. These facts are sufficient to establish them as common carriers under numerous decisions of the Commission and the courts. See, e.g., *Activities, Tariff Filing Practices and Carrier Status of Containerships, Inc.*, 9 F.M.C. 56, 63-65 (1965); *Investigation of Tariff Filing Practices*, 7 F.M.C. 305, 320-321 (1962); *McCallister Brothers, Inc. v. Norfolk & Western Railway Company*, 20 F.M.C. 52, 65-66 (1977); *Possible Violations of Section 18(a) of the Shipping Act, 1916*, 19 F.M.C. 43, 50-51 (1975); *United States v. Stephen Brothers Lines*, 384 F. 2d 118 (5th Cir. 1967). However, Continental argues that whenever the vessels or barges of these carriers called at the N & W Elevator, they did so under special contracts and were thus not operating in common carriage. There are several valid answers to this argument raised by Prudential and Hearing Counsel. First, even if a part of the vessel or barge sent by the common carrier was involved in contract carriage rather than common carriage, this does not mean that the common carrier which operated the ship lost its status as a common carrier or that the Elevator was not serving common carriers. As Hearing Counsel note, the Shipping Act is concerned with regulation over carriers, not with the type of carriage. Thus, the Commission noted in *Banana Distributors, Inc. v. Grace Line, Inc.*, 5 F.M.B. 615, 622 (1959), affirmed under the name *Grace Line, Inc. v. Federal Maritime Board*, 280 F. 2d 790 (2nd Cir. 1960), cert. denied, 364 U.S. 933 (1961):

> [t]he Act confers jurisdiction over carriers, specifically over "common carriers," as distinguished from types of carriage, i.e., common or contract. . . .

Furthermore, when common carriers have in fact utilized portions of their vessels in common carriage of general commodities but have segmented other portions of their vessels in so-called "contract carriage" on the same voyages, the Commission has not only continued to find the carrier to be a common carrier but has even applied Shipping Act standards to the so-called "contract carriers" portion of the voyage. For example, in the famous banana case cited above, *Grace Line, Inc. v. Federal Maritime Board*, 280 F. 2d 790, Grace Line had argued that its contract carriage of bananas was exempt from regulation notwithstanding its status as a common carrier for other commodities on the same vessels. The Court, however, refused to grant any partial exemption or to redefine Grace's common carrier status, holding, on the contrary, that a common carrier by water does not cease to be such because it chooses to make an exception as to a part of the goods it accepts. To this regard the Court stated:

> The Grace Line's argument presupposes not only that these duties [imposed by the Shipping Act] are limited to "common carriers by water," as of course they are, but also that they are limited to such carriers while they are carrying goods as to which they have "held themselves out as common carriers." We can see no reason to impute such a limitation upon the definition of common carriers in § 801.
>
> * * *
>
> As we have just said, a "common carrier by water" does not cease to be such because it chooses to make an exception as to a part of the goods that it accepts. 280 F. 2d at 792, 793.

Similarly, in *Flota Mercante Grancolombiana v. F.M.C.*, 302 F. 2d 887 (D.C. Cir. 1962), the court again refused to distinguish between a common carrier's activities as carrier of general cargo from its activities in so-called "contract carriage" of bananas and affirmed the Commission's finding of common carrier status for purposes of applying Shipping Act standards to the carrier's practices in handling contract shipments of bananas.

The cases just discussed show that a common carrier cannot divest itself of its status as such or avoid regulation under the Act by segmenting its vessel operations so long as a part of the operations on its vessels are those practiced by common carriers. Therefore, whatever were the terms under which the four common carriers' vessels or barges picked up grain at the N & W Elevator, they were still sent and operated by acknowledged common carriers. Unless section 1 of the Act is to be rewritten to specify that terminal operators subject to regulation under the Act are those persons furnishing terminal facilities only in connection with "cargo loaded in common carriage," one is left with the definition as written, namely the furnishing of such facilities in connection with "a common carrier by water," and there is no way in which the four common carriers named can be found on this record to be other than common carriers. Continental, however, emphasizes another fact in reliance on its contract-carriage argument. That is its argument that since Prudential and other common carriers customarily negotiate special rates for the carriage of bulk grain, which rates are not published in the carriers' tariffs, this fact again illustrates that Continental's N & W Elevator was not serving common carriers. Even if the lack of tariff filing of bulk commodity rates did signify that this portion of Prudential's business was not common carriage, I have just explained that it makes no difference since Prudential would remain a common carrier in the eyes of the law. However, the argument is not valid for two other reasons. First, common carriers were specifically exempted from the requirement that they file bulk commodity rates in their tariffs so that they could better compete with unregulated "tramp" carriers and could fill out their vessels with bulk cargo to supplement general cargo. Thus, instead of proving that Prudential or any other common carrier is not a common carrier merely because it does not file a negotiated bulk commodity rate, the argument corroborates the fact that Prudential and possibly the other common carriers were only trying to compete with "tramp" vessels and to fill out their vessels, or "shorten the ship" as Prudential calls this practice. This point is made very clear in the legislative history to P.L. 87-346, which added section 18(b) to the Shipping Act in 1961, the provision of law which governs tariff filing in foreign commerce. The testimony of then Chairman Stakem of the Federal Maritime Board (the Commission's predecessor agency) clearly describes the purpose of the bulk commodity tariff exemption as relating to the need for common carriers to be free to compete with "tramp" operators by quoting special rates without being encumbered with tariff-filing regulations. See Hearings Before the Special Subcommittee on Steamship Conferences of the House Committee on Merchant Marine and Fisheries on H.R. 4299, 87th Congress, First Session, March 20, 1961, pp. 26, 36.[4]

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[4] Chairman Stakem testified in pertinent part as follows:

We suggest that cargo loaded in bulk without mark or count be excluded from the filing and other requirements of section 3 of the bill. Since such cargoes are normally carried by "tramps" which are exempt from regulation under the 1916 Act, common carriers subject to the act should be free to change their rates in order to compete for these cargoes.

* * *

As you know, the bulk cargo is usually an open rate item for most of the conferences, and the liner ships are in competition with the tramps to put this cargo in as filler cargo. It seems to us that it is the type of commodity that we could not necessarily require an advance filing of rates on.

I think it would be a little bit impossible in the light of the fact that the tramps are free to do as they please and quote as they please, and it would put the liners in a very bad position in connection with the bottom cargo that they constantly seek.

Second, the Commission has already rejected Continental's argument that the ships or barges sent by Prudential or the other three common carriers were operating under special contractual arrangements with shippers and thus cannot be considered to be operating as common carriers. In *Tariff Filing Practices of Containerships, Inc.*, 9 F.M.C. 58, 64 (1965), the Commission rejected the argument as follows:

> In *Investigation of Tariff Filing Practices*, 7 F.M.C. 320 (1962), a carrier contended that it was not offering common carrier service since it did not advertise, solicit, or publish a sailing schedule and carried cargo only after it had secured a negotiated written transportation agreement with the shipper. The Commission rejected all these contentions and stated with respect to the last:
>
>> It cannot be successfully contended at this late date that a carrier may avoid common carrier status by insisting on a transportation agreement with each shipper. All cargo carried for compensation moves on some form of transportation agreement, express or implied. 7 F.M.C. at page 321.
>
> In *General Practices in Rates* (1961), 7 F.M.C. 260, 280 (1962), the Commission stated that a special arrangement to secure the business of a shipper did not of itself convert the arrangement into one of contract carriage. (Citations omitted.)
>
> The Commission has recognized that under some circumstances, a common carrier may execute contracts with particular shippers for the carriage of large volumes of cargo. This system does not abrogate common carrier status. The contracts are actually forward booking agreements. (Citations omitted.)

The previous discussion shows that the evidence of record which indicates that at least four common carriers sent vessels or barges to be loaded with grain at the N & W Elevator during 1977 and 1978 cannot be discounted merely because the four carriers may have negotiated special rates or may have carried bulk grain in a manner different from that in which they carried general cargo, even if it could be found that the four carriers conducted "contract carriage" or non-common carriage with respect to their booking of bulk grain. Continental, however, has another argument, namely, that even if on the occasions in which the four common carriers called at the N & W Elevator and loaded grain, they did so as common carriers and as common carriage, the relatively small number of these calls compared to all calls at the N & W Elevator removes the Elevator from Commission jurisdiction because the effects on common carriers are so minimal. Continental relies upon the case of *Fall River Pier, Inc. v. International Trading Corporation of Virginia, Inc.*, cited above 399 F. 2d 413, and to a lesser extent on *Bethlehem Steel Corp. v. Indiana Port Commission*, cited above, 21

F.M.C. 629 (1979) (opinion on remand), affirmed per curiam, 642 F. 2d 1215 (D.C. Cir. 1980). Continental argues that in the *Fall River Line Pier* case, the pier had unloaded common carriers on only four occasions out of the 33 unloadings which had occurred during the two years prior to the case. (Continental's Posthearing Statement, p. 66.) Continental argues that even assuming that all the vessels alleged to be operating as common carriers which had called at the N & W Elevator during a three-year period prior to this suit were in fact common-carrier vessels, they only amounted to 36 loadings out of 271 occurring during that time period. (*Id.*) Thus, according to Continental, the percentage of common-carrier loadings or unloadings compared to total loadings or unloadings in both cases is almost identical (12.1 percent in *Fall River Line Pier* compared to 13.3 percent in the present case). Moreover, in the present case, Continental argues, as in the *Fall River Line Pier* case, there is little or no impact on common carriers because Prudential's attempts to book the grain involved only contract carriage. Continental sums up its contention by stating that "the lesson of that case [i.e., *Fall River Line Pier*] is that a terminal at which common carriers have called on only a few occasions is not subject to the Commission's jurisdiction in its dealings with a contract carrier, absent a showing that the common carriage was affected." (Continental Posthearing Statement, p. 69.) Both Hearing Counsel and Prudential, however, in my opinion, have persuasively explained how the *Fall River Line Pier and Bethlehem Steel Corp.* cases cannot be used to support Continental's contentions. *Fall River Line Pier* is a peculiar case. Complainant, a contract importer of bagged cement at the Fall River Line Pier which, during the period in question, primarily served only two cement importers who used contract carriers, filed its complaint with the Commission alleging discriminatory storage charges and practices and ultimately obtained an order of the Commission against respondent terminal operator calling for the payment of approximately $12,000 in reparation. (See *International Trading Corp. v. Fall River Line Pier, Inc.*, 7 F.M.C. 219 (1962); and 8 F.M.C. 145 (1964).) A District Court enforced the Commission's order but on appeal, the 1st Circuit reversed, finding that the Commission had no jurisdiction over the respondent terminal operator. The basis for the Court's decision was its finding that although on some occasions vessels carrying general cargo had called at the piers, the case "involves vessels having no connection with the merchant marine, and only incidentally concerned with common carriage as distinguished from the extensive common carriage operations of the Grace Line, see *Banana Distributors, Inc. v. Grace Line, Inc.*, 5 F.M.B. 617 (1959)." (399 F. 2d at 416.) The Court went on to say that "[a]t a minimum there should have been a finding, or a factual basis supporting a finding, that the common carriage here was of sufficient consequence to be affected by the contract carriage." *Id.* Hearing

Counsel point out several distinguishing factors between *Fall River Line Pier* and the present case, note that the Commission has not followed the case in subsequent decisions, and question whether it was correctly decided. Prudential also questions whether the case was correctly decided (noting that no one appeared before the Court on behalf of the party asserting Commission jurisdiction) but more importantly showing that the present case is one in which a common carrier complainant alleges substantial effects on its operations unlike *Fall River Line Pier* where the effects on common carriage were supposedly minimal. Prudential also cites the latter case of *Bethlehem Steel Corp.* in which the Commission rejected the *Fall River Line Pier* rationale in finding jurisdiction over the respondent terminal operator.

Fall River Line Pier stands out peculiarly and has not been followed by the Commission. It involved a small pier dealing essentially with two contract cement importers and with vessels that only rarely discharged general cargo. The court's decision acknowledges that some general cargo had been discharged by one barge and three vessels and mentions a carrier known as "Thorden Line" which had discharged cement and office furniture at Fall River but also miscellaneous general cargo at New York, Philadelphia, and other ports. (399 F. 2d at 415.) At best there were only about four general cargo vessel calls at Fall River as opposed to the present case in which there were 21 or 36 loadings on vessels operated by common carriers at the N & W Elevator depending on whether one counts a two-year or three-year period prior to the loading involved in the present case. In the present case, moreover, four known common carriers (Central Gulf, Farrell, Prudential, and Icelandic) sent vessels or barges to the N & W Elevator. The main problem with *Fall River Line Pier*, however, is that it rests upon a counting or consequences theory. In other words, the Court deemed impressed that so few common carrier calls were made at the pier in Fall River compared to the overwhelming number of calls of contract carriers unloading bagged cement. Since there were so few calls by general-cargo vessels, the court could not find much impact on common carriers. In this case, the impact on common carriers is clear. Prudential is an acknowledged common carrier, as were the other three mentioned above and, even if one accepts Continental's argument that the ships these common carriers sent to the Elevator were not acting under common carriage, the record shows that Prudential at least customarily sought grain to "shorten the ship," i.e., to supplement common carriage cargo by filling in with grain. It is difficult, therefore, to argue that these four carriers' vessels calling at the Elevator were only "incidentally concerned with common carriage." Again, note that the Court seems to confuse "common carriage" with "common carriers" as if section 1 of the Shipping Act defined other persons subject to the Act as those persons furnishing terminal facilities in connection with "common carriage" rather than in connection with "a common carrier by water.") Whatever the merits of the Court's "incidental" or "insufficient consequences" test, however, it has not been followed by the Commission, which, it should be noted, was not a party before the Court.[5] As shown by the *Bethlehem Steel Corporation* decision, the Commission does not engage in a counting exercise to determine the number of common carriers that call at a particular pier before finding jurisdiction over terminal operators. In *Bethlehem Steel Corp. v. Indiana Port Commission*, complainant had alleged that respondent's assessment of a harbor service charge was unreasonable, in violation of section 17 of the Act. Early in the proceeding respondent Port Commission moved for a dismissal contending that "its services in connection with common carriers by water have been 'insubstantial and of insufficient consequence' to establish a basis for the Commission's jurisdiction." (12 SRR at 1080.) Specifically, the respondent Port Commission had argued that it had served only one common carrier vessel, the *URANUS*, on two occasions, which vessel had been engaging in foreign commerce. (Respondent had also argued that its service to common carriers in interstate as opposed to foreign commerce should not be counted.) The presiding officer rejected the counting theory, stating (12 SRR at 1061):

> The concept advocated by the Port which relates jurisdiction to the number of times a common carrier is served is rejected. It would be anomalous with the Commission's duty to regulate terminals serving common carriers by water to exempt a terminal from the duties and prohibitions imposed upon an "other person" in even one incident.

As he further stated (12 SRR at 1061):

> The finding that the Port served common carriers by water is sufficient to support the Commission's jurisdiction.

On appeal, the ruling of the presiding officer was adopted by the Commission. (13 SRR 22 (1972).) The Commission made the following remarks:

> The record shows that Respondent has furnished services to several common carriers by water in interstate commerce and

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[5] The effect of a decision by a Court of Appeals on the Commission is unclear when, as in *Fall River Line Pier*, the Commission was not a party and the Court had heard no argument from the Commission. There is some doubt as to the validity of a Court's reversing a Commission decision unless the Court reviews that decision under the so-called Hobbs Act (28 U.S. 2341 et seq.) instead of by means of reviewing a District Court's order of enforcement of a Commission order. See *Marine Terminal v. Rederi. Transatlantic*, 400 U.S. 62 (1970), holding such action of the Court of Appeals (again the 1st Circuit) to be improper. See also *Sanrio Company Ltd. v. Maersk Line*, 23 F.M.C. 154, 199 (I.D. 1980), adopted by the Commission, 23 F.M.C. 150 (1980), in which the Commission noted a decision of the Fifth Circuit Court of Appeals which contravened Commission decisions without the Commission's participation before the Court, which decision the Commission therefore declined to follow.

> on two occasions has served the Uranus, a vessel engaged in foreign commerce. Respondent holds itself out to the public that it "is readily accessible to overseas vessels with limited use of tugs." (13 SRR at 23.)

The Commission therefore did several things in the cited case. Fully aware of the *Fall River Line Pier* decision four years earlier, the Commission rejected the notion that its jurisdiction over terminal operators depended upon the number of times that a common carrier's vessels called at a terminal, showed no interest in determining whether a vessel owned by a common carrier had actually operated in common carriage when it called at the terminal, and was not apparently concerned with how large or how small the consequences or effects on common carriers happened to be but seemed more concerned with the holding out of the terminal to all vessels. I conclude, on the basis of the *Bethlehem Steel Corp.* case, that the Commission does not follow the rationale of the *Fall River Line Pier* decision.[6] In a fairly recent article concerning the Commission's jurisdiction over terminal operators, moreover, the author apparently agrees with this conclusion.[7] He interprets the *Bethlehem Steel* ruling of the Commission to mean that "[e]stablishing jurisdiction did not depend upon a showing that some threshold proportion of the Indiana Port Commission's terminal services were furnished to common carriers." [8] He also comments on the fact that the Commission has not followed the *Fall River Line Pier* case, stating: [9]

> There have been no cases decided since Fall River in which the Commission required a showing that a threshold proportion of a terminal's services were furnished to common carriers as a prerequisite to the FMC asserting jurisdiction. The Fall River standard has been abandoned in favor of an "even one common carrier" standard.

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[6] Continental questions the validity of the Commission's rulings on jurisdiction in the *Bethlehem Steel* case because of later developments in that case. Hearing Counsel, however, as well as Prudential, have shown that these later developments do not affect the jurisdictional rulings. (See especially Hearing Counsel's Reply Brief, pp. 15-16 n. 5.) These subsequent developments had nothing to do with the status of respondent Port Commission as an "other person subject to this [A]ct." They rather had to do first with the lawfulness and later the jurisdictional status of the Port's "Harbor Service Charge." After the Commission had found the subject charge to be unlawful under section 17 of the Act (17 F.M.C. 266 (1974)), the Court of Appeals set aside. that finding and remanded with instructions to determine reasonableness of the charge on the basis of the contributions of the parties to harbor development and of the benefits derived by the parties from use of the harbor. (See *Indiana Port Commission v. F.M.C.*, 521 F. 2d at 285). In its opinion on remand (21 F.M.C. at 633), the Commission affirmed its earlier jurisdictional ruling but found the particular charge to be unrelated to terminal activities and thus to be outside the Commission's jurisdiction under section 17 of the Act. This decision was affirmed without opinion by the Court. 642 F. 2d 1215 (D.C. Cir. 1980.)

[7] See Buchwald, *Federal Maritime Commission Jurisdiction Over Terminal Operators*, 12 Journal of Maritime Law and Commerce 209 (January 1981).

[8] *Ibid.*, p. 228.

[9] *Id.*

For another ruling in which jurisdiction was found over one furnishing terminal facilities without requiring a showing of any particular number of common carriers calling at the terminal, see *Louis Dreyfus Corp v. Plaquemines Port, Harbor, and Terminal District*, 19 SRR 749, 750 (Morgan, J. 1979).

The prevailing view of the Commission, therefore, appears to be that Shipping Act jurisdiction will not be renounced merely because the number of common carriers calling at a terminal is minimal or the particular vessels calling at the terminal are not themselves operating in common carriage although they are owned by common carriers.

Continental's Holding Out as a Public Terminal

The previous discussion deals with Continental's arguments that would deny Commission jurisdiction over its N & W Elevator by considering the number of vessels sent to the Elevator by common carriers, the supposedly small impact on common carriers, and the argument that the vessels were acting as contract carriers, not in common carriage when they arrived at the Elevator. Although superficially appealing, I cannot find these various arguments to be persuasive either in fact or in law. In fact four common carriers did send vessels or barges to be loaded at the N & W Elevator and Prudential, at least, followed the practice of adding grain to its general-cargo carryings when cargo was short. Moreover, the Commission seems to have specifically rejected the determination of jurisdiction by counting numbers of common carrier calls at terminals or by measuring impacts on common carriers so long as it appears that one or more common carriers have called. However, if the question is still considered close and Continental's arguments are found appealing, one final category of evidence which has not yet been considered tips the scales in favor of finding Continental's N & W Elevator to be a regulated marine terminal. This evidence has to do with Continental's public holding out as shown by its tariff filed with the Commission and its lease with the Norfolk & Western Railroad. As both Hearing Counsel and Prudential note, Continental has filed a terminal tariff with the Commission since at least October 1974 which Continental's own witness testified was regarded as a true tariff and which was utilized in billing carriers loading at the Elevator. Moreover, the tariff, while apparently limiting service to "self-propelled vessels" (which LASH is not) did not in fact bar LASH barges which had been loaded at the Elevator in the past.[10]

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[10] There is evidence that Continental did not follow its tariff regarding its purported limitation to self-propelled vessels since it had loaded LASH barges in the past. Moreover, there is also some evidence that despite the publication of "liner preference" in the tariff, no such preference was granted in fact. (See Prudential's Posthearing Statement, p. 39, and proposed finding 62 with record citations.) In

Continued

More importantly, perhaps, the tariff did not exclude common carriers' vessels. On the contrary, it even specifically defined "liner" vessels, as I noted earlier, as vessels on advertised schedules and regular sailings which did not load more than one half of the deadweight tonnage of the vessel with grain. Furthermore, the tariff also provided for "liner preference" although there is testimony that such preference was not actually granted in practice. Finally, Continental operates the N & W Elevator under a lease from the Norfolk & Western Railroad, which lease provides that the purpose of the operation is to conduct its business on the premises as "a public terminal open to all parties." No matter how Continental tries to persuade one that its N & W Elevator was not a regulated marine terminal because ships calling at the Elevator were not really acting in common carriage although they may have been sent by common carriers (and such arguments are not really persuasive, although superficially appealing, as I have shown), how can Continental dispute its public holding out when its own tariffs and the very lease under which it operates demonstrate such a holding out? Such a holding out, I believe, is significant.

The Commission regards terminal operators under its jurisdiction in the same light as public utilities or common carriers. See *Investigation of Free Time Practices - Port of San Diego*, 9 F.M.C. 525, 547-548 (1966); *American Export-Isbrandtsen Lines, Inc. v. Federal Maritime Commission*, 444 F. 2d 824, 828 (D.C. Cir. 1970); *Chr. Salvesen & Co., Ltd. v. West Mich. Dock & Market Corp.*, 12 F.M.C. 135, 141 (1968); *A.P. St. Philip, Inc. v. Atlantic Land & Improvement Co.*, 13 F.M.C. 166, 174 (1969). However, the essence of a public utility or common carrier is its public holding out. Thus, although the filing of a tariff, the regularity of schedules, the carriage of general cargo for several shippers, and similar factors all have a bearing on the ultimate determination of the status of a common carrier, as the Commission has noted (*Tariff Filing Practices of Containerships, Inc.*, 9 F.M.C. 56, 65 (1965)), the ultimate test is the carrier's holding out, i.e., whether it is public or private or limited. Thus, as the Commission stated in *Tariff Filing Practices of Containerships Inc.*, 9 F.M.C. at 62:

> The Commission has examined the indicia of "common carrier at common law" on numerous occasions. The most frequently mentioned characteristic is that a common carrier by a course of conduct holds himself out to accept goods from whomever offered to the extent of his ability to carry.

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case of conflict between what the tariff states and what the terminal operator actually does in any particular instance, the Commission has indicated that the actual practice will be controlling. See *In the Matter of Agreement No. T-2719*, 16 F.M.C. 318, 325 (1973). This does not mean, however, that the tariff is to be disregarded as evidence of a public holding out.

See also *American Export-Isbrandtsen lines, Inc. v. F.M.C.*, cited above, 444 F. 2d at 831. A preponderance of the evidence in this case shows that Continental held out to load grain on all carriers' vessels, and even though its tariff supposedly excluded non-self propelled vessels such as LASH barges, it loaded them as well. (Indeed, after the events that transpired in this case concerning the exclusion of Prudential's LASH barges from the N & W Elevator, Continental amended its terminal tariff in October 1978, reserving the right to "reject LASH barges, if, in its opinion such vessels interfered with the normal loading process.") This public holding out shown in the tariff and lease together with the fact that at least four common carriers did send vessels and barges to load at the Elevator, which vessels did not necessarily load exclusively with grain, the literal language of section 1 of the Act, the legislative intent to establish a comprehensive regulatory scheme extending beyond vessels into terminal operations incidental to common carriers' vessels, and the recognition of the public-utility-like aspect of marine terminal operations, provide adequate support for me to conclude that Continental's N & W Elevator was operating as an "other person subject to this [A]ct." To reinforce this conclusion, I note that other grain companies wishing to remove their elevators from Commission regulation have done so simply by specifically excluding common carriers in their tariffs. See, e.g., *New Orleans Steamship Association v. Bunge Corp.*, 8 F.M.C. 687, 694 (1965); *Agreement No. T-2719*, 16 F.M.C. 318, 321 (1973), in which it was held that a terminal operator may remove itself from Commission jurisdiction by explicitly announcing in its tariff that it no longer serves common carriers. As the Commission stated in the Bunge case (8 F.M.C. at 694):

> We, therefore, find that since November 22, 1961, the day Bunge barred common carriers from calling at its Destrehan facility, we have had no jurisdiction over its operations there.

In the present case, therefore, having chosen not to exclude common carriers from its N & W Elevator by tariff or otherwise, Continental has gained the benefits of serving common carriers as well as contract carriers. It cannot, therefore, renounce its status as a public terminal operator unless and until it specifically discontinues service to common carriers in its tariff and adheres to such publication.[11]

[11] Continental cites one other case to support its contention that it was not operating a terminal in connection with common carriers. That case is *McAllister Brothers, Inc. v. Norfolk & Western Railway Company*, 20 F.M.C. 62 (1977). In that case the Commission affirmed a finding by the presiding judge that respondent N & W Railway Company had not operated a regulated terminal facility at particular coal piers in Norfolk. The decision distinguished between the coal piers which handled coal exclusively in connection with chartered coal vessels which had no resemblance to common carriers as compared to a general merchandise pier serving other vessels. As Hearing Counsel correctly note (Hearing Counsel Reply Brief, p. 10) the vessels calling at the coal piers carried shiploads of coal, not mixtures

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THE ISSUE OF JURISDICTION OVER CONTINENTAL'S DECISION NOT TO LOAD LASH BARGES

The second general issue to be determined concerns the question of whether the Commission's jurisdiction extends into the particular exclusion which Prudential experienced. Prudential and Hearing Counsel contend that Continental's refusal to load Prudential's LASH barges at the N & W Elevator constituted a violation of section 16 First and 17 of the Act because it subjected Prudential to undue and unreasonable prejudice and disadvantage and constituted an unreasonable practice related to the receipt, handling, storing, and delivering of property. Both Prudential and Hearing Counsel believe that Continental's activities as a seller of grain and its exclusion of LASH barges from the particular contract of sale that was involved in this case do not exempt it from Commission regulation when it decided not to load LASH barges at its N & W Elevator. At that time, more or less, these parties believe that Continental was merely furthering its interests as a terminal operator rather than conducting a grain selling and merchandising business. Therefore, they argue, its conduct falls within Shipping Act concern. Prudential goes further by alleging that Continental and other major grain companies have engaged in a concerted effort to discriminate against LASH vessels in their contracts of sale, in violation of section 15 of the Act. Finally, Prudential believes that Continental unlawfully attempted to extract a penalty from Prudential before agreeing to permit Prudential to send its LASH barges to the N & W Elevator to load the grain in question.

Hearing Counsel, while generally agreeing with Prudential, argue that Commission jurisdiction attaches under sections 16 First and 17 of the Act because the grain was ultimately loaded at Continental's N & W Elevator and the interests of Continental as a grain seller and as a terminal operator became, for all intents and purposes, the same, although Hearing Counsel deny that Commission jurisdiction extends into the original contract of sale of the grain between Continental and Egypt or into the provision in that contract excluding LASH vessels. Moreover, Hearing Counsel believe that Commission jurisdiction is shown because of the ultimate effect on the operations of the N & W Elevator stemming from exclusion of LASH vessels.

Continental believes that the particular practice complained of, namely, exclusion of LASH vessels from the carriage of the wheat shipment in question, is part and parcel of Continental's grain selling

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of common and contract carrier cargoes and such vessels never published tariffs, advertised sailing schedules, or held themselves out as common carriers. The case is unlike the present one in several key respects since in this case common carriers have sent vessels to the N & W Elevator and have not exclusively loaded with grain. In *McAllister*, furthermore, there was no evidence of any public holding out by the coal piers to common carriers.

and merchandising business, not its terminal operations. Continental argues that the exclusion of LASH was determined in its contract of sale with Egypt, which the Commission has no legal authority to regulate under the Shipping Act, and that the reasons for this exclusion in that contract relate to the intricacies of the grain trading and selling business. Continental argues, in effect, that Prudential would have the Commission rewrite its contract of sale to permit Prudential to obtain a booking to which it was not entitled by contract. Such modification, furthermore, would have several serious adverse effects on Continental's grain selling and trading business because it would interfere with its options to fill sales and with its "elevation," i.e., the market differential between the price of grain received at the N & W Elevator and the FOB export price. The practice of excluding LASH vessels from this contract of sale or from other sales contracts is thus, according to Continental, a practice of the grain selling and trading business, not the terminal business. To illustrate this contention, Continental argues that it could not publish a provision in its terminal tariff to offset these problems caused by utilization of LASH barges instead of faster-loading bulk vessels because it cannot anticipate the many fluid factors in the grain commodity market, all of which are considered by Continental when selecting the grain to fill a contractual commitment. Continental believes that Hearing Counsel's argument that Continental was not subject to Commission regulation when entering into the contract of sale but did become subject when it declined to modify the contract to allow LASH to load the grain at its N & W Elevator is absurd.[12]

The arguments of Prudential and Hearing Counsel have some appeal, I must admit. It seems unfair that Prudential, which submitted an acceptable bid to Peralta, the Egyptian buyer's shipping broker, should be excluded from carriage merely because it operates LASH vessels and its barges are supposed to be slower loading than the grain industry's preferred bulk vessels. This also seems unfair when the record shows that LASH barges are not so slow in loading as Continental believes, load about as fast as "deck ships," and that with a little more effort and diligence, greater productivity in loading can probably be

[12] Hearing Counsel admit to difficulties in their position, namely, the problem of identifying that point in time when Continental, the grain seller, began to act like Continental, the terminal operator, or in other words, when did Continental begin to further its interests as a terminal operator rather than as a grain seller. Hearing Counsel admit that "the exact point at which Continental (New York) determined to load the. wheat . . . at the N & W Elevator cannot be ascertained from the evidence of record with any degree of certainty." (Hearing Counsel's Opening Brief, p. 61.) Therefore, Hearing Counsel admit that "it is difficult to determine in what capacity Continental (New York) was acting and what interests it sought to further by so acting, when it declined to accept Peralta's nomination of Prudential's LASH vessels." (*Ibid.*, p. 62). However, since the wheat was ultimately loaded at the N & W Elevator, Hearing Counsel argue that Continental's interests as grain seller and terminal operator became "indistinguishable" when Continental declined to accept LASH vessels and, furthermore, argue that its rejection of LASH had a "significant effect upon the operation of the N & W Elevator." (*Ibid.*, p. 63).

achieved at the N & W Elevator, based upon Prudential's experience. It also seems that since Continental publishes a terminal tariff and holds out to any type of vessel either in its tariff or in practice, that Prudential ought not to have been barred from loading grain at the N & W Elevator on the particular sale to Egypt. After all, isn't a terminal supposed to be akin to a public utility observing non-discriminatory practices to all who use its services? Moreover, isn't the problem here, to some extent, the fact that LASH barges supposedly load more slowly than bulk vessels causing other vessels to back up and costing the terminal in vessel demurrage charges or overtime, as even Continental acknowledges to be the case? If so, isn't this a terminal cost problem, not a grain selling problem, and cannot Continental protect itself by publishing an offsetting charge in its terminal tariff so that it could still accept LASH barges without loss? Moreover, how fair is it for the major grain companies to adopt a form contract and a custom to prefer bulk vessels over LASH and then to defend any particular Elevator's refusal to load LASH on the ground that the grain company operating the Elevator could not transfer the sale to another grain company's elevator because that company also followed the industry's non-LASH restrictive practice? There are still other facts which Prudential points out in its Reply Statement (pp. 23-24) which sometimes contradict Continental's factual assertions and indicate, for example, that LASH barges can be loaded about as fast as deck ships, which ships Continental in fact loaded for part of the wheat shipment to Egypt at the N & W Elevator, that the Department of Agriculture approved the P.L. 480 purchase and exclusion of LASH in the erroneous belief that all LASH vessels had been otherwise accounted for, that grain elevators on the East Coast were not as congested as Continental would have one believe, that Continental had made known that the N & W Elevator would be the point of loading possibly as early as June 28, 1978, when Prudential first tried to negotiate with Continental, or even June 27, when Peralta advised Prudential, that in other loadings, Norfolk had been named much earlier than Continental claims to be the practice, that Continental's offer to sell the grain in question has permitted deck ships and tankers as well as bulk vessels without additional increase in the sales price to Egypt, that congestion problems at the N & W Elevator had to do with loading efficiencies and slow loading rates of bulk vessels, that lost sales alleged by Continental as a result of an attempt to substitute LASH barges for bulk vessels would affect not the sale to Egypt but sales of corn which was also stored at the N & W Elevator during the relevant time period, and that transference of the sale to another grain company would not be impeded because of the standard contract of sale which precluded LASH because that contract had often been ignored in practice by grain companies.

All of these foregoing arguments and asserted facts would seem to indicate that this case calls for relief which the Commission can somehow grant under sections 16 First and 17 of the Act. However, I believe that the very size of the record and the complexity of the facts serve to conceal the fact that the case primarily involves a contract of sale of grain and only secondarily deals with the duties of a regulated terminal operator under the Shipping Act. If anything, the root cause of the problem which Prudential and other LASH vessel operators face is the fact that grain companies observe peculiar practices in their multifarious and complex grain trading and selling businesses which ultimately affect LASH operators but which have their source in grain merchandising, not terminal matters. In other words, the exclusion of LASH from carriage of the shipment in question originated in a grain selling and trading context, not in a terminal context, although ultimately the grain company's elevator was affected because bulk or other non-LASH vessels loaded. Therefore, attempts to insert the Shipping Act so as to affect the decision of Continental as seller of grain under its contract with Egypt would mean regulation of grain merchandising practices through the back door of the grain company's N & W Elevator. It makes little sense, in my opinion, to argue that the Commission has no jurisdiction over a contract of sale of grain which contains an exclusionary clause but somehow the Commission gains jurisdiction whenever the parties to that contract attempt to carry out that contractual provision. This, in effect, means that the Commission is regulating the contract because the Commission would be rendering the particular provision regarding selection of vessels void.

Another problem I find with the argument that the Commission can give Prudential relief from the terms of the contract of sale on the ground that the seller also operates the terminal through which the grain happened to pass is that such relief presupposes that Prudential had a right to the booking of the grain in the first place and that it was deprived of the booking by unlawful interference of a regulated terminal operator. In point of fact, however, it was Peralta, the booking agent of the Egyptian buyer, which violated its principal's contract with Continental, the seller of grain, by twice inducing Prudential to bid on the carriage of the shipment. This conduct by Peralta set in motion the unfortunate chain of events by misleading Prudential into believing that it could obtain a booking. Moreover, as Hearing Counsel acknowledge, it is somewhat inequitable for Peralta to seek to obtain cheap LASH rates for transporting the wheat after Continental had sold it at a price which was based upon use of different vessels and then force Continental, in the name of Prudential, to modify its contract regardless of any particular financial harm that may result to Continental. Furthermore, whatever the duties of a regulated terminal operator, they certainly do not require such operator to provide loading or other services to any vessel which shows up at the terminal and demands to be loaded even if such vessel has no booking. In other words, a carrier cannot show up at a regulated terminal and demand that the terminal operator load its ship when the cargo at the terminal has already been booked on another ship by the shipper merely because the terminal operator has a tariff on file with the Commission and holds itself out to load vessels. In short, we have here a carrier, Prudential, which had no booking but which had been misled by a booking agent, Peralta, into thinking that it could obtain a booking contrary to the terms of a private contract of a seller and buyer of grain, attempting to be permitted to send its LASH barges to the terminal at which the grain was to be loaded even without a booking. A brief analysis of pertinent facts and case law will illustrate support for the foregoing conclusions.

It is true that terminal operators subject to Commission jurisdiction are held to high duties similar to those of public utilities and common carriers so that they cannot unfairly discriminate among their customers. See, e.g., *Chr. Salvesen & Co. Ltd. v. West Mich. Dock & Market Corp.*, cited above, 12 F.M.C. at 141; *Investigation of Free Time Practices - Port of San Diego*, cited above, 9 F.M.C. at 547-548; *A. P. St. Phillip, Inc. v. Atlantic Land & Development Co.*, cited above, 13 F.M.C. at 174. But those and similar cases involve situations in which shippers sought to have cargo loaded or unloaded or sought other services pursuant to proper booking contracts or vessels called in response to a terminal tariff that held out to service vessels desiring unloading services or were denied use of alternative tugboat service without justification. In other words, the customer of the terminal who sought a tariff service had some proper reason to be at the terminal and sought a service that fell squarely within the four corners of the holding out in the tariff or the duty of the terminal operator. In none of those cases did a shipper appear at a terminal and demand that the terminal load its cargo on a ship for which it had no booking or a vessel call and demand to be loaded without having first acquired a booking. Moreover, even in those cases in which shippers have a legitimate reason to seek terminal services, the terminal operator is not required to provide services over and above those specified in its tariff. For example, shippers cannot deposit their cargo on piers and expect free warehousing or storage services. See, e.g., *Free Time and Demurrage Charges on Export Cargo*, 13 F.M.C. 207, 215, 245-246, 247 (1970); *Free Time and Demurrage Practices at N.Y. Harbor*, 11 F.M.C. 238, 253, 259 (1967). In short, terminal operators hold out to perform services under a tariff and to perform the services specified in the tariff fairly and without unreasonable discrimination. They do not hold themselves out to provide services for persons having no previously acquired right to appear at the terminal to seek its services. Nor are the terminal operators required to furnish extra non-terminal services by providing free warehousing or free storage or by acting as a booking agent for carriers or shippers. Nor, because they operate terminals, does the Commission regulate everything they do without regard to what and where the activity is. See e.g., *Bethlehem Steel Corp. v. Indiana Port Commission*, cited above, 21 F.M.C. 629 (Commission has no jurisdiction over a "Harbor Service Charge" imposed by a terminal operator which is related to navigation and not to the physical handling of cargo); *New Orleans Steamship Association v. Bunge Corp.*, cited above, 8 F.M.C. 687 (Commission has no jurisdiction over a Louisiana terminal merely because the same company operates a regulated terminal in Philadelphia); *Agreement Nos. T-1685 and T-1685-6*, 16 SRR 887 (1976), adopted on this point, 19 F.M.C. 440, 457-458 (1977) (no Commission jurisdiction over terms of a lease of backup terminal facilities when terminal operator acted as lessor of facilities only); *Levatino & Sons v. Prudential-Grace Lines*, 18 F.M.C. 82, 84-85, 108-112 (1974) (warehouse agreement between carrier and other person subject to Act outside section 15); *Investigation of Wharfage Charges on Bulk Grain at Pacific Coast Ports*, 8 F.M.C. 653, 656 (1965) (no Commission jurisdiction over terminal operator's grain storage activities); *United States v. American Union Transport, Inc.*, cited above, 327 U.S. at 453 ("The original congressional purpose [of section 1 of the Act] clearly was to reach all who carry on the *specified* activities whether in or out of affiliation with a carrier." (Emphasis added.))

But, argue Hearing Counsel and Prudential, Continental does operate a terminal (the N & W Elevator) and, therefore, it cannot discriminate among vessels merely because of a contract of sale which its grain selling division entered into. Moreover, the Commission has held that a regulated person cannot segment its operations so as to avoid regulation when such segmentation results in unjust discrimination. Hearing Counsel cite a long line of cases in which common carriers by water have been required to treat their customers fairly notwithstanding contrary pressures from underlying labor agreements.[13] But analysis of these cases shows that they directly involved the common carriage operations and duties of carriers not to discriminate while serving shippers, a fundamental duty long established in transportation law and one which this Commission quite properly and readily enforced. A typical

[13] These cases are collected on page 19 of Hearing Counsel's Reply Brief. They are: *South Atlantic and Caribbean Line, Inc. - Order to Show Cause*, 12 F.M.C. 237 (1969), affirmed, 424 F. 2d 941 (D.C. Cir. 1970); *Sea-Land Service, Inc. and Gulf Puerto Rico Lines, Inc. - Proposed ILA Rules on Containers*, 21 F.M.C. 1 (1978), appeal docketed, No. 72-1776 (D.C. Cir.); *Pacific Maritime Association v. F.M.C.*, 543 F. 2d 395 (D.C. Cir. 1976), reversed on other grounds, 435 U.S. 40 (1978); *United States v. Sea-Land Service, Inc.*, 424 F. Supp. 1008 (D. N.J. 1977), appeal dismissed, 577 F. 2d 730 (3rd Cir. 1976), denied, 439 U.S. 1072 (1979); and *Consolidated Express, Inc. v. Sea-Land Service, Inc.*, Denial of Motion to Dismiss, 16 SRR 817 (1976).

case is *South Atlantic and Caribbean Line, Inc. - Order to Show Cause*, 12 F.M.C. 237 (1969), affirmed, *South Atlantic and Caribbean Line, Inc. v. Federal Maritime Commission*, 424 F. 2d 941 (D.C. Cir. 1970), in which the Commission refused to allow a carrier to "embargo" certain containerized cargo within 50 miles of a particular port without complying with applicable tariff law, although the carrier claimed that the restrictive practice was mandated by an underlying labor contract. The Commission rejected the contention, stating:

> We are not here concerned with the ultimate validity of clause 19 [in the labor contract]. Such a determination is beyond our jurisdiction and is within the province of the National Labor Relations Board. But whatever its validity, we cannot permit the mere execution of a collective bargaining agreement to override the clear requirements of a statute we are charged to administer. Statutes controlling the activities of common carriers and the obligations of those carriers are not subordinate to the requirements of labor contracts. (Citation omitted.) (12 F.M.C. at 241.)

The *South Atlantic and Caribbean Line* case and the other labor-related cases cited by Hearing Counsel involved carriers operating as common carriers in a manner directly contrary to their common-carrier duties under fundamental transportation law.[14] But in the present case Hearing Counsel and Prudential are asking the Commission to impose common-carrier or public-utility-type duties in areas beyond Continental's terminal. Specifically, they want the Commission, in effect, to extend itself into Continental's grain selling and merchandising practices, specifically, the practice of utilizing contracts of sale in which ships other than LASH are preferred for reasons relating, to some extent, to exceedingly complex market factors affecting the constantly changing price of grain, the need to maintain options in filling orders until the last feasible moment, the need to strive for a favorable "elevation" when the grain is actually loaded, etc. As the record shows, the world of grain trading and selling is a unique and complex world unto itself, one that an agency with expertise in regulating ocean shipping and practices of carriers and marine terminals is ill equipped to deci-

[14] One of the labor-related cases cited by Hearing Counsel is somewhat different, however. That is *Federal Maritime Commission v. Pacific Maritime Association et al.*, 435 U.S. 40 (1978). That case had to do with labor agreements between various steamship lines and marine terminal operators and others on management side and a longshoremen's and warehousemen's labor union on the employees' side. The Court held that the Commission had jurisdiction over the agreements under section 15 of the Act notwithstanding the fact that the agreements were part of collective bargaining and might otherwise have involved antitrust law. The Court agreed that the agreements had competitive effects as regards other ports outside the collective bargaining unit and that the Commission could determine these effects in the shipping industry under section 15 of the Act. Although found in labor contracts, the carrier and terminal-operator members of PMA were apparently attempting to impose certain labor terms on non-member ports so as to remove competitive advantages which PMA members believed the non-member ports had enjoyed.

pher. To argue, as do Hearing Counsel, that the Commission isn't really being asked to extend itself into the murky world of grain trading because the Commission would not be nullifying the restrictive non-LASH provision in Continental's contract of sale with Egypt but would only be acting when that provision is implemented by Continental at the Elevator seems terribly unrealistic and illogical. If the provision in the contract of sale can be blocked by this Commission at any time after a party to the contract strives to follow it and this Commission so holds, what good would it do for Continental or its foreign buyer to insert such a provision into a contract of sale? How could anyone reasonably argue that the Commission would not be affecting the contract of sale itself?

But, as mentioned above, Hearing Counsel and Prudential argue that the Commission would really only be regulating Continental's terminal operations, not its grain business, and that this is necessary because one cannot allow a regulated person to segment his operations so as to avoid regulation if by so doing the person causes unjust discrimination. This analysis, however, does not hold up under scrutiny. First, does anyone really believe that a giant grain company like Continental is deliberately segmenting its grain business so as to avoid regulation by the Maritime Commission? There is no evidence that Continental began its business as a regulated terminal operator at a grain elevator and later expanded into the grain trading which it is now attempting to segregate from its terminal operations in order to avoid regulation under the Shipping Act, a law which was never intended to apply to the grain business in the first place. In reality Continental is a grain trader and merchandiser, and is quite a well known and mammoth one at that, and it happens to operate a number of grain elevators at various ports, as do other giant grain companies like Cargill and Bunge.

Second, to argue that the Commission would only be regulating the terminal operations of Continental, rather than the grain trading operations, is rather unrealistic. Such a contention makes the terminal tail wag the grain company dog. In other words, Hearing Counsel and Prudential believe that the Commission would merely be enforcing nondiscriminatory Shipping Act standards on Continental's terminal operations notwithstanding restrictive practices under Continental's grain selling contracts. But the primary business of Continental is grain trading and merchandising, not elevator operating. The practices complained of did not really originate at the N & W Elevator although their effects were felt there. They originated back in the grain trading offices when grain companies, including Continental, formulated standardized contracts of sale and trade customs which often preferred non-LASH vessels. It is one thing to order a common carrier by water to stop discriminating against types of shippers in its common-carriage business and to disregard contrary rules in underlying labor contracts and quite another thing to order a grain company to stop drafting contracts of sale which discriminate against types of vessels merely because the grain company operates a terminal which is subject to Shipping Act regulation. A common carrier cannot generally discriminate among its shipper customers under its tariff. Such conduct falls directly within the parameters of the common carrier's ancient holding out to carry fairly. However, there is no ancient law which requires a grain trader to fashion its terms of sale so as to ensure that it will purchase the services of every type of vessel willing to carry the grain. In the labor-related common carrier cases, the Commission had little difficulty in ordering the common carriers involved to terminate an embargo, file a correct tariff provision, or cease and desist from carrying out discriminatory practices among shippers. Such orders were well within the Commission's authority and expertise. But what kind of order is the Commission supposed to fashion in a case such as the present one in which the discriminatory practice originated in the grain selling business? How is the Commission supposed to order Continental to allow its buyers to select LASH vessels without restraint in its contracts of sale and do so by means of Continental's terminal tariff? As Continental noted (Continental's Posthearing Statement, p. 92 n. 13), its N & W Elevator tariff did not preclude loading of LASH barges when sales contracts had not excluded them from carriage. Moreover, there would be no reason to impose charges other than normal tariff charges for loading LASH barges if Continental's contract of sale had permitted LASH barges to load and they loaded at one of its elevators. This illustrates the point that the exclusionary practice of which Prudential complains originated in a sales contract long before any ship presented itself at a grain elevator and sought loading services. In other words, the discriminatory practice did not fall within the holding out of the terminal which merely loads any vessel having a proper booking on equal terms under a tariff.[15] Again it illustrates how Prudential and Hearing Counsel are asking the Commission to use the terminal tail to wag the grain company dog. The situation is similar to telling a common carrier which is preparing to load shipper A's cargo for export to a foreign buyer that the carrier must instead load and carry shipper B's cargo to the same buyer because shipper B complains that it should have gotten the order from the foreign buyer and would have but for shipper A which happens to be the carrier's parent corporation.

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[15] Indeed, as the record shows, all the grain which is stored in Continental's N & W Elevator and is loaded into vessels for export belongs to Continental itself, title not passing to the buyer until pouring into the vessel is completed. Continental's marine terminal tariff at the Elevator, therefore, really constitutes a holding out to provide loading and related services to any vessel which has acquired a booking to carry the grain and to charge all vessels the same tariff rates for these services. In a sense, then, Continental's grain business predominates even at the Elevator and its marine terminal business does not even begin until a vessel calls and begins to receive the loading and related services.

Moreover, if the carrier refuses to load B's cargo to the exclusion of A, B will sue the carrier, claiming unjust discrimination and that the carrier is really furthering the interests of the carrier and not the interests of shipper A. (It might be different, however, if the common carrier refused to load shipper B's cargo after shipper B had made the sale to the foreign buyer in order to allow shipper A to snatch the sale away from Shipper B. In such a scenario the common carrier is violating its clear duty to serve any shipper tendering cargo without discrimination. In the present case it is not the N & W Elevator which conceived the idea of refusing to load LASH barges under the original bid to Egypt; it was rather the grain selling and trading offices of Continental.)

No matter how earnestly Prudential and Hearing Counsel urge the Commission to find that Continental furthered its terminal interests rather than its grain selling and trading business when it insisted on its rights under the contract of sale to exclude use of LASH barges, I find that the situation really involves a grain trading practice and a contract of sale, that the restrictive practice originated not at the terminal but in the grain selling offices of Continental, and that the attempt to eliminate such practices by regulating Continental's N & W Elevator tariff is an unrealistic attempt to thrust the Commission outside the parameters of the Elevator's holding out into the world of grain trading and merchandising, an example of using the tail to wag the dog.

Finally, a look at another terminal case, in which the Commission held that no violation of sections 16 First, 17, or 15 of the Act had occurred, is helpful. This is the case of *D. J. Roach, Inc. v. Albany Port District et al.*, 5 F.M.B. 333 (1957). In that case a stevedore complained that respondent Port District and Cargill, both subject to the Act, had entered into an agreement providing for exclusive stevedoring by one stevedore at the Albany grain elevator which barred complainant from competing. The Commission found no violation of law in this arrangement despite the exclusion of the complaining stevedore because Cargill "held itself out to perform, and through contracts with vessels agreed to perform, stevedoring services, and merely subcontracted certain of its stevedoring operations to other stevedoring contractors who, in turn, performed the work for Cargill and not for the vessel or the cargo." (5 F.M.B. at 335.) Thus, although the Commission had found that Cargill was a regulated terminal operator under the Act (5 F.M.B. at 334-335), and although, in the performance of Cargill's grain-loading duties, it barred all but one stevedore, the Commission found that this was merely a subcontracting arrangement between Cargill and the preferred stevedore and therefore one beyond the scope of sections 16 First or 17. It would appear that if, in the performance of vessel-loading services as a terminal operator, the terminal operator is free to prefer a stevedore although this precludes other stevedores from doing business at the elevator, that Continental, in the present case, which is primarily a grain seller and trader, is free to prefer vessels in a contract of sale which does not originate at the terminal, although ultimately a vessel is precluded from calling and having grain loaded at the terminal.

Prudential's Allegations Regarding Concerted Restrictive Practices in the Grain Trading Industry

Prudential has striven to develop a record showing concerted restrictive practices of grain companies, harming not only LASH operators but private grain exporters, as well as showing Continental's mistaken notions of low productivity of loading of LASH barges. Prudential believes that it has shown that Continental, as well as other grain companies operating elevators, are also violating the various terminal tariffs which they file with the Commission and that its actions in demanding penalties or "premiums" at its N&W Elevator for loading Prudential's LASH barges show that it was really furthering its terminal business by carrying out these restrictive activities. The heart of Prudential's arguments are found in its proposed findings of fact, Nos. 41-52 (Prudential Posthearing Statement, pp. 22-34). Although I see some merit to Prudential's arguments showing that the grain companies follow an indusry practice preferring bulk vessels, exercise a peculiar control over grain exports through their elevators, and have a somewhat shortsighted view of LASH productivity, all of this evidence seems more relevant to antitrust law, i.e., to the prohibitions against combinations or conspiracies in restraint of trade than to the Shipping Act. If, moreover, there is a peculiar restriction against use of grain companies' elevators by private farmers or grain exporters outside of the grain company clique, I am not sure why such restrictions do not similarly fall under the proscriptions of antitrust law or perhaps under Department of Agriculture jurisdiction over public grain warehousing, rather than under the Shipping Act, if they are indeed unlawful. Prudential has shown so much that it has perhaps shown grounds to pursue the matter in greater depth under antitrust law or perhaps the U.S. Warehouse Act. However much these facts may gain sympathy for Prudential and other LASH operators, this does not mean that the Commission was given jurisdiction to correct the various inequities, if such they be.

Briefly, Prudential argues on the basis of evidence of record which it developed at the hearing, that despite the public warehouse nature of their elevators, the various grain companies have developed an industry understanding and practice that bulk vessels are to be preferred on sales of grain overseas and that LASH vessels will be excluded from grain elevators operated by these companies, or, if not refused, will be loaded only upon payment of "a heavy premium in the sales price as a condition of lifting the refusal to accept LASH barges." (Prudential Posthearing Statement, pp. 23-24.) Furthermore, the grain companies control the use of the export elevators on the East Coast by excluding private grain exporters or farmers from storing grain at an elevator which they operate and from exporting therefrom. Prudential asserts that under a "long-established trade restriction in effect since 1978 and earlier, a person desiring to sell grain for export from the U.S. East Coast was required either to load it through his own export elevator or to purchase the grain at the ocean side of an export elevator operated by a grain company which was itself engaged in the grain export business." (Prudential Posthearing Statement, p. 23.) In other words, Prudential is saying that the grain companies control the exportation of grain through the U.S. East Coast because they operate all the grain elevators there and do not permit anyone to ship grain through the elevators but themselves. Therefore, if any person desires to export grain through the U.S. East Coast, if he does not have his own export terminal facility, he must buy the grain from a grain company operating the elevator F.O.B. end of spout on the vessel. Thus, Continental and other grain companies, by an unlawful conspiracy, control grain exports through the East Coast and do so with restrictive provisions excluding LASH ships, which restrictions are contrary to their terminal tariffs and also to their status as licensed warehousemen. However, if Continental or any member of this group of grain companies decides to allow a LASH barge to load at one of the elevators on the East Coast, it may do so but will extract a penalty or "premium" from the LASH opeator without tariff authority. Moreover, even if one grain company were disposed to accept LASH barges for loading under a contract of sale, the existence of the industry practice to exclude LASH would probably mean that the grain company would ultimately refuse LASH because no other grain company would fill the contract under LASH terms.

Even if we accept all of Prudential's contentions as proven (and there is record support for them), these allegations seem to relate to a combination in restraint of trade under antitrust law far more than an unfiled agreement in the shipping industry among carriers or terminal operators under section 15 of the Act. Again the root cause of the problem of which Prudential complains is a practice which originated in the grain industry, not the terminal business. A concerted refusal to deal, if that is what this is, is a classic type of antitrust violation, i.e., a group boycott which is considered to be per se unlawful.[16] If Pruden-

[16] If a group of competitors agree not to deal with a person outside the group or agree to deal only on certain terms, this is a restrictive combination violating section 1 of the Sherman Act. See *Klors Inc. v. Broadway-Hale Storage, Inc.*, 359 U.S. 207 (1959), *Paramount Famous Lasky Corp. v. U.S.*, 252

Continued

tial is correct in arguing that the grain companies have engaged in such a boycott, the obvious remedy is an antitrust, not a Shipping Act suit. This again illustrates the point that Prudential's problems originated not at the N & W Elevator but in Continental's grain trading offices so that this Commission cannot effectively grant relief. To demonstrate this point, one need only consider that Continental and the other grain companies having tariffs on file with this Commission can quite easily remove themselves from all Commission regulation even at their terminals merely by specifying in their tariffs that they no longer hold out to serve common carriers. That is exactly what happened in *New Orleans Steamship Association v. Bunge Corp.*, cited above, 8 F.M.C. at 694, and *Agreement No. T-2719,* 16 F.M.C. at 321, cited above. (Also, as mentioned above, even if the grain companies do not cancel their holding out, there is no practical Shipping Act solution to Prudential's problem since there is no realistic amendment to the terminal tariff which could account for the continually changing market conditions in the grain selling and trading industry.) [17]

Another aspect of Prudential's allegations concerns Continental's purported refusal to handle any grain other than its own at its N & W Elevator. (According to testimony of the former manager of the N & W terminal, Mr. Winnie, the nature of the grain exporting industry has changed since 1972 when the Government had large surpluses of grain. Presently no person other than Continental apparently exports grain through the N & W Elevator. See Prudential Posthearing Statement, p. 26, and record references therein quoted.) This non-handling of a private person's grain at the N & W Elevator, Prudential suggests, is also contrary to Continential's duties as a licensed public grain warehouse publishing a warehouse tariff and operating under section 254 of the United States Warehouse Act (7 U.S.C. 241 et seq.) If so, however, such a matter is obviously the business of the agency that administers that Act, not the Federal Maritime Commission, which has specifically stated that it does not regulate grain storage practices under the jurisdiction of another agency. *Investigation of Wharfage Charges on Bulk Grain at Pacific Coast Ports,* cited above, 8 F.M.C. at 656; cf. *Agreements 8225 and 8225-1,* cited above, 5 F.M.B. at 653-654; *California Stevedore & Ballast Co. v. Stockton Port District,* cited above, 7 F.M.C.

U.S. 30 (1930); *U.S. v. First National Pictures, Inc.*, 282 U.S. 44 (1940). Such restrictive group agreements are deemed inherently harmful and cannot be justified under antitrust law, i.e., they are per se violations of that law. *Paramount Famous Lasky Corp. v. U.S.*, cited above.

[17] One of the grain company's Elevator tariffs does specify a special charge for loading LASH barges as well as "tween-decker" ships (5 cents per outbound bushel). This is Cargill's Norfolk tariff. Apparently all other elevator tariffs make no such special provision for LASH. (See Prudential's Posthearing Statement, pp. 31-32 n. 1.) This fact by itself, however, does not establish that there is a practical tariff charge that can deal with such matters as "elevation," current commodity market conditions, and lost sales, which Continental claims to be involved when LASH instead of bulk vessels are allowed to load at an elevator that expected bulk vessels to call.

at 81. See also *New Orleans Steamship Association v. Bunge Corp.*, cited above 8 F.M.C. at 694-695.

Finally, Prudential argues that Continental is really furthering its terminal intertest, not its grain selling interests by excluding LASH barges from its N & W Elevator and furthermore excludes the barges under a mistaken idea that LASH barges' loading productivity is lower than all other vessels. To support this contention, Prudential points to evidence showing that when it negotiated with Continential's grain selling executives in New York, seeking to pay some sort of penalty or "premium" in order to load the grain at the N & W Elevator despite the contract of sale excluding LASH, Continental's suggested figures were based upon terminal cost considerations and Continental's mistaken estimates of slow productivity of LASH barges. The record does show that Continental took an unnecessarily dim view of LASH loading productivity since LASH could be loaded about as fast as deck ships which Continental's contract of sale did not exclude, and Continental had not exercised all the diligence that it might have done in an effort to increase the loading rate of LASH barges at the N & W Elevator. As I have also discussed earlier, the record is full of evidence showing various loading rates of LASH barges at the N & W Elevator and elsewhere as compared to loading rates for other types of ships such as bulk and deck ships. It is rather involved and complex but does indicate that LASH barges did rather well in loading when compared to deck ships and liner vessels and that there is considerable loss of time at the N & W Elevator when no pouring occurs regardles of which type of ship is on berth. Bulk ships do appear to load faster than any other type even if not exactly at the four-to-one ratio compared to LASH that Continential believes, but the considerable lost time when the Elevator is not pouring resulting in slow productivity generally should be considered when evaluating the impact of loading LASH barges on other loadings. A clear answer to the question whether Continential's negotiations with Prudential leading to a possible "penalty" payment relates to the terminal business or to the grain selling business is not possible. It appears that there are elements of both. It seems true enough that Continential was, to some extent, basing its end of the negotiations with Prudential on assumed productivity rates of LASH barges compared to bulk vessels. This could translate into additional costs at the terminal, for example, labor overtime or vessel demurrage with Continential would have to pay to other vessels backed up and waiting for LASH barges to complete loading. These factors seem to relate to the desire of Continential to increase productivity at the terminal. But, as Continential argues, there are other factors that enter into the attempt to substitute LASH barges for bulk vessels which are not compensated by a productivity penalty and relate to the grain selling business. Mainly these are lost "elevation" and loss of sales that could have been made while barges were loading. These factors, it would appear, pertain to the state of the grain market.

Perhaps Continential's fears that its N & W Elevator would become "plugged" if LASH barges had been allowed to substitute for bulk vessels was mistaken and probably its views as to the rate of LASH loadings were too pessimistic. Therfore perhaps Continential should reconsider the grain industry practice of excluding LASH from the terms of its contract of sale with Egypt and risk problems if it had to transfer the sale to another grain company which also followed the restrictive practice. However, even if it seems unfair for Continental to follow a discriminatory provision in contracts of sale against LASH barges which do no load as slowly as Continental apparently thinks, one again must face the fact that the restrictive provision against LASH originated in Continental's contract of sale and is apparently often followed by other grain companies in their contracts of sale. Therefore, to grant Prudential the relief it seeks, the Commission would have to hold Continental liable for refusing to depart from its contract of sale which it made as a seller of grain. Furthermore, if the Commission orders Continental to refrain from preferring bulk vessels in its contracts of sale or from barring LASH vessels in those contracts when Continental wishes to base its sales price in consideration of the use of bulk vessels or in consideration of the need to maintain flexibility in filling the order without fear of losing "elevation" because of slower-loading LASH barges, the Commission is obviously interfering with Continental's grain trading and selling business no matter how well motivated the Commission may be in seeking to remove an unwarranted stigma from LASH vessels. Although there do appear to be aspects of the terminal business which entered into Continental's thinking when it negotiated with Prudential regarding a possible penalty payment and perhaps even some concern over terminal productivity generally even when the contract of sale was formulated because of a belief that LASH productivity was relatively slow, this entire controversy seems to boil down to the question of whether this matter is essentially one involving the grain selling business and the rights of Continental under its contract of sale or whether it involves a terminal matter and the terminal's duty to serve its customers without discrimination. I believe that a preponderance of the evidence shows that the case primarily involves grain trading and selling and related practices of that business and that the relief which Prudential seeks, namely a cease and desist order and monetary damages because of Continental's refusal to waive its rights under its contract of sale, simply lies beyond the Shipping Act and this Commission's jurisdiction. If the restrictive practices against LASH vessels of which Prudential complains did originate in 1978 or earlier among various grain companies and those companies continue concertedly to place such restrictions in their contracts of sale, as

Prudential contends, then it would appear that Prudential ought to seek relief under that body of law which deals directly with concerted refusals to do business and similar restraints of trade, namely, the antitrust laws. I do not believe that this Commission is authorized by law to change a practice in the grain industry which is intertwined with complex market considerations, by looking at grain elevator tariffs and trying to extend obligations of common carriers into grain selling practices or by holding Continental's terminal operating personnel responsible for vessel booking practices of its grain traders and salesmen.

Prudential's Allegations of a Section 15 Violation and of Continental's Status as a Carrier

Since Prudential added two more allegations during the course of this proceeding, I believe some mention of them should be made. The first concerns Prudential's allegation that Continental and other grain companies have violated section 15 by entering into agreements which discriminate against LASH vessls. This allegation was not made in the original complaint nor in Prudential's Rule 95 prehearing statement but appeared in Prudential's Posthearing Statement (pp. 75-77). The second concerns Prudential's allegation that Continental, which itself sometimes has acted as a carrier competing with Prudential ought not to be allowed to use its terminals to exclude other carriers. (See Prudential's Posthearing Statement, p. 71.) I find neither allegation sufficient to alter my decision.

As to the first allegation regarding an unfiled section 15 agreement, I find several deficiencies in both law and fact. The first problem is procedural because of lack of notice of such an issue in the original complaint which was confined to allegations of violations of sections 16 and 17 of the Act. It is procedurally improper and untimely to attempt to litigate an issue which broadens the original complaint at such a belated point in time. A similar problem arose in *Levatino & Sons v. Prudential-Grace Lines,* cited above, 18 F.M.C. 82, when the Initial Decision in that case had found violations by respondent carrier because of shutouts of cargo although the original complaint and the hearing had given notice only of unjust discrimination. Although the finding of violation was made under the same sections of law (sections 14 Fourth and 16 First) as involved in the matter of discrimination, the Commission found the finding to be improper because of inadequate notice ot respondent. The Commission stated:

> As to shutouts, at issue in this proceeding was only Levatino's charge that Grace had violated sections 14 Fourth, 16 First and 17 of the Act by failing to provide Lavatino with space accommodations for Levatino's cargoes which Grace had contracted to carry. While we do not insist upon overnice limitation of issues to those framed in the various pleadings, we are

> of the opinion that the extension of this claim to a general investigation of a course of conduct pursued by Grace with respect to many other shippers was unwarranted. (18 F.M.C. at 86.)

A second problem also concerns the question of notice. This has to do with the fact that Prudential, in its Posthearing Statement, is charging that Continental has entered into unfiled agreements with other grain companies operating terminal elevators on the East Coast. However, these other companies were never named as respondents in the original complaint and are only referred to generally or occasionally in Prudential's Posthearing Statement. If the Commission is expected to find that grain companies operating elevators on the East Coast have entered into agreements which make them subject to the requirements of section 15, much more notice would be necessary under basic principles of administrative law. The alleged companies would have to be named as respondents in the complaint and given an opportunity to answer and defend the charges. None of this was done. Accordingly, this proceeding cannot make findings under section 15. See Administrative Procedure Act, 5 U.S.C. 554(b); *Imposition of Surcharge by the Far East Conference*, 9 F.M.C. 129, 141 (1965); see also *Agreement No. T-2880, as Amended,* 14 SSR 1567, 1568 (1975) (question of jurisdiction under section 15 requires full hearing).

The final problem with findings under section 15 concerns the fact that parties to agreements subject to that law must be subject to the Act in the first place and their agreements must fall under one of the subject matter categories of the law. Grain companies are not ordinarily subject to the Act and, as I have discussed above, the subject matter of the purported restrictive agreements originated in the grain trading and selling industry, not at marine terminals. As I have discussed earlier, not every activity or arrangement even of regulated persons is subject to Commission jurisdiction. See, e.g., *Agreement Nos. T-1685 and T-1685-6,* cited above, 19 F.M.C. at 457-458; *Levatino & Sons v. Prudential Grace Lines,* cited above, 18 F.M.C. at 84-85.

Prudential's final agrument is that since Continental sometimes charters ships itself which load grain at its Elevator, it has operated as a carrier itself at the Elevator. If so, Prudential asserts that Continental "should not be allowed to use its public terminals to exclude competing carriers from the trade." (Prudential's Posthearing Statement, p. 71.) This argument I find to be exceedingly weak. If a terminal operator under Shipping Act jurisdiction has a duty to service all customers having a legitimate reason to call at the terminal to be loaded or unloaded, as indeed it does, preferring one carrier's vessels over another would violate that duty. See *Chr. Salvesen & Company Ltd. v. West Mich. Dock & Market Corp.,* cited above, 12 F.M.C. 135. However, there is no evidence that Continental gave special preferences to vessels which it had itself chartered over any other vessels. Moreover, it is not even clear from the limited record on this point what kind of carrier Continental is even if it can be found to be some type of carrier. A similar argument was made in *New Orleans Steamship Association v. Bunge Corp.*, cited above, 8 F.M.C. at 693-694. In that case complainant argued that the Bunge Corp. had provided ships to load and carry grain for a variety of buyers and therefore was itself a common carrier. The Commission quickly rejected the argument, finding that Bunge's operations did not constitute "the undertaking to carry for hire for those seeking to employ the carrier" (8 F.M.C. at 693) and that "[a]ll of Bunge's shipments are in fulfillment of contracts for the sale of grain. Bunge does not undertake to carry for anyone; it does not sell ocean transportation; it merely delivers grain in chartered vessels to its customers." (8 F.M.C. at 694.) I therefore find no merit to the argument.

ULTIMATE CONCLUSIONS

Continental Grain Company is, first and foremost, a grain selling and trading organization. It operates the N & W Grain Elevator at Norfolk and, in so doing, furnishes terminal facilities "in connection with a common carrier by water," thereby bringing its N & W Elevator under the jurisdiction of the Shipping Act, 1916. Its arguments that it does not fall under such jurisdiction because it does not serve common carriers or vessels in common carriage and, even if it does, it does so infrequently, do not withstand scrutiny. The record shows that common carriers have sent vessels or barges to the N & W Elevator for loading and that Continental publishes and files a terminal tariff which does not exclude common carriers from the Elevator and even defines "liner" vessels and operates under a lease which calls for Continental to maintain a "public terminal open to all parties." The doctrine that Continental should not be found subject to the Act because of relatively infrequent calls by common carriers or by vessels of common carriers was enunciated in a decision of the United States Court of Appeals for the First Circuit in a case in which the Commission was not a party and which has not been followed by the Commission.

Although Continental does operate the N & W Elevator as a person subject to the Act, not everything the grain company does is subject to that Act. Specifically, Continental's practice, which appears to be a grain industry practice as well, in specifically preferring non-LASH vessels in its contracts of sale of grain, originated in the complex world of grain selling and trading for reasons which, while not totally removed from consideration of terminal efficiencies, are based upon the numerous factors which grain traders consider when formulating their contracts of sale. Therefore, the practice, while ultimately affecting Prudential adversely, is one which lies outside the scope of the Shipping Act and the expertise of the Commission. Evidence, which Prudential developed, that this exclusionary practice is common in the grain industry or that it violates Continental's status as a licensed warehouseman regulated by the Department of Agriculture deals with matters within the jurisdiction of the antitrust laws or the Department of Agriculture.

The situation in which Prudential found itself commands considerable sympathy since Prudential was precluded from carriage of a sizable shipment of wheat merely because it operates LASH vessels and barges and the loading rate of those barges at grain elevators is not as slow as Continental believes. However, Prudential was seeking to obtain a booking which was not permitted in Continental's contract of sale and was induced to do this by the actions of the Peralta shipping agency which had no authority to go outside the provisions of the contract of sale. Therefore, no matter how the case is analyzed, it comes down to the fact that Prudential was asking Continental to give up its contractual rights as a grain seller and now wants the Commission to hold Continental liable for monetary damages merely because Continental also operates the N & W Elevator through which this particular shipment moved but which it did not necessarily have to move. The argument that the Commission would not really be regulating a provision in a contract of sale of grain but would really be confining its regulation to Continental's terminal operations is not realistic. This argument would not only have the tail wag the dog but would ignore the fact that the practice complained of originated not at the terminal but in the grain selling and trading industry and that the Commission would be attempting to extend its shipping expertise into a totally different industry.

NORMAN D. KLINE
Administrative Law Judge

FEDERAL MARITIME COMMISSION

DOCKET NO. 81-59

GENERAL TRANSPAC SYSTEM - POSSIBLE VIOLATIONS OF SECTION 15 SHIPPING ACT, 1916

NOTICE

August 23, 1982

Notice is given that no exceptions have been filed to the July 16, 1982 initial decision in this proceeding and the time within which the Commission could determine to review that decision has expired. No such determination has been made and accordingly, that decision has become administratively final.

(S) FRANCIS C. HURNEY
Secretary

FEDERAL MARITIME COMMISSION

DOCKET NO. 81-59

GENERAL TRANSPAC SYSTEM - POSSIBLE VIOLATIONS OF SECTION 15, SHIPPING ACT, 1916

Respondent found to have violated section 15 by entering into an unfiled cooperative working arrangement with another non-vessel operating common carrier.

No penalty found to be warranted.

George J. Gmelch for General Transpac Systems.

John Robert Ewers, Joseph B. Slunt, and *Aaron W. Reese* for Office of Hearing Counsel, Bureau of Hearings and Field Operations.

INITIAL DECISION [1] OF JOHN E. COGRAVE, ADMINISTRATIVE LAW JUDGE

Finalized August 23, 1982

The respondent General Transpac System is a Nevada corporation which during the period relevant here operated as a non-vessel operating common carrier (NVOCC). Mr. George J. Gmelch was Chairman of the Board and Chief Executive Officer of General Transpac and Mr. Herb Pierce was its Vice President. Sometime prior to April 30, 1976, Mr. Pierce came to Mr. Gmelch with a problem. Under General Transpac's tariff (Transpac Container Freight, Guam Freight Tariff No. 5, FMC No. 6) a shipper, in order to determine the total cost of a shipment, had to add to the port-to-port rate charges for such things as wharfage, handling, container stuffing, and delivery at destination. A number of General Transpac's customers wanted a single, all-inclusive, "door-to-door" rate. Gmelch suggest that they simply publish such a rate in General Transpac's existing tariff. However, Pierce had been in touch with someone at the Commission's San Francisco field office and was told that General Transpac could not publish its all-inclusive or door-to-door rate in its tariff so long as it retained the port-to-port rate in the same tariff.[2] Gmelch had Pierce check again with the San Francisco office and its position remained the same.

At this time Gmelch was the sole owner of Transpacific Freighting Corporation. Transpacific's activities ranged from owning a vineyard in Napa Valley to operating a steamship agency in San Francisco. Trans-

[1] This decision will become the decision of the Commission in the absence of review thereof by the Commission (Rule 227, Rules of Practice and Procedure, 46 CFR 502.227).

[2] The record is not clear on either the person contacted at the San Francisco office or the particular question put to that person. The general basis for the position of the San Francisco office seems to have been that a tariff could not contain two different rates for the same commodity and service.

pacific was incorporated in California in 1955 to operate chartered vessels, primarily in the bulk trade from the West Coast. It became more or less dormant in 1957 or '58 and the vessels it was operating were redelivered. It was around this time that Gmelch acquired an interest in Transpacific. In 1971 Gmelch acquired the remaining shares and became the sole owner. In 1974 Transpacific "sought steamship agency activity and representation," because Gmelch, no longer employed by Pacific Far East Line, "had friends or connections in the shipping industry and . . . felt that there was a need for a steamship agency representation on the West Coast." Transpacific had no salaried employees and while the corporation's official address was 956 Sacramento Street (a residence), Gmelch used General Transpac's office to conduct operations. It was Transpacific that Gmelch used to resolve what he saw as the dilemma presented by the need for a door-to-door rate and the position of the Commission's San Francisco office on the inclusion of that rate in General Transpac's tariff. On April 30, 1976, Transpacific Freighting Corporation published "A Non-Vessel Operating Common Carrier" Tariff No. 2.[3]

From the beginning Transpacific was a "paper" carrier. Aside from distributing a circular giving a summary of the services it offered, Transpacific's "advertising" as an NVOCC was restricted to a telephone listing. Transpacific's function was to serve as a kind of second choice offered to shippers who when contacted by General Transpac said they were only interested in an all-inclusive or door-to-door rate. The arrangement between General Transpac and Transpacific is contained in two memoranda. Under it General Transpac paid all expenses and performed all services connected with Transpacific cargo. Transpacific was then "invoiced" for "their pro-rata share of the expenses" and for "80% of the container profit to cover handling costs." On January 1, 1977, General Transpac and Transpacific entered into an agency agreement under which General Transpac appointed Transpacific its agent in California and Guam. General Transpac was to bear the expenses of the agency and "Transpacific was to pay 99.5% of the ocean freight revenue generated under its Polypac Container Service for services rendered" under the agreement.[4]

Sometime after Transpacific's tariff became effective, Mr. Louis A. Hammond, a General Investigator from the Commission's San Francisco office visited the offices of General Transpac and Transpacific. The purpose of the visit was to determine whether Transpacific had handled

[3] Tariff No. 1 was rejected by the Commission for reasons not stated in the record. Transpacific was known by the trade name "Polypac Container Freight".

[4] The "invoicing" of Transpacific for 80% of the freight was an initial step only and Transpacific's total compensation for its activities as an NVOCC and agent was one-half of one percent of the revenue generated on its shipments.

any shipments prior to April 30, 1976, when its tariff went into effect. Mr. Hammond found no violations and in the course of discussions with Messrs. Gmelch and Pierce restated the position that a carrier could not have two different rates for the same commodity.[5] In addition Mr. Hammond expressed his opinion that there was still some question as to the validity of the two rates even though they were published in separate tariffs. It was his idea that "two NVO's or carriers working through a single agent" could not "have two tariffs for the same commodities and the same service." [6] Confronted with the proposition that it might still be in violation of the law, Transpacific ultimately cancelled its tariff in August of 1977 and General Transpac amended its tariff to include the door-to-door rate as it had wanted to do from the beginning.

His investigation completed, Mr. Hammond prepared a draft of his report on the matter and it was at this time that his superiors raised the question of a possible violation of section 15 based upon the existence of two separate corporations and the apparent lack of any agreement between them which had been filed with and approved by the Commission as required by that section. The possible violation of section 15 was included in the report, but no mention of it was made to anyone at General Transpac or Transpacific.[7]

On February 9, 1981, Commission's Bureau of Hearings and Field Operations asserted a claim of $20,000 against General Transpac for carrying out an unfiled section 15 agreement with Transpacific during the period April 30, 1976 through August 15, 1977. General Transpac rejected the claim and this proceeding was instituted.

DISCUSSION AND CONCLUSIONS

The issues to be resolved here are:

1. Whether General Transpac System violated section 15, Shipping Act, 1916, by carrying out an unfiled cooperative working arrangement with Transpacific Freight Corporation subject to section 15 of the Shipping Act, 1916; and
2. Whether civil penalties should be assessed against General Transpac System pursuant to 46 U.S.C. 831(e), for violations of section 15 of the Shipping Act, 1916, and, if so, the amount of any such penalty which should be imposed taking into consideration factors in possible mitigation of such a penalty.

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[5] There were qualifications to this flat prohibition which are not relevant here.

[6] Other portions of Mr. Hammond's deposition make it clear that he thought that General Transpac and Transpacific were "one entity" and that the two corporations were a "fiction". At this time Gmelch owned 43% of General Transpac and effectively controlled it.

[7] When asked why no further contact was made with respondent Mr. Hammond explained that the two tariffs had been discontinued and a modified single tariff substituted for them and that this eliminated the problem as far as he was concerned.

That there was an agreement between General Transpac and Transpacific is admitted by respondent. The dispute arises over whether the agreement had to be approved by the Commission under section 15 which in relevant part provides:

> Every common carrier by water . . . shall file immediately with the Commission a true copy, or, if oral, a true and complete memorandum, of every agreement with another carrier or person subject to this Act, or modification or cancellation thereof, to which it may be a party or conform in whole or in part . . . providing for an exclusive preferential working arrangement.

Transpacific published and filed with the Commission a tariff under which it held itself out to perform all the services of an NVOCC. It issued its own bills of lading and so far as the shipping public had any reason to know, Transpacific was an NVOCC. While it is true that Transpacific did not actually perform as an NVOCC, leaving to General Transpac the performance of those functions, it was not by its own characterization of its activities a "mere agent" of General Transpac. The agreement between General Transpac and Transpacific was a cooperative arrangement between two NVOCC's and should have been filed with the Commission.[8] *York Forwarding Corp., J. B. Wood Shipping Co., Inc. and Edwards Fuge Corp.*, 15 F.M.C. 114 (1972).

Even if the arrangement here were a pure agency arrangement, respondent's contention that the Commission's exemption of agency agreements from the requirements of section 15 in 1981 demonstrates that agency agreements were never intended to be filed under section 15 is without merit. The Commission did not exempt agency agreements between "common carriers".[9] (See 46 CFR 502.11.) But respondent argues that in refusing to exempt agency agreements between carriers, the Commission gave as its reason the "potential" for "conflicts of interests as well as possible market sharing" in such agreements. Since the agreement between General Transpac and Transpacific involve neither, respondent says it is not within section 15. It hardly seems necessary to point out that the Commission *did not* say that only those agency agreements between common carriers which contained conflicts of interests or included market sharing were within section 15. The Commission made it quite clear that all agency agreements between common carriers had to be filed with and approved by the Commission under section 15 of the Act. (See Order adopting the exemption, 24 F.M.C. 301 (1981).)

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[8] Respondent argues that even if there was a violation it was a "technical" one. This argument goes only to the amount of any penalty which might be assessed because of the violation, not to whether a violation occurred.

[9] NVOCC's are "common carriers". See e.g., *Bernhard Ullmann v. Puerto Rican Express Co.*, 3 F.M.B. 771 (1952).

Where two separate corporations each holding itself out to the public as NVOCC's enter into an agreement whereby one assumes responsibility for, conducts the operations of, and reaps profit from the other, that agreement is a cooperative working arrangement subject to section 15 of the Shipping Act, 1916. Since respondent was a party to such an agreement it was in violation of section 15 for the life of that agreement.

The remaining issue is whether civil penalties should be assessed and if so the amount of the penalty taking into consideration possible factors in mitigation. The Office of Hearing Counsel, Bureau of Field Operations (the Bureau) recommends that a penalty of $5,000.00 be assessed. The basis for this amount is (1) The Agreement which violated section 15 was in effect from April 30, 1976 through August 15, 1977, and (2) The penalty for violating section 15 is $1,000 per day for each day the violation continues, and the agreement generated revenues of $57,600. From this the Bureau concludes that a penalty of "$5,000 would be reasonable considering the nature of the violation and the extent of the operations under the cooperative working arrangement."

Respondent, somewhat indignantly, urges that even if it did violate section 15 the imposition of any penalty would be "unconscionable" because, "If there was ever a case where a company did its best to follow FMC advice and was clobbered by doing so this is it." Stated briefly, respondent's position is that a person should not be punished if by accepting and acting upon representations of an official of the Commission, that person commits a technical violation of the Shipping Act. The Bureau rejects this contention and argues that any discussions between the Commission's Investigator, Mr. Hammond, and Messrs. Gmelch and Pierce are irrelevant "to the issue to be resolved here . . . whether [General Transpac] violated section 15. . . .[10] This may well be true, but there are two issues in the case and "the discussions" dismissed by the Bureau as irrelevant are directed to the second issue--whether a civil penalty should be assessed and if so how much should it be. The Commission's order calls for the consideration of factors in mitigation in answering the question of whether a civil penalty should be imposed and if so the amount of the penalty. However, the Bureau

[10] The additional argument is made that "Whatever the reason for TFC (Transpacific) becoming an NVOCC, even assuming but not conceding, that it was the result of misleading information from Commission personnel, it cannot be conceived that Commission personnel, directly or indirectly misled GTS (General Transpac) into making and carrying out a cooperative working arrangement in violation of section 15." It is difficult to decide just what to make of this. If we assume that Transpacific became an NVOCC because of "misleading information from Commission personnel" then "Commission personnel directly or indirectly misled" Transpacific. If the proposition is that Commission personnel did not deliberately mislead General Transpac nobody is arguing that they did. Finally, if the position is that the misleading information need not have lead to a violation of section 15, this may be true, i.e., respondent may have had other options open to it. But this does not alter the fact that the representations did create the circumstances which prompted respondent to do what it did.

does not discuss a single one in arriving at its recommended figure of $5,000 and the respondent simply offers without citation or reference to authority, the proposition that because it was misled it should not be punished.

General Order 30 (46 CFR Part 505) sets out in some detail the procedures to be followed in the "compromise, assessment, and settlement of civil penalties"; but when it deals with the standards or criteria to be applied in determining the amounts of penalties when they are compromised, assessed or settled, the Order simply says ". . . for the purpose of this part, the criteria for compromise, settlement, or assessment may include, but need not be limited to, those which are set forth in 4 CFR Part 101-105." The regulations contained in Parts 101-105 were issued jointly by the Comptroller General and the Attorney General under section 3 of the Federal Claims Collection Act of 1966, 80 Stat. 309 and their purpose was to "prescribe standards for the administrative collection compromise, termination of agency collection, and the referral to the General Accounting Office and to the Department of Justice for litigation of civil claims by the Federal Government for money or property." The standards stop short of any prescriptions for the assessment of penalties in formal proceedings such as this. Civil penalties as distinguished from "debts" are dealt with specifically in only two instances: (1) Agencies seeking "the collection of statutory penalties or forfeitures . . . will give serious consideration to the suspension or revocation of licenses . . . for any inexcusable, prolonged or repeated failure of a debtor to pay . . . a claim" (46 CFR 102.7),[11] and (2) Section 103.5 provides:

> Statutory penalties, forfeitures, or debts established as an aid to enforcement and to compel compliance may be compromised . . . if the agency's enforcement policy in terms of deterrence and securing compliance, both present and future will be adequately served by acceptance of the sum to be agreed upon. Mere accidental or technical violations may be dealt with less severely than willful and substantial violations (46 CFR 103.5).

While section 102.7 is inapplicable here, section 103.5 can, with little change and for such help as it gives, be applied to the assessment as well as the compromise or settlement of civil penalty claims. But aside from this, there are no other published standards clearly applicable to the assessment of civil penalties.

The imposition of civil penalties is obviously designed to serve the generic goal of promoting or furthering a statute's regulatory objectives. Penalties can do this in at least two ways. The first, and the most widely accepted way, is the motivation of future behavior or "deter-

[11] There is no license to suspend or revoke here and the "debtor" would seem to be one against whom a civil penalty has already been assessed but who refuses to pay.

rence." The prospect of punishment, it is thought, will foster the behavior the agency wants to encourage and discourage behavior the agency wants to inhibit. The second, and one which is not really relevant here, is compensation. Almost by definition a civil money penalty does not serve the specific compensatory function of making whole an identifiable individual who has been injured by the wrongful act or violation. However, it is sometimes argued that civil penalties can be viewed as compensation to society at large for the harm it has suffered at the hands of the violator.[12]

That the motivation of behavior or deterrence is the overriding if not the only purpose of the civil penalties imposed by the Shipping Act was most recently illustrated in the enactment of P.L. 96-25, the statute under which this proceeding was brought. Among other things, P.L. 96-25 amended the Shipping Act to increase the amount of penalties that could be assessed against carriers for illegal rebating and gave the Commission the authority to assess the increased penalties itself.[13] In explaining the need for the increased penalties, the House said:

> The penalties for rebating under existing provisions of the Shipping Act, 1916, have not been sufficient to take the profit out of rebating, and the difficulty of enforcing those penalties often makes rebating worth the risk. (House Rep. 96-232, Shipping Act Amendments, 1979, 96th Cong. 1st Sess. 1979, page 8.)

In a similar vein the Senate said:

> The bill substantially increases the monetary penalties and adds a new penalty of tariff suspension for rebating violations. The Committee shares the Commission's belief that these penalties will be far more effective as a deterrent than the rather nominal penalties now in the Shipping Act, 1916. (Sen. Rep. 96-147, Shipping Act Amendments, 1979, 96th Cong. 1st Sess., 1979, page 9.)

Whatever may be the purposes of particular civil penalties, the need for standards in their imposition is widely recognized. The Administrative Conference of the United States, now a permanent agency of the Government, whose purpose it is to develop and recommend improvements in the legal procedures by which Federal agencies administer regulatory and benefit programs, dealt with the assessment of civil

[12] Translating compensation into a set of standards presents unique difficulties even in cases where it has been specifically recognized as a legitimate objective of money penalties. Since money penalties serve a general rather than a specific compensatory function, the agency must, in theory, measure the nonspecific *social* harm caused by the illegal activity--a difficult enough task in environmental cases such as air or water pollution but virtually an impossible one in cases of Shipping Act violations. How is the social harm of an unfiled section 15 agreement measured?

[13] P.L. 96-25 amended section 32 of the Act to authorize the Commission to assess its own penalties instead of referring the case to the Department of Justice for prosecution in the Federal District Courts.

penalties in Recommendation 79-2 (1 CFR 305.79-2). The Conference recommended that "Agencies enforcing regulatory statutes, violation of which is punishable by a civil money penalty, should establish standards for determining appropriate penalty amounts in individual cases." [14] Admitting the need, there remains the problem of just what standards are appropriate to the assessment of penalties under the Shipping Act. Fortunately, we have the benefit of the current views of two committees of Congress.

Section 13(c) of H.R. 4374, a bill which would make major revisions of the Shipping Act, 1916, provides:

> Assessment Procedure--Every civil penalty provided for in this Act may be assessed by the Commission after notice and opportunity for hearing. In determining the amount of penalty, the Commission shall take into account the nature, circumstances, extent and gravity of the violation committed and with respect to the violator, the degree of culpability, history of prior offenses, ability to pay and such other matters as justice may require. . . .

Identical language appears in section 15(c) of S. 1593, the Senate version of H.R. 4374.[15] In its Report the Senate Committee on Commerce, Science and Transportation made no mention of the civil penalty provision and the House Committee referring to section 13 merely states, "This section also provides the manner in which a civil penalty will be assessed and the things that must be considered in arriving at the amount of the penalty to be assessed." [16] While not yet the law, the criteria or standards which appear in S. 1593 and H.R. 4374 are a clear expression of Congressional attitude toward the assessment of penalties by the Commission.[17] The Commission is, of course, free to adopt these standards whatever the fate of S. 1593 and H.R. 4374, unless of course one of the grounds for the defeat of either bill is the rejection of the standards--a highly unlikely event. In any event, I find these standards to be the best available guide for deciding what if any penalty is appropriate here.

The record demonstrates that had not a representative of the Commission questioned General Transpac's plan to publish a second all-inclusive or door-to-door rate in its tariff the chain of events leading to

[14] See also *Diver, The Assessment and Mitigation of Civil Money Penalties by Federal Administrative Agencies,* 79 Column L. Rev. 1435, 1457 (1979).

[15] Senate Report No. 97-414, 97th Congress, 2d Sess. 1982.

[16] House Report No. 97-611, Part 1, 97th Congress, 2d Sess. 1982.

[17] This Congressional attitude is not new nor is it restricted to the Commission. Section 503 of the Federal Communications Act requires the FCC, when setting penalty amounts, to "take into account the nature and circumstances, extent and gravity of the prohibited acts committed and with respect to the violator, the degree of culpability, any history of prior offenses, ability to pay and such other matters as justice may require." (47 U.S.C. 503(b)(2)).

this proceeding would not have occurred.[18] It was Mr. Hammond's position that General Transpac could not have the two rates in its tariff that led Mr. Gmelch to use Transpacific as an NVOCC to publish the second rate. This in turn led to the arrangement found here to be in violation of section 15. Thus the circumstances surrounding the violation to some degree were created by the Commission itself through its representative.[19]

The violation began on April 30, 1976, and continued until August 15, 1977. This proceeding was instituted under sections 15, 22, 32 and 44 of the Shipping Act, 1916. Section 32 authorizes the Commission to assess civil penalties "*Provided, however,* That in order to assess such-penalties a formal proceeding under section 22 of this Act shall be commenced within five years from the date when the violation occurred." This proceeding was begun on September 30, 1981, so that some 45 days of the violation were excluded from prosecution by section 32(c). The Bureau in apparent recognition of this problem introduced as Exhibit 1 a document entitled "Waiver of the Period Within Which to Institute Civil Penalty Claim Action." This document states that the Commission has reason to believe that General Transpac may have violated one or more sections of the Shipping Act, 1916, and that "during the period that may be required to investigate such violations and to negotiate a possible settlement thereof, the Statute of Limitations (28 U.S.C. 2462) may operate to bar or prevent the recovery of civil penalties . . ." and that having had an opportunity to confer with counsel General Transpac agrees that it "will not interpose the Statute of Limitation as a bar to any civil penalty claim undertaken pursuant to Public Law 92-416 [20] prior to September 30, 1981." [21] Mr. Gmelch signed this waiver on April 10, 1981.

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[18] At the time that Transpacific canceled its tariff, General Transpac amended its tariff to do what it wanted to do in the first place and this amendment was accepted by the Commission.

[19] I am in no way suggesting that the Commission is "estopped" from imposing a penalty in this case, although there are some authorities to that effect. (See Davis, 1982 Supplement to Administrative Law Treatise, pp. 247-257 and authorities cited therein.) I am suggesting that role of the Commission's representative is a factor to be considered in determining the amount of the penalty if any is to be assessed.

[20] In Exhibit 1 there is an asterisk after Public Law 92-416 and there is a footnote at the bottom of the page: "Public Law 92-416 provides 'Any civil penalty provided herein may be compromised by the Federal Maritime Commission, or may be recovered by the United States in a civil action.' "

[21] The avowed purpose of the waiver is to afford additional time "to investigate such violations and to negotiate a possible settlement" before the statute of limitations bars the claim. While, admittedly, too much could be made of the situation, one cannot help but wonder at the need for an investigation at this late stage of the civil penalty process. The claim letter for a civil penalty of $20,000 was sent on February 9, 1981. If an investigation was still necessary, what was the basis for the amount claimed? It seems to me that all necessary investigations should precede the claim not follow it. See my Dismissal of Proceeding in Docket No. 80-12 served June 30, 1982. On the general question of the forfeiture of a violator's rights in exchange for an offer of mitigation see *Nelson, Administrative Blackmail, The Remission of Penalties,* 4 W. Pol. L.Q. 610 (1951).

By its terms the waiver is inapplicable to this proceeding since it is an agreement by Mr. Gmelch not to interpose the bar of the Statute of Limitations (section 2462) in either a compromise by the Commission or in a civil action by the United States, neither of which is involved here. The statute applicable to this proceeding is not 28 U.S.C. 2642 but section 32 of the Shipping Act. Thus for the purposes of this proceeding the violation took place between September 30, 1976 and August 15, 1977.

During the life of the agreement the Bureau says that it generated $57,600 in revenue. This amount is based upon the statement by respondent that Transpacific's one-half of one percent under the agreement amounted to $288. The $57,600 does not represent profit to General Transpac since freight charges had to be paid to the underlying carriers. The record does not show what these charges were or what other expenses were attendant to the shipments in question.

There is no evidence in the record that the agreement between General Transpac and Transpacific affected third parties in any way except perhaps to give those few shippers using the Transpacific tariff the convenience of a single all-inclusive rate. The agreement, so far as the record here shows did not unjustly discriminate against carriers, shippers, exporters, importers or ports or between exporters from the United States and their foreign competitors, it did not operate to the detriment of the commerce of the United States, nor was it contrary to the public interest. Thus, if a measure of the gravity of a section 15 violation is its effect on third parties (persons not party to the agreement) then this is the kind of "accidental or technical violation" which is to be contrasted and dealt with less severely than "willful and substantial violations." (46 CFR 103.5).

Culpability is most often associated with criminal offenses, e.g., *Black's Law Dictionary*, Fifth Edition, speaks only in terms of a person's "criminal culpability" which "requires a showing that he acted purposely, knowingly, recklessly, or negligently, as the law may require, with respect to each material element of the offense." The Shipping Act is not of course a penal statute and its offenses are civil not criminal. However, by analogy "civil" culpability would require a showing that the person acted knowingly, recklessly, or negligently as the Shipping Act requires with respect to each element of the offense alleged.

Respondent here is charged with and found in violation of section 15 of the Act for its failure to file the cooperative working arrangement with Transpacific. The single element of the violation is the failure to file, and it remains only to determine whether section 15 requires knowledge, recklessness, or negligence or some other state of mind to establish culpability. In contrast to section 16 First which requires that the prohibited act be "knowingly and willfully" done, section 15 places the affirmative duty upon all parties to an agreement to file it with the Commission. The language of the section requires neither knowledge of the requirement to file nor an intent to violate its terms. *Unapproved Section 15 Agreements—South African Trade,* 7 F.M.C. 159 (1962). In *Unapproved Section 15 Agreement—Coal to Japan/Korea,* 7 F.M.C. 295 (1962), the Commission said at page 304:

> It is not necessary under section 15 to impute an evil motive. For the purpose of this statute nonfeasance is as objectionable as malfeasance. There is little if any excuse for failure to file with the Commission, or at least make inquiry of it as to whether an agreement comes within the scope of section 15, and therefore must be filed and approved.

Thus section 15 would seem to impose an absolute liability to file an agreement with the Commission and the question of culpability is not relevant to the question of whether a violation has occurred. However, the Commission was careful to distinguish between the question of whether there has been a violation of section 15 and the question of the penalty to be imposed. In dealing with a finding by the Administrative Law Judge (the Hearing Examiner) that the violation of section 15 was "purely technical," the Commission in *Coal to Japan/Korea, supra,* said at page 303:

> We shall not pursue the point further because it is associated in any event with an immaterial issue as to the respondents' motives. We suppose there could be an occasion where the parties' motive or intent is useful to the proper disposition of an investigation by this Commission of unlawful conduct. But where as here, the objective is only to show a so-called "technical violation" it is irrelevant . . . [P]roceedings by this Commission inquiring into allegedly unlawful activity are regulatory in nature not penal. . . .
>
> Here the Examiner, after finding that the violations were "technical," indulged in respondents' fundamental misconception that the Commission could excuse them from any penalty . . . But the Commission, as we have said, lacks the power to assess penalties . . . Prosecution and the assessment or waiver of penalties are matters that rest within the province of the Attorney General and the Courts. (7 F.M.C. at page 303.)

With the passage of Public Law 96-25 the "assessment and waiver of penalties" are now matters that rest within the province of the Commission and questions of "motive and intent" are relevant to the determination of the amount, if any, of the penalty to be assessed a violator.

On the record here the degree of culpability was slight indeed. In converting Transpacific into an NVOCC and creating the arrangement between it and respondent, Mr. Gmelch was reacting to the representations of an official of the Commission. Moreover, and wrongly as it turned out, Mr. Gmelch viewed the arrangement between General

Transpac and Transpacific as an agency agreement which he mistakenly believed did not need to be filed under section 15. While none of this excuses the violation, it goes a long way in mitigation of the penalty when considered together with the other circumstances of the violation, e.g., its lack of impact on third parties.

The record here is devoid of any evidence of prior offenses by General Transpac which could be taken into consideration in fixing the amount of penalty to be assessed. As for General Transpac's ability to pay a civil penalty it says "The Respondent is in deep financial trouble and is struggling for its survival." The Bureau on the other hand argues that the only evidence in support of this assertion is General Transpac's 1980 Federal Income Tax Return and an unaudited consolidated balance sheet dated June, 1981 and that the tax return reveals that General Transpac spent in excess of $41,000 for travel and entertainment; and "A minor curtailment of these activities would offset the civil penalty we recommend be assessed in this proceeding." Whatever the wisdom of this expenditure, the money has already been spent and the ability to pay is determined by the current posture of the company. Here again there is little help in the record and were ability to pay a crucial factor in the decision here, additional evidence would have to be obtained.[22]

After careful consideration of the circumstances surrounding the violation, the extent and gravity of it and the degree of culpability and the lack of prior offenses on the part of respondent, it is my conclusion that a penalty is neither dictated by the respondent's past actions resulting in the violation nor warranted as a deterrent to future unlawful activity by the respondent.[23]

The proceeding is dismissed.

(S) JOHN E. COGRAVE
Administrative Law Judge

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[22] There is from this record no way of telling what benefit General Transpac derived from the money spent for travel and entertainment and there is the question of whether, absent fraud, concealment, gross negligence or the like, consideration of a violator's ability to pay legitimately includes an inquiry into the efficiency of the past management or business methods of the violator.

[23] In the almost four years from the cessation of the violation found here and the claim for penalties because of it, the respondent, so far as this record shows, has engaged in no unlawful activity. There is no reason to believe that this will change in the future.

FEDERAL MARITIME COMMISSION

TITLE 46 - SHIPPING
CHAPTER IV - FEDERAL MARITIME COMMISSION
[GENERAL ORDER 29; DOCKET NO. 82-16]
PART 549 - INDEFINITE SUSPENSION OF REGULATIONS GOVERNING LEVEL OF MILITARY RATES

August 25, 1982

AGENCY : Federal Maritime Commission

ACTION : Final Rule

SUMMARY: This rule suspends the regulations governing rates quoted for the transportation of U.S. Defense Department cargoes pursuant to Military Sealift Command requests for proposals for an indefinite period. This action is taken in light of the determination that military rates are no longer so low as to be detrimental to the commerce of the United States, and with a view towards lessening the regulatory burden on U.S. flag operators.

DATE: Effective on October 1, 1982

SUPPLEMENTARY INFORMATION:

Notice is hereby given that the Federal Maritime Commission is extending the suspension of its regulations governing the level of military rates established in Part 549 of Title 46 of the Code of Federal Regulations, Federal Maritime Commission General Order 29, for an indefinite period. The suspension currently in effect will expire on September 30, 1982.

The Commission's General Order 29 (46 C.F.R. 549) governing the level of military rates was published in the *Federal Register* on December 2, 1972 (47 FR 25720). The Commission's proposal to temporarily suspend General Order 29, and the reasons therefor, were published in the *Federal Register* on February 4, 1981 (46 FR 10767). The final rule suspending General Order 29 during the period October 1, 1981 through September 30, 1982 was published in the *Federal Register* on April 3, 1981 (46 FR 20199). On March 23, 1982, a proposed rule to make the suspension permanent through the removal of 46 C.F.R. Part 549 was published (47 FR 12367).

Four parties commented on the proposed rule. The Military Sealift Command (MSC) supported the rule, asserting that General Order 29 was unworkable and burdensome. Sea-Land Service, Inc. (Sea-Land)

and E.I. Dupont de Nemours and Company (Dupont), concerned with a reoccurrence of the abuses which led to the promulgation of General Order 29, recommended that its suspended status be continued. Such action would provide regulatory relief, while maintaining the Commission's ability to react to events which may occur in the future. The Del Monte Corp. stated that the regulations made a positive contribution to the current reasonable level of military rates.

The Commission has concluded that the contention of Sea-Land and Dupont that this action, as opposed to outright elimination of the regulations, has considerable merit. It will accomplish the goal of reducing the regulatory burden imposed on U.S. flag carriers, while providing the salutary effect of demonstrating a continued interest in rates offered for the carriage of Defense Department cargoes. Should the Commission, at some point, terminate the suspension, steps will be taken to improve the effectiveness of the regulations.

Pursuant to the Regulatory Flexibility Act (5 U.S.C. 601 *et seq.*), the Commission certifies that the proposed rule will not, if adopted, have a significant economic impact on a substantial number of small entities. The primary impact of this proposed rule will be carriers publishing military cargo rates and the Military Sealift Command, none of which are generally considered to be small entities within the meaning of the Act.

List of subjects in 46 C.F.R. - Rates, Maritime Carriers.

Therefore, pursuant to section 18(b)(5) and 43 of the Shipping Act, 1916 (46 U.S.C. 817 and 841(a)), the Commission amends section 549.9, Part 549 of Title 46 C.F.R. to read as follows:

"§ 549.9 Suspension.

The provisions of this Part are suspended for an indefinite period."

By the Commission.

(S) FRANCIS C. HURNEY
Secretary

FEDERAL MARITIME COMMISSION

46 C.F.R. PART 502

GENERAL ORDER 16, AMENDMENT NO. 42; DOCKET NO. 82-21

IMPROVEMENTS IN PREHEARING AND DISCOVERY PROCEDURES

September 7, 1982

AGENCY: Federal Maritime Commission

ACTION: Final rules

SUMMARY: The rules of procedure relating to discovery are revised to require more prompt commencement and completion of discovery, require the establishment of reasonable discovery plans, secure prompt rulings in case of disputes, eliminate time-consuming procedural formalities, provide for protective orders and supplementary responses, and otherwise simplify procedures and promote ease of usage of the rules. This action will simplify and expedite the discovery phase of Commission proceedings.

DATE: Effective as to all adjudicatory proceedings under section 22 of the Shipping Act, 1916, which commence after October 15, 1982.

SUPPLEMENTARY INFORMATION

On April 6, 1982, the Commission published a Notice of Proposed Rulemaking in the *Federal Register* (46 F.R. 14734) which proposed to revise its rules of procedure relating to prehearing discovery promulgated in Subpart L of Part 502 of Title 46 of the Code of Federal Regulations. The proposed revisions were substantial and would effectuate major changes in the existing discovery rules in order to simplify discovery procedures and assist parties in formal Commission proceedings to complete discovery with minimal delay. Thus, under the proposed rules, parties would be required to begin discovery with the filing of their initial pleadings in complaint cases and would be required to complete discovery within 120 days after service of the complaint or after service of the Commission's order initiating a proceeding. Parties would also be required to meet early in the proceeding to plan for the completion of discovery within the required time period. Provision was made for conferences with the presiding officer who would issue such rulings as might be necessary to resolve disputes and enable the discovery plan formulated by the parties to succeed in meeting the required deadlines. The entire discovery procedure would, moreover, be simplified by providing an alternate to the present system whereby discovery is conducted in a series of "waves" and parties must file formal motions seeking compulsory orders whenever disputes occur. Other reforms in discovery procedures were proposed in accordance with the modern federal rules of discovery currently in effect in civil proceedings before the courts, such as the provision for telephonic depositions, for issuance of detailed protective orders, and the requirement that parties furnish supplementary responses under certain circumstances. The Commission also proposed to simplify the present rules dealing with discovery requests directed to persons or documents located in foreign countries by allowing initial rulings by the presiding officer subject to appeal to or review by the Commission. Finally, the Commission proposed to rearrange and otherwise simplify the form of the rules to promote ease of usage.

Comments to the Notice of Proposed Rulemaking were submitted by the Maritime Administrative Bar Association (MABA), the law firm of Lillick, McHose & Charles, and by Sea-Land Service, Inc., a carrier by water subject to the jurisdiction of the Shipping Act, 1916. All of the commentators support the proposed rules. However, MABA and the Lillick firm propose several changes. These proposed changes are addressed below.

I. *Commencement of Discovery*

MABA suggests that the proposed rules are not clear regarding what is meant by the commencement of discovery and suggests the addition of a new section, 502.201(b)(3), which would provide that the prompt-commencement requirements of sections 502.201(b)(1) and (2) would be satisfied when a party undertakes discovery under sections 502.205 and/or 502.206. MABA further suggests that the new section make clear that the parties may provide for further discovery at the conference of the parties required by section 502.201(d). While the proposed rules require the prompt commencement of discovery, they do not specify which type of discovery a party must utilize or whether a party must utilize all types of discovery at the outset of the proceeding in order to satisfy the rules concerning commencement. Therefore, the Commission agrees that clarification is desirable. However, MABA's proposed subsection 502.201(b)(3) is too narrowly drawn because it is restricted to interrogatories (§ 502.205) and requests for production (§ 502.206). The rules, however, cover not only interrogatories and requests for production but depositions and requests for admissions. Furthermore, depositions are a discovery device that may be employed with respect to persons who are not parties to a proceeding. Accordingly, MABA's suggestions will be adopted but its proposed section

502.201(b)(3) will be expanded to include any discovery device including discovery that may commence with respect to persons who are not parties to the proceeding.

II. *Establishing a Fixed Date for a Discovery Conference and Otherwise Clarifying the Purpose of that Conference*

MABA suggests that proposed section 502.201(d), which would require parties to confer as soon as possible after certain events in order to provide for the completion of discovery within 120 days after service of the complaint or the Commission's order initiating the proceeding, needs clarification and certain improvements. MABA suggests that the parties be required to meet on a definite date, i.e., within 15 days after service of the answer to a complaint or service of discovery requests in a Commission-instituted proceeding. MABA also suggests that the rule specify that the parties are under a duty to establish a schedule for the completion of discovery within the prescribed time limit and to resolve disputes to the fullest extent possible by the use of admissions, stipulations and other techniques. Finally, MABA suggests that the proposed rule unnecessarily refers to "attorneys" as well as the parties.

The Commission agrees that the establishment of a date certain would promote the basic purposes of the discovery rule revisions, i.e., simplification and expedition, and that the specification of the duty of the parties to establish a discovery schedule and to utilize available devices to eliminate disputes also serves these purposes. Furthermore, the Commission agrees that the reference to the parties' attorneys is unnecessary in the context of the particular rule. Accordingly, MABA's suggested improvements and clarification will be adopted in the final rule. However, to ensure that the changes that will now be incorporated in the final rule do not contribute to delay, the Commission will specify in the final rule that the establishment of a fixed date should not be construed to preclude the parties from holding an earlier meeting. Finally, provision will be made for the submission of any discovery schedule to the presiding officer so that the presiding officer can monitor the course of the discovery phase of the proceeding and issue rulings when necessary to carry out the purposes of these rules.

III. *Proposals to Alter the Discovery Schedule*

MABA believes that proposed section 502.201(e) which requires any party unable to complete discovery within the 120-day period to propose an alternate schedule within 60 days after service of the complaint or after the order instituting the proceeding, does not provide sufficient time and suggests a 90-day period instead. MABA states that the parties may not know whether additional time to complete discovery is necessary in such a short period especially if there are clients located overseas and for other reasons. The Lillick firm also comments that the 60-

day period is too short and that it fails to account for the possibility that unforeseen events may require an extension of the normal 120-day period for completion of discovery at any time during the 120-day period. The Lillick firm suggests that the presiding officer be authorized to extend that period for good cause shown at any time during that period.

The Commission finds merit to the contention that in some cases involving complicated discovery, parties may not be able to determine within 60 days whether problems will arise subsequently which will prevent them from completing discovery within the prescribed 120-day period and recognizes furthermore that unforeseen events may arise at any time throughout this period. The main purpose of section 502.201(e) was to require the parties to notify the presiding officer promptly if such problems arose which would prevent timely completion of discovery and to propose appropriate alternative schedules for the presiding officer's approval. Rather than select any one point in time for such notification, such as 60 days or 90 days, however, the Commission believes that the purposes of the particular rule in question would be served if the parties were required to submit periodic status reports to the presiding officer on a monthly basis or at such other times as the presiding officer may require or circumstances may warrant and concluding on the final day of the discovery schedule. Requests for changes in the schedule can be made by means of such reports. The first such report should be made to the presiding officer not later than 30 days after the parties submit their discovery plan and schedule pursuant to section 502.201(d) unless the presiding officer otherwise directs. However, by permitting parties to submit such reports and to propose alternative schedules when necessary, the Commission does not mean to imply that parties may relax their diligence or may propose alternative schedules for frivolous reasons and therefore will make clear that proposals for changes in discovery schedules must be approved by the presiding officer. Accordingly, the Commission is revising proposed section 502.201(e) to require such status reports to be submitted in the manner described.

IV. *Provision for Written Rulings after Completion of Informal Conferences*

In order to resolve discovery disputes promptly and at minimal cost, the proposed rules authorize the presiding officer to conduct conferences which may be formal, on-the-record or informal when no reporter is present. See proposed sections 502.201(f) and (g). As an example of the latter type conference, the presiding officer may conduct a telephonic conference call, thereby saving considerable time and expense if the parties are located in widely scattered parts of the country. MABA believes that where possible, discovery disputes should be resolved informally by the presiding officer. However, to avoid subsequent misunderstanding and confusion, MABA believes that written rulings are necessary and suggests that the parties should be responsible for submitting within three work days after the conference a joint memorandum upon which the written rulings of the presiding officer can be based, unless the presiding officer grants additional time.

The Commission agrees that informal conferences with the presiding officer by telephone or otherwise can save time and unnecessary expense but that such conferences may be discouraged if no provision for adequate recording of the rulings and for written confirmation is made in the rules. Therefore, the Commission agrees with MABA's suggestion that the parties furnish a joint written memorandum of the rulings made at informal conferences. Of course, if one or more of the parties do not wish to undertake the responsibility of furnishing such a memorandum or if the presiding officer finds that an informal conference would not be suitable in any particular instance, the presiding officer may still summon a formal, on-the-record conference or may require written pleadings to resolve discovery disputes. Accordingly, MABA's suggestions, as incorporated in its proposed additions to section 502.201(f), will be adopted.

V. *Permission to File Written Replies to Discovery Objections*

As proposed, the rules provide for written objections to interrogatories and to requests for production of documents. See proposed sections 502.205(a) and 502.206(b). MABA states that unless there is a provision for the filing of written replies to such objections, each side does not have an equal opportunity to state its case and that the record on which the presiding officer will rule would not be complete. Also, MABA suggests that written expression of each party's position may also facilitate settlements. Therefore, MABA suggests that proposed sections 502.205(b) and 502.206(b) be amended by adding language permitting the filing of written replies to objections but with the caveat that such filings shall be permitted only to the extent that the discovery schedule previously established under section 502.201(d) is not delayed.

Although the proposed rules strive for as much simplicity and informality as possible, as seen from the previous discussion in regard to the holding of informal conferences, it is conceivable that there may be occasions when written expressions of positions on both sides of a discovery dispute are necessary to offset any possible disadvantage to a party who is restricted to oral presentation only. Furthermore, a more adequate record may be necessary to assist the presiding officer in reaching a just and reasonable decision in a complicated discovery matter. If the discovery schedule is not disturbed by the filing of an additional pleading, then there are benefits to such a procedure with no corresponding harm. Accordingly, the Commission agrees with MABA's suggestions and they will be adopted.

VI. *Specification of Sanctions for Violations of Protective Orders*

MABA suggests that the rules should outline specific sanctions for violations of protective orders issued by presiding officers under section 502.201(i) and recommends adoption of a new section 502.210(d) which would authorize sanctions ranging from private warnings to financial penalties and institution of disciplinary proceedings against attorneys and practitioners. MABA concedes that the language of its proposed new rule has not been noticed in the *Federal Register* but contends that the Commission has discretion to adopt the suggested amendments which MABA believes to have a "reasonable nexus" between the rules originally proposed and those finally adopted.

The Commission does not agree that this proceeding is the proper place to consider MABA's proposals. Not only are the suggested amendments well beyond the scope of the notice provided in the *Federal Register* but they impose several, severe sanctions on attorneys and other persons who have had no opportunity to comment and, additionally, raise legal questions as to the extent of the Commission's authority to issue such rules. Accordingly, while the Commission believes that the integrity of its proceedings must be protected and that violations of protective orders are serious matters, which are to be discouraged, the Commission believes that the matter of sanctions must be carefully considered under proper procedures and, if further amendments to the rules are believed to be necessary, will institute an appropriate rulemaking proceeding.

Pursuant to the Regulatory Flexibility Act (5 U.S.C. §§ 601 et seq.), the Commission certifies that adoption of the rules herein discussed will not have a significant impact on a substantial number of small entities.

List of subjects in 46 C.F.R. Part 502: Administrative Practice and Procedure

THEREFORE, pursuant to the Administrative Procedure Act (5 U.S.C. § 553), sections 22, 27, and 43 of the Shipping Act, 1916 (46 U.S.C. §§ 821, 826, and 841a), the Commission is revising Subpart L of Part 502 of Title 46 C.F.R. to read as follows:

SUBPART L—DEPOSITIONS, WRITTEN INTERROGATORIES, AND DISCOVERY

SUBPART L—DEPOSITIONS, WRITTEN INTERROGATORIES, AND DISCOVERY

§ 502.201 General provisions governing discovery.

(a) *Applicability.* The procedures described in this subpart are available in all adjudicatory proceedings under section 22 of the Shipping Act, 1916. Unless otherwise ordered by the presiding officer, the copy requirements of § 502.118(b)(3)(i) shall be observed.

(b) *Schedule for use.* (1) *Complaint proceedings.* Any party desiring to use the procedures provided in this subpart shall commence doing so at the time it files its initial pleading, e.g., complaint, answer or petition for leave to intervene. Discovery matters accompanying complaints shall be filed with the Secretary of the Commission for service pursuant to § 502.113 of this part.

(2) *Commission instituted proceedings.* All parties desiring to use the procedures provided in this subpart shall commence to do so within 30 days of the service of the Commission's order initiating the proceeding.

(3) *Commencement of discovery.* The requirement to commence discovery under sections 502.201(b)(1) and (2) shall be deemed satisfied when a party serves any discovery request under this Subpart upon a party or person from whom a response is deemed necessary by the party commencing discovery. A schedule for further discovery pursuant to this Subpart shall be established at the conference of the parties pursuant to section 502.201(d).

(c) *Completion of discovery.* Discovery shall be completed within 120 days of the service of the complaint or the Commission's order initiating the proceeding.

(d) *Duty of the Parties.* In all proceedings in which the procedures of this Subpart are used, it shall be the duty of the parties to meet or confer within 15 days (1) after service of the answer to a complaint or (2) after service of the discovery requests in a Commission instituted proceeding: to establish a schedule for the completion of discovery within the 120-day period prescribed in section 502.201(c); to resolve to the fullest extent possible disputes relating to discovery matters; and to expedite, limit, or eliminate discovery by use of admissions, stipulations and other techniques. The schedule shall be submitted to the presiding officer not later than five days after the conference. Nothing in this rule should be construed to preclude the parties from meeting or conferring at an earlier date.

(e) *Submission of status reports and requests to alter schedule.* The parties shall submit status reports concerning their progress under the discovery schedule established pursuant to section 502.201(d) not later than 30 days after submission of such schedule to the presiding officer and at 30-day intervals thereafter, concluding on the final day of the discovery schedule, unless the presiding officer otherwise directs. Requests to alter such schedule beyond the 120-day period shall set forth clearly and in detail the reasons why the schedule cannot be met. Such requests may be submitted with the status reports unless an event occurs which makes adherence to the schedule appear to be impossible, in which case the requests shall be submitted promptly after occurrence of such event.

(f) *Conferences.* The presiding officer may at any time order the parties or their attorneys to participate in a conference at which the presiding officer may direct the proper use of the procedures of this subpart or make such orders as may be necessary to resolve disputes with respect to discovery and to prevent delay or undue inconvenience. When a reporter is not present and oral rulings are made at a conference held pursuant to this section or section 502.201(g), the parties shall submit to the presiding officer as soon as possible but within three work days, unless the presiding officer grants additional time, a joint memorandum setting forth their mutual understanding as to each ruling on which they agree and as to each ruling on which their understandings differ, the individual understandings of each party. Thereafter, the presiding officer shall issue a written order setting forth such rulings.

(g) *Resolution of disputes.* After making every reasonable effort to resolve discovery disputes, a party may request a conference or rulings from the presiding officer in such disputes. Such rulings shall be made orally upon the record when feasible and/or by subsequent ruling in writing. If necessary to prevent undue delay or otherwise facilitate conclusion of the proceeding, the presiding officer may order a hearing to commence before the completion of discovery.

(h) *Scope of examination.* Persons and parties may be examined regarding any matter, not privileged, which is relevant to the subject matter involved in the proceeding, whether it relates to the claim or defense of the examining party or to the claim or defense of any other party, including the existence, description, nature, custody, condition, and location of any books, documents, or other tangible things, and the identity and location of persons having knowledge of relevant facts. It is not ground for objection that the testimony will be inadmissible at the hearing if the testimony sought appears reasonably calculated to lead to the discovery of admissible evidence.

(i) *Protective Orders.* Upon motion by a party or by the person from whom discovery is sought, and for good cause shown, the presiding officer may make any order which justice requires to protect a party or person from annoyance, embarrassment, oppression, or undue burden or expense, including one or more of the following: (1) that the discovery not be had; (2) that the discovery may be had only on specified terms and conditions, including a designation of the time or place; (3) that the discovery may be had only by a method of discovery other than that selected by the party seeking discovery; (4) that certain matters not be inquired into, or that the scope of the discovery be limited to certain matters; (5) that discovery may be conducted with no one present except persons designated by the presiding officer; (6) that a deposition after being sealed be opened only by order of the presiding officer; (7) that a trade secret or other confidential research, development, or commercial information not be disclosed or be disclosed only in a designated way; (8) that the parties simultaneously file specified documents or information enclosed in sealed envelopes to be opened as directed by the presiding officer. If the motion for a protective order is denied in whole or in part, the presiding officer may, on such terms and conditions as are just, order that any party or person provide or permit discovery. Rulings under this paragraph shall be issued by the presiding officer at a discovery conference called under § 502.201(f) or, if circumstances warrant, under such other procedure as the presiding officer may establish.

(j) *Supplementation of responses.* A party who has responded to a request for discovery with a response that was complete when made is under no duty to supplement the party's responses to include information thereafter acquired, except as follows:

(1) A party is under a duty seasonably to supplement responses with respect to any question directly addressed to (A) the identity and location of persons having knowledge of discoverable matters, and (B) the identity of each person expected to be called as an expert witness at a hearing, the subject matter on which such person is expected to testify, and the substance of the testimony.

(2) A party is under a duty seasonably to amend a prior response if the party obtains information upon the basis of which (A) the party knows that the response was incorrect when made, or (B) the party knows that the response though correct when made is no longer true and the circumstances are such that a failure to amend the response is in substance a knowing concealment.

(3) A duty to supplement responses may be imposed by order of the presiding officer or by agreement of the parties, subject to the time limitations set forth in § 502.201(c) or established under § 502.201(e). [Rule 201.]

§ 502.202 Persons before whom depositions may be taken.

(a) *Within the United States.* Within the United States or within a territory or insular possession subject to the jurisdiction of the United

States, depositions shall be taken before an officer authorized to administer oaths under the laws of the United States or of the place where the examination is held.

(b) *In foreign countries.* In a foreign country, depositions may be taken (1) on notice, before a person authorized to administer oaths in the place in which the examination is held, either under the law thereof or under the law of the United States, or (2) before a person commissioned by the Commission, and a person so commissioned shall have the power by virtue of his commission to administer any necessary oath and take testimony, or (3) pursuant to a letter rogatory. A commission or a letter rogatory shall be issued on application and notice and on terms that are just and appropriate. It is not requisite to the issuance of a commission or a letter rogatory that the taking of the deposition in any other manner is impracticable or inconvenient; and both a commission and a letter rogatory may be issued in proper cases. A notice or commission may designate the person before whom the deposition is to be taken either by name or descriptive title. A letter rogatory may be addressed "To the Appropriate Authority in [here name the country]." Evidence obtained in response to a letter rogatory need not be excluded merely for the reason that it is not a verbatim transcript or that the testimony was not taken under oath or for any similar departure from the requirements for depositions taken within the United States under the rules in this subpart. [See 22 CFR 92.49-92.66.]

(c) *Disqualification for interest.* No deposition shall be taken before a person who is a relative or employee or attorney or counsel of any of the parties, or is a relative or employee of such attorney or counsel, or is financially interested in the action.

(d) *Waiver of objection.* Objection to taking a deposition because of disqualification of the officer before whom it is to be taken is waived unless made before the deposition begins or as soon thereafter as the disqualification becomes known or could be discovered with reasonable diligence.

(e) *Stipulations.* If the parties so stipulate in writing, depositions may be taken before any person, at any time or place, upon any notice, and in any manner and when so taken may be used like other depositions. [Rule 202.]

§ 502.203 Depositions upon oral examination.

(a) *Notice of examination.* A party desiring to take the deposition of any person upon oral examination shall give reasonable notice in writing to such person and to every other party to the action. The notice shall state the time and place for the taking of the deposition and the name and address of each person to be examined if known, or if the name is not known, a general description sufficient to identify the person or the particular class or group to which the person belongs.

The notice shall also contain a statement of the matters concerning which each witness will testify. The attendance of witnesses may be compelled by subpena as provided in Subpart I of this part. If a subpena duces tecum is to be served on the person to be examined, the designation of the materials to be produced as set forth in the subpena shall be attached to or included in the notice. All errors and irregularities in the notice or subpena for taking of a deposition are waived unless written objection is promptly served upon the party giving the notice. Examination and cross-examination of deponents may proceed as permitted at the hearing under the provisions of § 502.154.

(b) *Record of examination; oath; objections.* The officer before whom the deposition is to be taken shall put the witness on oath and shall personally, or by someone acting under his direction and in his presence, record the testimony of the witness. The testimony shall be taken stenographically and transcribed unless the parties agree otherwise. All objections made at the time of the examination to the qualifications of the officer taking the deposition, or to the manner of taking it, or to the evidence presented, or to the conduct of any party, and any other objection to the proceedings, shall be noted by the officer upon the deposition. Evidence objected to shall be taken subject to the objections. Objections shall be resolved at a discovery conference called under § 502.201(f) or, if circumstances warrant, by such other procedure as the presiding officer may establish. In lieu of participating in the oral examination, parties served with notice of taking a deposition may transmit written interrogatories to the officer, who shall propound them to the witness and record the answers verbatim. The parties may stipulate or the presiding officer may upon motion order that a deposition be taken by telephone or other reliable device.

(c) *Motion to terminate or limit examination.* At any time during the taking of the deposition, on motion of any party or of the deponent and upon a showing that the examination is being conducted in bad faith or in such manner as unreasonably to annoy, embarrass, or oppress the deponent or party, the presiding officer may order the officer conducting the examination to cease forthwith from taking the deposition, or may limit the scope and manner of the taking of the deposition as provided in paragraph (b) of this section. If the order made terminates the examination, it shall be resumed thereafter only upon the order of the presiding officer. Upon demand of the objecting party or deponent, the taking of the deposition shall be suspended for the time necessary to make a motion for an order. Rulings under this paragraph shall be issued by the presiding officer at a discovery conference called under § 502.201(f) or, if circumstances warrant, by such other procedure as the presiding officer may establish.

(d) *Submission to witness; changes; signing.* When the testimony is fully transcribed, the deposition shall be submitted to the witness for examination and shall be read to or by the witness, unless such examination and reading are waived by the witness and by the parties. Any changes in form or substance which the witness desires to make shall be entered upon the deposition by the officer with a statement of the reasons given by the witness for making them. The deposition shall then be signed by the witness unless the parties by stipulation waive the signing or the witness is ill or cannot be found or refuses to sign. If the deposition is not signed by the witness, the officer shall sign it and state on the record the fact of the waiver or of the illness or absence of the witness or the fact of the refusal to sign together with the reason, if any, given therefor; and the deposition may then be used as fully as though signed, unless upon objection, the presiding officer holds that the reasons given for the refusal to sign require rejection of the deposition in whole or in part.

(e) *Certification and filing by officer; copies, notice of filing.* (1) The officer taking the deposition shall certify on the deposition that the witness was duly sworn by the officer and that the deposition is a true record of the testimony given by the witness. The officer shall then securely seal the deposition in an envelope indorsed with the title of the action and marked "Deposition of [here insert name of witness]" and shall promptly file it with the Secretary of the Commission by hand or registered or certified mail.

(2) Interested parties shall make their own arrangements with the officer taking the deposition for copies of the testimony and the exhibits.

(3) The party taking the deposition shall give prompt notice of its filing to all other parties.

(f) *Effect of errors and irregularities.* Errors and irregularities in the manner in which the testimony is transcribed or the deposition is prepared, signed, certified, sealed, indorsed, transmitted, filed, or otherwise dealt with by the officer under this § 502.203 and § 502.204 are waived unless a motion to suppress the deposition or some part thereof is made within ten (10) days of filing. [Rule 203.]

§ 502.204 Depositions upon written interrogatories.

(a) *Serving interrogatories; notice.* A party desiring to take the deposition of any person upon written interrogatories shall serve them upon every other party with a notice stating the name and address of the person who is to answer them and the name or descriptive title and address of the officer before whom the deposition is to be taken. Within 10 days thereafter, a party so served may serve cross interrogatories upon the party proposing to take the deposition. All errors and irregularities in the notice are waived unless written objection is promptly served upon the party giving the notice.

(b) *Officer to take responses and prepare record.* A copy of the notice and copies of all interrogatories served shall be delivered by the party taking the deposition to the officer designated in the notice, who shall proceed promptly in the manner provided by § 502.205 (c), (e), and (f), to take the testimony of the witness in response to the interrogatories and to prepare, certify, and file or mail the deposition, attaching thereto the copy of the notice and the interrogatories received by him.

(c) *Notice of filing.* When the deposition is filed, the party taking it shall promptly give notice thereof to all other parties. [Rule 204.]

§ 502.205 Interrogatories to parties.

(a) Any party may serve upon any other party written interrogatories to be answered by the party served or, if the party served is a public or private corporation or a partnership or association, by any officer or agent, who shall furnish such information as is available to the party. Any party desiring to serve interrogatories as provided by this section must comply with the applicable provisions of § 502.201 and make service thereof on all parties to the proceeding. Each interrogatory shall be answered separately and fully in writing under oath, unless it is objected to, in which event the reasons for objection shall be stated in lieu of an answer. The answers are to be signed by the person making them, and the objections signed by the attorney making them. The party upon whom the interrogatories have been served shall serve a copy of the answers, and objections if any, on all parties to the proceeding under the schedule established pursuant to § 502.201. The presiding officer, for good cause, may limit service of answers.

(b) *Objections to interrogatories.* All objections to interrogatories shall be resolved at the conference or meeting provided for under § 502.201(f) or, if circumstances warrant, by such other procedure as the presiding officer may establish. Written replies to objections to interrogatories shall be permitted only to the extent that the discovery schedule previously established under section 502.201(d) is not delayed.

(c) *Scope, time, number and use.* Interrogatories may relate to any matters which can be inquired into under § 502.201(h), and the answers may be used to the same extent as provided in § 502.209 for the use of the deposition of a party. Interrogatories may be sought after interrogatories have been answered, but the presiding officer, on motion of the deponent or the party interrogated, may make such protective order as justice may require. The number of interrogatories or of sets of interrogatories to be served is not limited except as justice requires to protect the party from annoyance, expense, embarrassment, or oppression. An interrogatory otherwise proper is not necessarily objectionable merely because an answer to the interrogatory involves an opinion or contention that relates to fact or the application of law to fact, but the presiding officer may order that such an interrogatory need not be answered until after designated discovery has been completed or until a prehearing conference or other later time.

(d) *Option to produce business records.* Where the answer to an interrogatory may be derived or ascertained from the business records of the party upon whom the interrogatory has been served or from an examination, audit or inspection of such business records, or from a compilation, abstract or summary based thereon, and the burden of deriving or ascertaining the answer is substantially the same for the party serving the interrogatory as for the party served, it is a sufficient answer to such interrogatory to specify the records from which the answer may be derived or ascertained and to afford to the party serving the interrogatory reasonable opportunity to examine, audit or inspect such records and to make copies, compilations, abstracts or summaries. [Rule 205.]

§ 502.206 Production of documents and things and entry upon land for inspection and other purposes.

(a) *Scope.* Any party may serve on any other party a request (1) to produce and permit the party making the request, or someone acting on his behalf, to inspect and copy any designated documents (including writings, drawings, graphs, charts, photographs, sound or video recordings, and other data compilations from which information can be obtained, translated, if necessary, by the respondent through detection devices into reasonably usable form), or to inspect and copy, test, or sample any tangible things which constitute or contain matters within the scope of § 502.203(a) and which are in the possession, custody or control of the party upon whom the request is served; or (2) to permit entry upon designated land or other property in the possession or control of the party upon whom the request is served for the purpose of inspection and measuring, surveying, photographing, testing, or sampling the property of any designated object or operation thereon, within the scope of § 502.203(a).

(b) *Procedure.* The request shall set forth the items to be inspected either by individual item or by category, and describe each item and category with reasonable particularity. The request shall specify a reasonable time, place, and manner of making the inspection and performing the related acts. Responses shall be served under the schedule established pursuant to § 502.201. The response shall state, with respect to each item or category, that inspection and related activities will be permitted as requested, unless the request is objected to, in which event the reasons for objection shall be stated. Objections to requests for production of documents shall be resolved at the conference or meeting required under § 502.201(f) or, if circumstances warrant, by such other procedure as the presiding officer may establish. Written replies to objections to requests for production of documents shall be permitted only to the extent that the discovery schedule previously established under section 502.201(d) is not delayed. [Rule 206.]

§ 502.207 Requests for Admission.

(a)(1) A party may serve upon any other party a written request for the admission, for purposes of the pending action only, of the truth of any matters within the scope of § 502.203(a) set forth in the request that relate to statements or opinions of fact or of the application of law to fact, including the genuineness of any documents described in the request. Copies of documents shall be served with the request unless they have been or are otherwise furnished or made available for inspection and copying. Any party desiring to serve a request as provided by this section must comply with the applicable provisions of § 502.201.

(2) Each matter of which an admission is requested shall be separately set forth. The matter is admitted unless, within 30 days after service of the request, or within such shorter or longer time as the presiding officer may allow pursuant to § 502.201, the party to whom the request is directed serves upon the party requesting the admission a written answer or objection addressed to the matter, signed by the party or the party's attorney. If objection is made. the reasons therefor shall be stated. The answer shall specifically deny the matter or set forth in detail the reasons why the answering party cannot truthfully admit or deny the matter. A denial shall fairly meet the substance of the requested admission, and when good faith requires that a party qualify the answer or deny only a part of the matter of which an admission is requested, the party shall specify so much of it as is true and qualify or deny the remainder. An answering party may not give lack of information or knowledge as a reason for failure to admit or deny unless the party states that reasonable inquiry has been made and that the information known or readily obtainable is insufficient to enable the party to admit or deny. A party who considers that a matter of which an admission has been requested presents a genuine issue for trial may not, on that ground alone, object to the request; a party may, subject to the provisions of § 502.207(c) deny the matter or set forth reasons why it cannot be admitted or denied.

(3) The party who has requested the admissions may request rulings on the sufficiency of the answers or objections. Rulings on such requests shall be issued at a conference called under § 502.201(f) or, if circumstances warrant, by such other procedure as the presiding officer may establish. Unless the presiding officer determines that an objection is justified, the presiding officer shall order that an answer be served. If the presiding officer determines that an answer does not comply with the requirements of this rule, the presiding officer may order either that the matter is admitted or that an amended answer be served. The presiding officer may, in lieu of these orders, determine that final

disposition of the request be made at a prehearing conference or at a designated time prior to hearing.

(b) *Effect of admission.* Any matter admitted under this rule is conclusively established unless the presiding officer on motion permits withdrawal or amendment of the admission. The presiding officer may permit withdrawal or amendment when the presentation of the merits of the action will be subserved thereby and the party who obtained the admission fails to satisfy the presiding officer that withdrawal or amendment will be prejudicial in maintaining the party's action or defense on the merits. Any admission made by a party under this rule is for the purpose of the pending proceeding only and is not an admission for any other purpose nor may it be used against the party in any other proceeding.

(c) *Expenses on failure to admit.* If a party fails to admit the genuineness of any document or the truth of any matter as requested under § 502.207(a), and if the party requesting the admission thereafter proves the genuineness of the document or the truth of the matter, that party may apply to the presiding officer for an order requiring the other party to pay the reasonable expenses incurred in making that proof, including reasonable attorney's fees. Such application must be made to the presiding officer before issuance of the initial decision in the proceeding. The presiding officer shall make the order unless it is found that (1) the request was held objectionable pursuant to § 502.207(a), or (2) the admission sought was of no substantial importance, or (3) the party failing to admit had reasonable ground to believe that it might prevail on the matter, or (4) there was other good reason for the failure to admit. [Rule 207.]

§ 502.208 Use of discovery procedures directed to Commission staff personnel.

(a) Discovery procedures described in §§ 502.202, 502.203. 502.204, 502.205, 502.206, and 502.207, directed to Commission staff personnel shall be permitted and shall be governed by the procedures set forth in those sections except as modified by paragraphs (b) and (c) of this section. All notices to take depositions, written interrogatories, requests for production of documents and other things, requests for admissions, and any motions in connection with the foregoing, shall be served on the Secretary of the Commission.

(b) The General Counsel shall designate an attorney to represent any Commission staff personnel to whom any discovery requests or motions are directed. The attorney so designated shall not thereafter participate in the Commission's decision-making process concerning any issue in the proceeding.

(c) Rulings of the presiding officer issued under § 502.208(a) shall become final rulings of the Commission unless an appeal is filed within ten (10) days after date of issuance of such rulings or unless the Commission on its own motion reverses, modifies, or stays such rulings within twenty (20) days of their issuance. Replies to appeals may be filed within ten (10) days. No motion for leave to appeal is necessary in such instances and no ruling of the presiding officer shall be effective until twenty (20) days from date of issuance unless the Commission otherwise directs. [Rule 208.]

§ 502.209 Use of depositions at hearings.

(a) *General.* At the hearing, any part or all of a deposition, so far as admissible under the rules of evidence, may be used against any party who was present or represented at the taking of the deposition or who had due notice thereof in accordance with any one of the following provisions:

(1) Any deposition may be used by any party for the purpose of contradicting or impeaching the testimony of deponent as a witness.

(2) The deposition of a party or of anyone who at the time of taking the deposition was an officer, director, or duly authorized agent of a public or private corporation, partnership, or association which is a party, may be used by any other party for any purpose.

(3) The deposition of a witness, whether or not a party, may be used by any party for any purpose if the presiding officer finds: (i) That the witness is dead; or (ii) that the witness is out of the United States unless it appears that the absence of the witness was procured by the party offering the depositions; or (iii) that the witness is unable to attend or testify because of age, sickness, infirmity, or imprisonment; or (iv) that the party offering the deposition has been unable to procure the attendance of the witness by subpoena; or (v) upon application and notice, that such exceptional circumstances exist as to make it desirable, in the interest of justice and with due regard to the importance of presenting the testimony of witnesses orally in open hearing, to allow the deposition to be used.

(4) If only part of a deposition is offered in evidence by a party, any other party may require introduction of all of it which is relevant to the part introduced, and any party may introduce any other parts.

(5) Substitution of parties does not affect the right to use depositions previously taken; and, when a proceeding in any hearing has been dismissed and another proceeding involving the same subject matter is afterward brought between the same parties or their representatives or successors in interest, all depositions lawfully taken and duly filed in the former proceeding may be used in the latter as if originally taken therefor.

(b) *Objections to admissibility.* Except as provided in this paragraph, objection may be made at the hearing to receiving in evidence any deposition or part thereof for any reason which would require the exclusion of the evidence if the witness were then present and testifying.

(1) Objections to the competency of a witness or to the competency, relevancy, or materiality of testimony are not waived by failure to make them before or during the taking of the deposition, unless the ground of the objection is one which might have been obviated or removed if presented at that time.

(2) Errors and irregularities occurring at the oral examination in the manner of taking the deposition, in the form of the questions or answers, in the oath or affirmation, or in the conduct of parties and errors of any kind which might be obviated, removed, or cured if promptly presented, are waived unless reasonable objection thereto is made at the taking of the deposition.

(3) Objections to the form of written interrogatories submitted under § 502.204 are waived unless served in writing upon the party propounding them within the time allowed for serving the succeeding cross interrogatories.

(c) *Effect of taking or using depositions.* A party shall not be deemed to make a person its own witness for any purpose by taking such person's deposition. The introduction in evidence of the deposition or any part thereof for any purpose other than that of contradicting or impeaching the deponent makes the deponent the witness of the party introducing the deposition, but this shall not apply to the use by any other party of a deposition as described in subparagraph (2) of paragraph (a) of this section. At the hearing, any party may rebut any relevant evidence contained in a deposition whether introduced by him or by any other party. [Rule 209.]

§ 502.210 Refusal to comply with orders to answer or produce documents; sanctions; enforcement.

(a) *Sanctions for failure to comply with order.* If a party or an officer or duly authorized agent of a party refuses to obey an order requiring such party to answer designated questions or to produce any document or other thing for inspection, copying or photographing or to permit it to be done, the presiding officer may make such orders in regard to the refusal as are just, and among others the following:

(1) An order that the matters regarding which the order was made or any other designated facta shall be taken to be established for the purposes of the action in accordance with the claim of the party obtaining the order;

(2) An order refusing to allow the disobedient party to support or oppose designated claims or defenses, or prohibiting the disobedient party from introducing designated matters in evidence or an order that with respect to matters regarding which the order was made or any

other designated fact, inferences will be drawn adverse to the person or party refusing to obey such order;

(3) An order striking out pleadings or parts thereof, or staying further proceedings until the order is obeyed, or dismissing the action or proceeding or any party thereof, or rendering a judgment by default against the disobedient party.

(b) *Enforcement of orders.* In the event of refusal to obey an order, the affected party or the Commission may apply for enforcement to a district court having jurisdiction of the parties, provided that the affected party seeks court enforcement within 20 days of the date of refusal to obey the order in question. Failure to seek enforcement in timely fashion will result in a waiver of the affected party's rights to enforcement of the subject order.

(c) *Persons and documents located in a foreign country.* Orders of the presiding officer directed to persons or documents located in a foreign country shall become final orders of the Commission unless an appeal to the Commission is filed within ten (10) days after date of issuance of such orders or unless the Commission on its own motion reverses, modifies, or stays such rulings within twenty (20) days of their issuance. Replies to appeals may be filed within ten (10) days. No motion for leave to appeal is necessary in such instances and no orders of the presiding officer shall be effective until twenty (20) days from date of issuance unless the Commission otherwise directs. [Rule 210.]

By the Commission.

(S) FRANCIS C. HURNEY
Secretary

FEDERAL MARITIME COMMISSION

SPECIAL DOCKET NO. 942

APPLICATION OF TRANS FREIGHT LINES, INC. FOR THE BENEFIT OF MILITZER & MUENCH U.S.A., INC. AS AGENT FOR LODGEGREEN, LTD.

ORDER OF PARTIAL ADOPTION

September 8, 1982

The Commission has determined to review an Initial Decision issued in this proceeding by Administrative Law Judge William Beasley Harris. The Administrative Law Judge granted permission pursuant to section 18(b)(3) of the Shipping Act, 1916, 46 U.S.C. § 817(b)(3) and Rule 92(a) of the Commission's Rules of Practice and Procedure, 46 C.F.R. § 502.92(a), to Trans Freight Lines, Inc., to refund a portion of the freight charges collected from Lodgegreen, Ltd., on the shipment of a containerload of mixed paper products from Baltimore, Maryland, to Liverpool, United Kingdom. The Presiding Officer found that Trans Freight Lines had inadvertently failed to file, as intended, a special rate for the shipment and that the application meets all the statutory requirements.[1] However, in the belief that the carrier had initially charged less than the applicable rate, the Presiding Officer granted a refund of $1,040.40. This exceeds by $131.75 the amount requested in the application.

The question of whether the shipment should have been assessed a higher rate is irrelevant to refunds or waivers as provided for by section 18(b)(3). The refund cannot exceed the difference between the amount the shipper Lodgegreen actually disbursed and the amount payable under the rate set forth in the amended tariff. In this instance, the shipper paid $2,674.53 in freight charges. The freight computed on the containerload rate set forth in the corrected tariff amounts to $1,765.88. The difference between these figures is $908.65 and not $1,040.40, as stated in the Initial Decision. Trans Freight Lines, therefore, is granted permission to refund to the shipper the amount of $908.65.

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[1] Section 18(b)(3) of the Shipping Act, 1916, gives the Commission discretion to permit a carrier to refund or waive collection of a portion of freight charges where it finds that there is

> an error in the tariff due to inadvertence in failing to file a new tariff . . . .

THEREFORE, IT IS ORDERED, That Trans Freight Lines, Inc., is granted permission to refund a portion of the freight charges collected from Lodgegreen, Ltd., in the amount of $908.65.[2]

IT IS FURTHER ORDERED, That, except as herein modified, the Initial Decision issued in this proceeding is adopted by the Commission and made a part hereof.

IT IS FURTHER ORDERED, That Trans Freight Lines, Inc., shall promptly publish in its tariff the following notice:

> Notice is hereby given, as required by the decision of the Federal Maritime Commission in Special Docket No. 942, that effective February 12, 1982, through March 4, 1982, for purposes of refund or waiver of freight charges, the rate for containerloads of mixed paper products, viz: napkins, invitations, plates, tablecloths, candy cups, is $1,700.00, per 20 ft. container, subject to all applicable rules, regulations, terms and conditions of said rate and tariff.

IT IS FINALLY ORDERED, That this proceeding is discontinued.

By the Commission.

(S) FRANCIS C. HURNEY
Secretary

[2] Militzer & Muench U.S.A. are directed to certify to the Commission within 45 days from the date of this Order that it has remitted to Lodgegreen the refund or explain why such remittance has not been made.

FEDERAL MARITIME COMMISSION

SPECIAL DOCKET NO. 942

APPLICATION OF TRANS FREIGHT LINES, INC. FOR THE BENEFIT OF MILITZER & MUENCH U.S.A., INC. AS AGENT FOR LODGEGREEN, LTD.

PERMISSION GRANTED TO REFUND A $1,040.40 PORTION OF AGGREGATE OCEAN FREIGHT CHARGES OF $2,806.28.

Rose Murphy, Rate Analyst, Trans Freight Lines, Inc., for carrier—applicant.

INITIAL DECISION [1] OF WILLIAM BEASLEY HARRIS, ADMINISTRATIVE LAW JUDGE

Partially Adopted September 8, 1982

This is a special docket application pursuant to section 18(b)(3) of the Shipping Act, 1916, as amended, and Rule 92 of the Commission's Rules of Practice and Procedure, 46 CFR 502.92. The application contains a certification of having been mailed June 23, 1982, to the Secretary of this Commission. Under those circumstances and the Act and Rule above, the date of the filing of this application is June 23, 1982.

On February 10, 1982, the carrier-applicant received, through Rose Murphy, a rate request from Fritz Oltman of Forwarder Militzer & Muench U.S.A. Inc. (FMC #1664), for mixed containerload of paper products consisting of Napkins, Invitations, Plates, Tablecloths, and Candy Cups. This request was brought before Trans Freight Lines, Inc.'s Pricing Committee on February 11, 1982, and it was agreed to offer Lump Sum rate of $1,700.00 plus T.H.C.—$2.50 M (per 40 cft.) and this was quoted by Rose Murphy to Fritz Oltman. The following day Mr. Oltman contacted Rose Murphy to file the agreed rate.

At the above time, Rose Murphy was involved in preparing for a General Rate Increase in Trans Freight Lines, Inc.'s tariffs. The request to file the rate was misplaced in a dead file.

Trans Freight Lines, Inc.'s Bill of Lading No. 191721, dated February 26, 1982, shows 1 X 20 Ft. H/H Container No. INTU 245654, said to contain Mixed Lot Party Items, viz (Napkins, Table Cloths, Party Plates, Cups & Invitations), Gross Weight 9916 lbs; measurement 1054.4

[1] This decision will become the decision of the Commission in the absence of review thereof by the Commission (Rule 227, Rules of Practice and Procedure, 46 CFR 502.227).

cft., was loaded at Baltimore on the vessel SS *TFL - Adams*, Voyage 11E, for discharge at Felixstowe for delivery to Liverpool. "Freight payable at destination." The shipment sailed February 28, 1982.

The application shows the original charge as:

$99.00 M (per 40 cft.) at 1054 cft.	=	$2,608.65
plus T.H.C. - $2.50 (per 40 cft.)	=	65.88
		$2,674.53

The B/L 191721 shows the same charge. However, there is no support showing the $99.00 M rate, but the $104 rate.

The application states that the rate applicable at the time of shipment was $104.00, Min. 800 cft. per H/H Ctr. (Exhibit No. 3). Exhibit No. 3 is a copy of Trans Freight Lines, Inc.'s Tariff No. 39, FMC-39, From: United States Atlantic Ports in the Eastport, Me/Hampton Roads, Va Range To: Ports of Call in England, Scotland, Wales, Northern Ireland, and Erie, 2nd Revised Page 185, effective date February 22, 1982, showing Item No. 931.6001.001—Commodity—Party Decorations & Favors, VIZ: Napkins, Cups, Plates, Ribbons, Wrappings, Paper Tablecloths, Party Favors, Stationery, Books, Candles, Vinyl Plaques, Puzzles, Desk Accessories; Packed. Minimum 800 cft. per H/H Container Rate $104.00 (M).

On this rate, the charges would be:

$104.00 M (per 40 cft.) at 1054 cft.	=	$2,740.40
plus T.H.C. - $2.50 (per 40 cft.)	=	65.88
		$2,806.28

This $2,806.28 charge is $131.75 more than the charge shown in the application and that on the B/L No. 191721 of $2,674.53.

The rate sought to be applied is Lump Sum per 20 ft. H/H Ctr.—$1,700.00. The 4th Revised Page 185, effective date March 9, 1982, ((1)(R) effective 3/4/82 per telex to FMC 3/4/82) shows Item No. 931.6002.001 (1) Mixed Containerloads of Paper Products, VIZ: Napkins, Invitations, Plates, Tablecloths, Candy Cups (R) Per 20 ft. H/H Ctr. (thru 4/3/8) Rate Basis LS $1,700.00. At this rate, the sought charges are:

Lump Sum	=	$1,700.00
Plus T.H.C. - $2.50 (per 40 cft.)	=	65.88
		$1,765.88

Charges sought to be refunded in the application are stated as $908.65, but the calculation made above under the difference between the $99.00 rate and the $104 rate, revealing the $131.75 error, added to the $908.65, makes the refund total $1,040.40.

DISCUSSION

The carrier-applicant asserts there are no other docket applications or formal proceedings involving the same rate situation presently before the Commission; that there were no other shipments of the same commodity by other than the shipper for whose benefit the refund is sought during the same period of time at the rate applicable at time of the involved shipment.

The sought to be applied rate was agreed to February 12, 1982. The request to file the agreed-upon rate was misplaced in a dead file. On March 4, 1982, the shipper stated that the cargo moved on February 26, 1982, and that the consignee was overcharged in excess of the agreed rate. The carrier-applicant filed the agreed rate effective March 4, 1982, via temporary filing to the Commission, which was before this application was filed on June 23, 1982. The application was filed within 180 days of the February 28, 1982, sailing of the involved shipment.

Upon consideration of the above and the record herein, the Presiding Administrative Law Judge *finds* and *concludes* that the carrier-applicant has conformed to and complied with section 18(b)(3) of the Shipping Act, 1916, as amended, and Rule 92 referred to above and that permission to refund should be granted.

Wherefore, it is *ordered*, subject to review by the Commission as provided in the Commission's Rules of Practice and Procedure, that

(A) Trans Freight Lines, Inc., be and hereby is granted permission to refund a $1,040.40 portion of aggregate ocean freight charges of $2,806.28 for the benefit of Militzer & Muench U.S.A., Inc., as Agent for Lodgegreen, Ltd.

(B) Trans Freight Lines, Inc., shall make any adjustments in compensation necessitated by this refund and notify the Commission thereof.

(C) The carrier-applicant shall publish an appropriate notice of this decision in the applicable tariff.

(D) This proceeding is discontinued.

(S) WILLIAM BEASLEY HARRIS
Administrative Law Judge

FEDERAL MARITIME COMMISSION

DOCKET NO. 81-17

AROUNDWORLD SHIPPING & CHARTERING, INC. LICENSE NO. 1860

AND JOHN TARNOWSKI APPLICANT FOR A LICENSE AS AN INDEPENDENT

OCEAN FREIGHT FORWARDER

NOTICE

September 9, 1982

Notice is given that no exceptions have been filed to the July 28, 1982 initial decision in this proceeding and the time within which the Commission could determine to review that decision has expired. No such determination has been made and accordingly, that decision has become administratively final.

(S) FRANCIS C. HURNEY
Secretary

FEDERAL MARITIME COMMISSION

DOCKET NO. 81-17

AROUNDWORLD SHIPPING & CHARTERING INC.

LICENSE NO. 1860 AND JOHN TARNOWSKI

APPLICANT FOR A LICENSE AS AN

INDEPENDENT OCEAN FREIGHT FORWARDER

Aroundworld Shipping & Chartering, Inc., found to have violated certain sections of General Order 4; to have turned in its independent ocean freight forwarder license; and to be insolvent, and therefore that no civil penalty should be assessed against ASC. John J. Tarnowski found to have violated a section of General Order 4; and fit to be licensed as an independent ocean freight forwarder.

Duane E. Crowley, Jr., and *Alvin C. Askew, Jr.*, for respondent, Aroundworld Shipping & Chartering, Inc.

Eliot P. Tucker for respondent, John Tarnowski.

John Robert Ewers, Joseph B. Slunt, Alan J. Jacobson, and *Stuart James* as Hearing Counsel.

INITIAL DECISION [1] OF CHARLES E. MORGAN, ADMINISTRATIVE LAW JUDGE

Finalized September 9, 1982

This proceeding [2] is an investigation instituted by the Commission to determine whether one of the two respondents, Aroundworld Shipping & Chartering, Inc. (ASC), a licensed independent ocean freight forwarder, had violated certain sections of the Commission's General Order 4 (46 CFR 510); whether a civil penalty should be assessed against ASC pursuant to section 32(e) of the Shipping Act, 1916 (the Act), and if so, the amount of any such penalty; and whether ASC's independent ocean freight forwarder license No. 1860 should be suspended or revoked pursuant to section 44(d) of the Act.

This proceeding also ordered an investigation and hearing as to the respondent Tarnowski, as follows:

> IT IS FURTHER ORDERED, that pursuant to the above cited sections of the Shipping Act, 1916, this proceeding also determine whether John J. Tarnowski, in light of the evidence adduced pursuant to the first, second, third and fourth issues,

[1] This decision will become the decision of the Commission in the absence of review thereof by the Commission (Rule 227, Rules of Practice and Procedure, 46 CFR 502.227).

[2] This proceeding was reassigned to Administrative Law Judge Charles E. Morgan after the Administrative Law Judge who had presided at the hearing transferred to another agency.

> together with any other evidence adduced, possesses the requisite fitness within the meaning of section 44(b) Shipping Act, 1916, to be licensed as an independent ocean freight forwarder.
>
> IT IS FURTHER ORDERED, that Aroundworld Shipping & Chartering Inc. and John J. Tarnowski be made Respondents in this proceeding.

The matter of ASC will be taken up herein first. The issues relating to ASC were itemized in the order of investigation, as follows:

> THEREFORE IT IS ORDERED, that pursuant to sections 22, 32 and 44 (USC 821, 831 and 841(b)) of the Shipping Act, 1916, and section 510.9 of General Order 4 (46 CFR 510.9) a proceeding is hereby instituted to determine:

1. Whether ASC has violated section 510.5(c) of the Commission's General Order 4 by failing to inform the Commission of changes in its management and location within the thirty day time limit;
2. Whether ASC has violated section 510.23(a) of General Order 4 by permitting its license to be used by a person not in its employ to perform ocean freight forwarding services on 16 shipments from December 17, 1979 through January 25, 1980;
3. Whether ASC violated section 510.23(f) of General Order 4 by failing to promptly refund monies due one shipper in March 1978;
4. Whether ASC has violated sections 510.23(d), 510.23(e) and 510.23(j) of General Order 4 by incorrectly invoicing shippers for the cost of cargo insurance and accessorial services on at least 31 instances during the period September 15, 1977 through March 1, 1979;
5. Whether a civil penalty should be assessed against ASC pursuant to section 32(e), Shipping Act, 1916, for violations of sections 510.5(c) and 510.23(a), (d)(e)(f) and (j) of the Commission's General Order 4 and, if so, the amount of any such penalty
6. Whether ASC's independent ocean freight forwarder license should be suspended or revoked, pursuant to section 44(d) of the Shipping Act, 1916 for:
   a. willful violations of the sections of the Commission's General Order 4 listed in subparagraph 5 above; or
   b. such conduct as the Commission shall find renders ASC unfit to carry on the business of forwarding in accordance with section 510.9(e) of General Order 4.

An opening brief was filed by Hearing Counsel on behalf of the Bureau of Hearings and Field Operations, in which it proposed numerous findings of fact. ASC did not file a reply brief, but instead on November 20, 1981, turned in its forwarder license to the Commission, along with a letter stating that ASC had become insolvent and would no longer be an active participant in this proceeding.

Because ASC did not reply, in general the proposed findings of fact of Hearing Counsel herewith are adopted subject to any mathematical or other necessary corrections. The facts show that ASC experienced a number of changes in its location and its management during the last few years, and the Commission was not promptly advised of the changes as required by section 510.5(c) of General Order 4. ASC moved its Houston branch office from 609 Fannin Building, Houston, to 16515 Hedgecroft, Houston, on March 24, 1978, but the Commission was not advised until much later, on December 28, 1978.

The principal headquarters of ASC in Washington, D.C., ceased operating on November 1, 1978, and the Commission was advised on December 28, 1978. On the same date, John Tarnowski, the qualifying officer of ASC's Houston office, advised the Commission of the resignation of ASC's president, Reginald Slocombe, on November 1, 1978. There were other such occasions of failure by ASC to promptly advise within the 30-day period required by General Order 4. John Tarnowski, in time, became acting president of ASC, and he also failed to advise the Commission within the 30-day period of changes in ASC's location and management.

ASC did not promptly refund to E. Systems, Inc., on a shipment handled by Delta Line, when E. Systems had overpaid ASC for ocean freight on the shipment. Delta Line had issued a corrected manifest for the shipment on June 27, 1978, but it was not until March 28, 1979, that ASC refunded the amount owed to E. Systems, Inc. A prompt refund was required by section 510.23(f) of General Order 4.

Between September 15, 1977, and March 1, 1979, ASC improperly invoiced six of its clients on nine occasions for wharfage or terminal charges on shipments which ASC forwarded in amounts greater than the amounts entitled to ASC. Also in this same period, ASC improperly invoiced ten of its clients on 13 occasions for insurance charges stating premium rates greater than the rates billed to ASC. Sections 510.23(d), (e) and (j) of General Order 4 required that ASC bill the proper charges.

During the period December 17, 1979, through January 15, 1980, sixteen shipments were billed by Robert Tinder under the name of Professional Freight Forwarder International (P.F.F.I.), using the forwarder license number of ASC. Tinder's relationship with ASC was not as an employee.

John Tarnowski drafted the contract with Robert Tinder, and Tinder had complete control over the two accounts (clients) with whom he dealt. Tinder worked out of his own separate location. Tarnowski had no knowledge of how Tinder was billing the accounts, further proof that Tinder was not an employee of ASC. Also Tinder was not on ASC's payroll, but operated strictly on a commission basis. The two clients of Tinder were his before he established any relationship with ASC. It is concluded that ASC violated section 510.23(a) of General Order 4, which provides that no licensee shall permit his name to be used by any person not an employee of the licensee.

Hearing Counsel originally recommended that ASC should be assessed a civil penalty in the amount of $15,000 in view of certain mitigating circumstances. Much of ASC's billing problems occurred as a result of its Washington headquarters closing down, with the confusion associated with a transfer of records to Houston. Hearing Counsel state that ASC realized $4,424.71 from its improper invoicing methods, and that in view of this and of all of ASC's violations, that $15,000 is proper, considering also the institution of corrective measures by ASC to prevent future violations. These views and the $15,000 fine recommendation were contained in Hearing Counsel's opening brief, received prior to the time that ASC turned in its forwarder license on November 30, 1981.

Since that time, at the request of the formerly presiding Administrative Law Judge, Hearing Counsel has provided additional information and has withdrawn the recommendation for a $15,000 fine.

By motion dated May 12, 1982, Hearing Counsel request that certain documentation attached to said motion be received, and that their revised recommendation be adopted. Said motion to receive the additional documentation hereby is granted. It includes ASC's financial statements, an analysis of said statements by the Commission's Office of Financial Analysis (OFA), a statement of the attorney for ASC, and a statement of a certified public accountant (CPA). The financial statements are unaudited, and the CPA expresses no opinion or any form of assurance in them. The CPA has withdrawn its further services because ASC has been unable to pay it the $7,000 plus balance already due to the CPA.

ASC's attorney points out that since the date of the financial statements, September 17, 1981, both of the two primary customers of ASC have been lost, one filing for bankruptcy, and one transferring its business to another forwarder. A comparison of current assets and current accounts payable of ASC shows more payable. Furthermore, one account receivable is in the doubtful category.

The Commission's Office of Financial Analysis on review believes that ASC cannot afford a fine. Based on ASC's insolvency, Hearing Counsel assert that assessing a fine would be an exercise in futility, and now recommend that no civil penalty be assessed against ASC.

As to ASC, it is concluded and found that ASC violated sections 510.5(c), 510.23(a), 510.23(d), 510.23(e), 510.23(f) and 510.23(j) of the

Commission's General Order 4; that ASC has turned in its independent freight forwarder's license and accordingly this action has made moot the issue of whether ASC's forwarder license should be suspended or revoked; and that while a fine of $15,000 would be justified for the said violations, no fine should be assessed ASC because of its insolvency and inability to pay.

Attention is now directed to the issue of the fitness of John J. Tarnowski to be licensed as an independent ocean freight forwarder.

As seen, from the facts found with regard to ASC, some of these also pertain to Tarnowski, because he was the Houston office manager and a vice-president of ASC since December 21, 1976. Tarnowski was president and a director of ASC from January 16, 1979, until he was removed from his position of president of ASC on June 10, 1981. Tarnowski made the arrangements with Tinder to use ASC's license number, but Tarnowski took the position that Tinder became an employee of ASC, even though Tinder operated out of a separate location and with a separate freight forwarder name. Tinder had complete control over the two accounts which he handled.

A civil lawsuit is pending in the state District Court in Harris County, Texas, in which Aroundworld Shipping & Chartering, Inc., is the complainant and John J. Tarnowski is the defendant. Because of the backlog of cases in Harris County, apparently a trial on a jury case, as is this one against Mr. Tarnowski, will not occur sooner than 2-1/2 to 3-1/2 years from the filing date of the suit. Also, more time might be involved should appeals be filed with higher courts.

The above suit in Harris County and counterclaims are based on alleged facts said to have occurred during Mr. Tarnowski's tenure as president of Aroundworld Shipping & Chartering, Inc.

The order of investigation herein with regard to Tarnowski names certain specific matters to be considered to determine the fitness of Tarnowski. But, the order is not limited to these specifics inasmuch as it contemplates consideration of "any other evidence adduced" in the proceeding. Further, section 44(b) of the Act sets the requirements necessary to be met for the issuance of a license, including a finding that the applicant is fit.

Any applicant, whose past conduct shows him to be not fit, shall not be issued a license as a freight forwarder; and any applicant who receives such a license and subsequently is shown to be unfit shall have his license revoked.

On the other hand, an applicant is entitled to a reasonably prompt ruling on his application.

The former presiding Administrative Law Judge apparently was faced with reconciling the above two general principles, when he ruled at the oral hearing in this proceeding, denying the request of Hearing Counsel for more time to develop certain facts as to Mr. Tarnowski's conduct as president of ASC. In effect, since the matter was pending in Harris County, it was ruled out of the present case before the Federal Maritime Commission. As shown on the transcript, page 29, the former presiding Administrative Law Judge asked if what Hearing Counsel were suggesting was a collateral investigation concurrent with that of the Harris County Court. The answer was yes, and the motion of Hearing Counsel was denied.

An offer of proof was made that an investigator employed by the Federal Maritime Commission would have testified that during his investigation of ASC, he was shown and obtained copies of ledger pages indicating payments to J & E Enterprises, totalling $37,328.28 paid by checks number 1140, dated May 29, 1979, and ending with check number 3727, dated May 29, 1981; and that when the investigator questioned Mr. Tarnowski about these findings on July 28, 1981, Mr. Tarnowski advised that his attorneys had advised him not to comment on this topic.

In their first brief in this matter, Hearing Counsel on page 21 state, "While there are a number of allegations concerning John Tarnowski, which the Commission is aware of, which might affect his fitness, these allegations are not involved in this proceeding and this recommendation is made based only on the facts of record and the issues in the Order of Investigation as interpreted by the Presiding Administrative Law Judge.[2]" Footnote 2 on this page states that, "Hearing Counsel intend to except to the Administrative Law Judge's decision which bars any examination of these allegations, as they relate to John Tarnowski's fitness in this proceeding."

The recommendation of Hearing Counsel, with the caveat above, is, "After examining the facts of record in this proceeding Hearing Counsel contend that John Tarnowski is fit to be licensed as an Independent Ocean Freight Forwarder."

Hearing Counsel state that denial of such a license is an extreme sanction, and that John Tarnowski on this record has not evidenced any unwillingness to comply with the Commission's rules and regulations in the future.

In all of the above circumstances, and especially in view of the long time which apparently would have been necessary to determine the facts as to the matters pending in the Harris County Court, there appears no good reason now to reconsider the ruling of the former Administrative Law Judge. While Hearing Counsel asked him to reconsider, which motion he denied, and while Hearing Counsel stated they intended to except to his decision which bars any of the allegations related to the Harris County case, Hearing Counsel have not asked the present Administrative Law Judge to reconsider that ruling, although they have had ample opportunity to do so.

Accordingly, it is ruled that the record must stand as it is, and there is no good cause for reopening this record.

As to Mr. Tarnowski, it is concluded and found that he violated section 510.5(c) of the Commission's General Order 4, by failing promptly to advise the Commission of change in the location of ASC's Houston office, and of change in its officers and directors.

No civil penalty is recommended to be assessed against Mr. Tarnowski, and based upon the limited facts of record herein, Mr. Tarnowski is found fit to be licensed as an independent ocean freight forwarder.

(S) CHARLES E. MORGAN
Administrative Law Judge

FEDERAL MARITIME COMMISSION

[46 C.F.R. PART 507]

[GENERAL ORDER 39, DOCKET NO. 82-31]

ACTIONS TO ADJUST OR MEET CONDITIONS UNFAVORABLE TO SHIPPING IN THE FOREIGN TRADE OF THE UNITED STATES

September 9, 1982

ACTION: Removal of Part 507

SUMMARY: This removes regulations designed to meet or adjust conditions unfavorable to shipping in the United States/Guatemalan trade resulting from a since repealed Guatemalan decree.

DATE: September 14, 1982

SUPPLEMENTARY INFORMATION:

On June 28, 1982, the Commission issued a notice of proposed rulemaking requesting comments on the proposed removal of Part 507 of Title 46 of the Code of Federal Regulations (47 F.R. 27875). No comments were received in response to the Commission's Notice.

Part 507 was promulgated, pursuant to section 19 of the Merchant Marine Act of 1920 (46 U.S.C. § 19(1)(b)), to offset the discriminatory effects of a Guatemalan decree on the United States foreign commerce. Because the Guatemalan Decree has now been repealed, there is no longer any need for the regulations in Part 507.

THEREFORE, IT IS ORDERED, That, pursuant to 5 U.S.C. § 553 and section 43, Shipping Act, 1916 (46 U.S.C. § 841(a) and section 19(1)(b)), Merchant Marine Act, 1920 (46 U.S.C. § 876(1)(b)), Part 507 of Title 46 of the C.F.R. is removed.

IT IS FURTHER ORDERED, That this proceeding be discontinued.

By the Commission.

(S) FRANCIS C. HURNEY
Secretary

FEDERAL MARITIME COMMISSION

DOCKET NO. 81-72

SEALD-SWEET INTERNATIONAL, INC.

v.

SEA-LAND SERVICE, INC.

ORDER ADOPTING INITIAL DECISION

September 10, 1982

This proceeding is before the Commission upon its determination to review the Initial Decision of Administrative Law Judge William Beasley Harris finding for Complainant and against Sea-Land Service, Inc. The Initial Decision also ordered:

> Sea-Land Service, Inc., shall publish in the applicable tariff an appropriate notice of the decision in this proceeding so that shippers similarly situated during the time period involved are not discriminated against and receive the same treatment, if eligible, as the complainant.

Initial Decision, at 10-11.

Publication in a tariff of notice of a Commission decision concerning that tariff is a Special Docket procedure. It has not been a requirement in misclassification proceedings arising under section 18(b)(3) of the Shipping Act, 1916 (46 U.S.C. § 817). In the instant proceeding, the phrase "shippers similarly situated during the time period involved" could be interpreted as including shippers already time-barred by the two-year statute of limitations prescribed at 46 U.S.C. § 821. Although there may be some benefit in the notice requirement for shippers who are not time-barred, the possibility of unintended implications and confusion regarding the statute of limitations outweighs the usefulness of such publication. The Initial Decision shall therefore be adopted except for the notice requirement prescribed in paragraph (3) of the Presiding Officer's conclusions and paragraph (B) of the ordering language.

THEREFORE, IT IS ORDERED, That the Initial Decision is adopted to the extent indicated above; and

IT IS FURTHER ORDERED, That this proceeding is discontinued.

By the Commission.

(S) FRANCIS C. HURNEY
Secretary

FEDERAL MARITIME COMMISSION

DOCKET NO. 81-72

SEALD-SWEET INTERNATIONAL, INC.

v.

SEA-LAND SERVICE, INC.

Besides admission by the parties, the record clearly evinces a course of conduct strongly indicating that both the carrier and the shipper understood that the commodity Fruits, Citrus, N.E.S. VIZ: Temperature Controlled, Fibre Cartons, Minimum 950 cartons per container (thru March 31, 1980) EA (R) 3.65, Item No. 051.0005.803 in SANE Tariff No. 5, FMC 13, 11th Revised Page 138, effective December 17, 1979, would be applicable to all these shipments.

The conflicting interpretation of the applicable tariff by the complainant shipper and respondent carrier points up a definite ambiguity in the tariff, as demonstrated by the fact that respondent itself at first applied the interpretation the complainant did of 950 4/5 bushel cartons or 2/5 bushel cartons bundled together or not totalling 950 4/5 bushel cartons to a container. However, subsequently in supplemental billings respondent interpreted the tariff as requiring that a 2/5 bushel carton be counted as one carton.

The action of the carrier and the shipper are factors to be considered in determining what was a fair and reasonable interpretation of an ambiguous tariff item. The ambiguity is resolved against the carrier and in favor of the shipper.

The carrier should remove any ambiguity as to the tariff Item No. 051.0005.503 by making its tariff specific and plain.

Michael Joseph and *Timothy Trushel* of Kominers, Fort, Schlefer & Boyer for the complainant.

Claudia E. Stone and *John M. Ridlon* for the respondent.

INITIAL DECISION [1] OF WILLIAM BEASLEY HARRIS, ADMINISTRATIVE LAW JUDGE

Adopted September 10, 1982

The complainant Seald-Sweet International, Inc., alleges a charge and demand by the respondent Sea-Land Service, Inc., for a greater compensation for the transportation in containers of oranges packed in 2/5 bushel cartons bundled together, than the rates and charges specified in Sea-Land's tariff. Seald-Sweet alleges this is a violation of section 18(b)(3) of the Shipping Act, 1916, 46 U.S.C. § 817(b)(3) and an

[1] This decision will become the decision of the Commission in the absence of review thereof by the Commission (Rule 227, Rules of Practice and Procedure, 46 CFR 502.227).

unjust discrimination between shippers in violation of section 17 of the same Act, 46 U.S.C. § 816.

This proceeding, as requested by the complainant and agreed to by the respondent was conducted under shortened procedure without oral hearing pursuant to 46 CFR 502.181, et seq.

The Presiding Administrative Law Judge from the record herein finds the following facts:

FACTS

There are seven (7) involved shipments of U.S. #1 Fresh Temple Oranges from Jacksonville, Florida, to Rotterdam, Holland. Two (2) of the seven (7) shipments sailed under the following Bills of Lading on the vessel *Producer*, Voy. 66 East:

(1) B/L No. 971787210-3 dated 1/6/80 - 1,634 2/5 Bushel Cartons - Gross Weight 32,680 lbs.; Freight and Charges Prepaid $4,307.79.

(2) B/L No. 971787411-3 dated 1/6/80 - 1,573 2/5 Bushel Cartons - Gross Weight 31,460 lbs., Freight and Charges Prepaid $4,301.67.

The remaining five (5) of the seven (7) shipments sailed under the following Bills of Lading on the vessel *Economy*, Voy. 119 East:

(1) B/L No. 971787456-3 dated 1/10/80 - 1900 2/5 Bushel Cartons - Gross Weight 38,000 lbs.; Freight and Charges Prepaid $4,334.52.

(2) B/L No. 971787457-4 dated 1/10/80 - 1900 2/5 Bushel Cartons - Gross Weight 38,000 lbs.; Freight and Charges Prepaid $4,334.52.

(3) B/L No. 971787484-3 dated 1/10/80 - 1900 2/5 Bushel Cartons - Gross Weight 38,000 lbs., Freight and Charges Prepaid $4,334.52.

(4) B/L No. 971787485-4 dated 1/10/80 - 2,600 2/5 Bushel Cartons - Gross Weight 32,020 lbs.; Freight and Charges Prepaid $4,304.38.

(5) B/L No. 971787486-5 dated 1/10/80 - 1,601 2/5 Bushel Cartons - Gross Weight 32,020 lbs.; Freight Charges Prepaid $4,304.48.

The tariff applicable here is that of South Atlantic-North Europe Rate Agreement FMC No. 9984 (SANE) Tariff No. 5 FMC-13 From: South Atlantic Ports of the United States below Hampton Roads, Virginia, to and including Key West, Florida, To: Antwerp, Rotterdam, Amsterdam, Hamburg, Bremen, Bremerhaven and French Atlantic Ports in the Bordeaux/Dunkirk Range. Each involved shipment moved under the Tariff Item No. 051.0005.803, 11th Revised Page 138, effective December 17, 1979, Commodity Fruits, Citrus, N.E.S., VIZ:

Temperature Controlled Fibre Cartons:

				Item No.
Up to/incl. 1′ 4″ cft each	EA		6.65	051.0005.477
Minimum 950 Cartons per container				
(Thru March 31, 1980)	EA	(R)	3.65	051.0005.503
(Eff. April 1, 1980)	EA	(A)	4.05	051.0005.803

Complainant Seald-Sweet International, Inc., is a Florida corporation with principal place of business in Tampa, Florida, engaged in the exporting of citrus fruit.

Respondent Sea-Land Service, Inc., is a common carrier by water engaged in transportation between ports on the South Atlantic Coast of the United States and ports in North Europe, and as such is subject to the provisions of the Shipping Act, 1916, as amended.

The majority of Seald-Sweet's shipments consisted of approximately 950 packages each comprised of one 4/5 bushel carton, for which Seald-Sweet was charged, for example, 950 cartons at $3.65 per carton, or $3,467.50 per container.

Respondent admits to carrying 7 shipments between January 6 and 11, 1980, for the complainant which consisted of approximately the same volume of oranges but were shipped in approximately 950 packages, each consisting of two 2/5 bushel cartons bundled together, for which Seald-Sweet has been charged, for example, 1,900 cartons at $3.65 per carton, or $6,935.00 per container.

In each of the seven involved shipments the oranges were packed in single cartons each comprised of two 2/5 bushel cartons bundled together. Freight charges were computed on the basis of the 950-carton minimum for each.

By means of seven freight bills dated January 30, 1980, Sea-Land charged and demanded that Seald-Sweet pay supplemental billings in the aggregate amount of $23,806.43, reflecting charges of $3.65 for each 2/5 carton in each shipment plus currency surcharges.

DISCUSSION, REASONS, FINDINGS AND CONCLUSIONS

The respondent seeks to apply the rate applicable to the cargo which moved on the basis of the number of "cartons" which were transported on behalf of the complainant irrespective of whether they were bundled or single individual cartons. The respondent asserts it is required to apply the tariff as it seeks to do here; that the applicable tariff provision specifies clearly that it refers to "cartons" up to and including 1′ 4″ cft each, without specificity as to the manner of packaging.

The complainant contends, "The facts alleged in the complaint establish that, consistent with the fair import of the language of the tariff, Sea-Land routinely accepted standard 4/5 bushel cartons, including half-cartons bundled together, for shipment as 'cartons' under Item No. 051.0005.803 of the tariff. For a typical containerload under that item, where the container was sufficiently filled (or deemed to be filled) to meet the 950-carton minimum incentive rate, freight was customarily and properly charged for 950 cartons at $3.65, totalling $3,467.50, regardless whether the cartons used were single cartons of 4/5 bushel capacity or were half-cartons bundled together. By attempting to charge Seald-Sweet for the number of half-cartons shipped in excess of

950 in each of seven shipments, Sea-Land takes the position that SANE Tariff No. 5 should be construed to require that a shipment of 950 single cartons, notwithstanding that each pair of bundled half-cartons is less than the maximum dimension allowed in the tariff for each 'carton.' Such a reading of Tariff No. 5 according to the complainant is supported neither by its language nor by common sense."

The complainant asserts the case of *Joseph P. Sullivan & Co. v. Sea-Land Service, Inc.*, Docket No. 571(F), 21 F.M.C. 734, 18 SRR 1493 (1979), is directly on point with the instant case. The complainant shipper had shipped 13 containers under tariff items described as:

Apples: Temperature Controlled
In Wooden Boxes or Fibreboard Cartons or in
Cartons Bundled Two Together: Viz:
Not Exceeding 1′ 2″ - EA. 1.45
Not Exceeding 2′ 2″ - EA. ---
Not Exceeding 2′ 2″
Minimum 725 Packages per Container - EA. 2.90

"The shipments consisted of, by way of illustration, 615 full cartons (2′ 2″) and 200 *unbundled* half-cartons (1′ 2″) of apples. The respondent carrier, Sea-Land, was willing to count individual half-cartons as 'cartons' for the purpose of the 725-carton minimum and charged the shipper $2.90 each for 725 cartons (actually 615 full cartons and 110 half cartons) plus $1.45 each for the remaining 90 half cartons. The shipper's reasonable interpretation was that while pairs of half cartons, bundled or not, should be counted as 'cartons' for purposes of the 725-carton minimum, nothing in the tariff authorized application of the full carton rate to individual half cartons. The Commission upheld the shipper's interpretation. The complainant argues that, if for the purposes of an item described as wooden boxes or fibreboard cartons or in cartons bundled together, a pair of unbundled half cartons is to be deemed a carton then, *a fortiori*, for the purposes of an item described as fibre cartons: Up to/incl. 1′ 4″ cft. each/minimum 950 cartons per container, a pair of half cartons bundled together must be considered to be a "carton," so long as the maximum dimension of "1′ 4″" cft is not exceeded.

Respondent in its January 15, 1982, answering memorandum (p. 12) asserts "It is abundantly clear from the Complaint, the Exhibits, and the Argument of Complainant that the entire proceeding before the Commission in this case rests upon a single dispute as to the interpretation and application of a particular tariff rate. In its barest form, the dispute may be resolved into a disagreement between the parties as to its applicability of a particular rate to 'cartons.' It is clearly the position of Complainant that its use of 2/5 bushel capacity 'cartons' when bundled together into a single package, constitutes a single carton rather than two cartons forming one package."

Asked to explain in more detail whether or not the case of *Joseph P. Sillivan & Co. v. Sea-Land Service, Inc.*, Docket No. 571(f), 21 F.M.C. 734, 18 SRR 1493 (1979), is directly on point with the instant case, the complainant stated the case is directly on point with the instant case on the facts, in that it was there held that pairs of half-cartons of fruit must be counted as "cartons" where the applicable tariff does not clearly call for different treatment, and it is directly on point on the law in that it applied the principle that ambiguities in a tariff are to be construed against the carrier. The respondent says the *Sullivan* case, *supra*, although facially similar is distinguishable in law and fact and is thus not controlling of the instant case. In both cases, the commodity at issue was fruit. Similarly, both cases involved shipments of fruit in cartons. In both cases the issue was one of tariff application. However, at that point the cases diverge. The respondent says in the tariff at issue in the *Sullivan* case the relevant wording of the commodity description read: "In Wooden Boxes or Fibreboard Cartons or in Cartons Bundled Two Together," rated on a half carton basis (not exceeding 1′ 2″ each) or rated on a full carton basis (not exceeding 2′ 2″ each, subject to a minimum of 725 packages per container). The issue in the *Sullivan* case was whether half cartons were required to be bundled together to obtain the half carton rate. Thus, the case concerned an ambiguous tariff item. In the subject proceeding, according to the respondent, however, no ambiguity exists with respect to the tariff provision applicable to a commodity description. The respondent continues, the tariff item at issue in this docket applies to "Fibre Cartons" rated on a per carton basis as the "EA" designation states. If an ambiguity exists, it is in the shipper's commodity description of the contents of the container. In the instant case, there is no tariff provision for "cartons bundled two together" nor is there a rate for half cartons. There is only a rate on cartons applicable to each carton. Moreover, the *Sullivan* case provided for a rate based on cartons or cartons bundled together and limited by a minimum of 725 packages to obtain the rate for full cartons. The subject tariff description at issue here rates cargo on the basis of each *carton* and contains a 950 *carton* minimum.

In short, says the respondent, the *Sullivan* case is not directly on point with the subject proceeding.

The Presiding Administrative Law Judge finds that he does agree with the complainant that the *Sullivan* case applied the principle that ambiguities in a tariff are to be construed against the carrier; and the Presiding Judge also does agree with the respondent that the *Sullivan* case is distinguishable and not controlling of this case. The parties are in conflict as to their interpretation of the *Sullivan* case. As to the instant case, too, they conflict on tariff interpretation. The conflicting interpretation of the applicable tariff by the complainant shipper and respondent carrier points up a definite ambiguity in the tariff, as demonstrated by the fact that the respondent itself at first applied the interpretation the complainant did of 950 4/5 bushel cartons or 2/5 bushel cartons bundled together or not totalling 950 4/5 bushel cartons to a container. However, subsequently in supplemental billings respondent interpreted the tariff as requiring that a 2/5 bushel carton be counted as one carton. The conflicting interpretation points up a definite ambiguity in the tariff. *Peter Pratti Associates, Inc. v. Prudential Lines, Inc. & WINAC*, Docket No. 1172; *Hellenic Lines & WINAC*, Docket No. 1173, 8 F.M.C. 375 (1965).

This action of the carrier and the shipper is a factor to be considered in determining what was a fair and reasonable interpretation of an ambiguous tariff item. See *Aleutian Homes, Inc. v. Coastwise Lines, et al.*, Docket No. 799, 5 F.M.B. 602, 609 (1959). Also, the respondent and complainant both say the applicable tariff does not include a definition of the term "carton"; and, Seald-Sweet is aware of no understanding of the term "carton 1′ 4″ cft" among those involved in shipping; the respondent cannot state precisely what is meant by "carton 1′ 4″ cft" as used in the applicable tariff and adds that on information and belief, this language was added to the tariff at the request of a shipper of citrus fruit but respondent cannot reconstruct the source of such request.

Upon consideration of the above and the record herein, the Presiding Administrative Law Judge *finds* and *concludes* in addition to those heretofore found and concluded, that:

(1) There is an ambiguity as explained above in the applicable tariff.

(2) The ambiguity is resolved against the carrier in favor of the shipper. This ambiguity with the resulting supplemental billings in the aggregate amount of $23,806.43 if allowed to stand, under the circumstances of this case, would be violative of section 18(b)(3) of the Shipping Act, 1916, and section 17 of that Act. Sea-Land is to rescind such supplemental billings.

(3) To avoid discrimination among shippers Sea-Land shall publish an appropriate notice in the applicable tariff so that shippers similarly situated during the time period involved herein may also utilize the results hereof.

(4) The carrier-respondent should remove any ambiguity as to its tariff.

Wherefore, it is *ordered*, subject to review by the Commission as provided in the Commission's Rules of Practice and Procedure:

(A) Due to the ambiguity in the applicable tariff as explained above, the ambiguity is resolved against the carrier and in favor of the complainant shipper. The carrier Sea-Land Service, Inc., is directed to rescind the supplemental billings in the aggregate amount of $23,806.43.

(B) Sea-Land Service, Inc., shall publish in the applicable tariff an appropriate notice of the decision in this proceeding so that shippers similarly situated during the time period involved are not discriminated against and receive the same treatment, if eligible, as the complainant.

(C) Sea-Land Service, Inc., shall clear up any ambiguity as to the Tariff Item No. 051.0005.803 by making its tariff specific and plain.

(D) This proceeding is discontinued.

(S) WILLIAM BEASLEY HARRIS
Administrative Law Judge

FEDERAL MARITIME COMMISSION

DOCKET NO. 81-45

PACIFIC LUMBER & SHIPPING COMPANY, INC., ET AL.

v.

STAR SHIPPING A/S

NOTICE

September 14, 1982

Notice is given that no appeal has been taken to the August 5, 1982 order of dismissal in this proceeding and that the time within which the Commission could determine to review has expired. No such determination has been made and accordingly, the dismissal has become administratively final.

(S) FRANCIS C. HURNEY
Secretary

FEDERAL MARITIME COMMISSION

DOCKET NO. 81-45

PACIFIC LUMBER & SHIPPING COMPANY, INC. ET AL.

v.

STAR SHIPPING A/S

UNOPPOSED MOTION FOR DISMISSAL WITH PREJUDICE GRANTED

Finalized September 14, 1982

This proceeding was commenced by complaint served by the Federal Maritime Commission on July 2, 1981, asserting violations of section 14, Third and Fourth and section 16 of the Shipping Act, 1916. A cause of action under section 18 of the Shipping Act, 1916 was later added by amended complaint.

Initiation of the administrative proceeding followed and arose from the initiation of a Federal District Court action commenced in Seattle, Washington on or about February 8, 1979. That action was styled *Pacific Lumber & Shipping Co., Inc., et al. v. Star Shipping A/S and the M.S. Star Clipper*, No. C79-140B. At the time of filing of this motion neither the District Court proceeding nor the administrative proceeding have gone to final hearing, although the administrative proceeding has been set by procedural order of the Presiding Officer for September 24, 1982.

On or about July 1, 1982 Complainants and Respondent entered into an agreement to settle the District Court action. That settlement agreement is conditional upon payment of an agreed sum and upon the "closing" of the administrative proceeding. In order to meet the latter condition Complainants file this Unopposed Motion for Dismissal with Prejudice for the approval of the Presiding Officer.

In support of their motion the Complainants cite several cases which indicate that the settlement of administrative proceedings is favored by the Congress, the Courts and the Administrative Agencies themselves.[1] Further, as to the basis of the settlement, they state that:

> . . . It is based upon the sound commercial judgment of the parties that continued litigation would cause greater expense

[1] *Quality Food Corporation v. Tropical Shipping Co. Ltd.*, 23 F.M.C. 602 (1980); see also the authorities summarized in *Ellenville Handle works, Inc. v. Far Eastern Shipping Co.*, 23 F.M.C. 707 (1981); and *Old Ben Coal Co. v. Sea-Land Service, Inc.*, 21 F.M.C. 505 (1978).

to all parties than any recovery on the merits, that settlement of both proceedings at this stage would avoid months, and perhaps years of continued wasteful litigation at tremendous expense to the parties, and that insofar as the compromise is based upon the foregoing factors, it embodies no intention to contravene either the law or policy generally, or the provisions of any of the applicable shipping statutes.

Wherefore, in view of the above and the entire record so far made in this case, it is,

Ordered that the Complainants' Unopposed Motion for Dismissal With Prejudice is hereby granted.

(S) JOSEPH N. INGOLIA
Administrative Law Judge

FEDERAL MARITIME COMMISSION

DOCKET NO. 82-27

BURLINGTON INDUSTRIES, INC.

v.

THE ITALIAN LINE STEAMSHIP CO.

NOTICE

September 14, 1982

Notice is given that no appeal has been taken to the August 6, 1982 dismissal of the complaint in this proceeding and that the time within which the Commission could determine to review has expired. No such determination has been made and accordingly, the dismissal has become administratively final.

(S) FRANCIS C. HURNEY
Secretary

FEDERAL MARITIME COMMISSION

DOCKET NO. 82-27

BURLINGTON INDUSTRIES, INC. (ACTING ON BEHALF OF WHOLLY OWNED SUBSIDIARY, KLOPMAN INTERNATIONAL S.P.A., PROSINONE, ITALY)

v.

THE ITALIAN LINE STEAMSHIP COMPANY

MOTION FOR DISMISSAL OF COMPLAINT AND APPROVAL OF SETTLEMENT GRANTED

Finalized September 14, 1982

This action began as the result of a complaint filed by Burlington Industries against Italian Lines Steamship Company, served on May 14, 1982. Answer to the complaint was filed on June 16, 1982.

On June 27, 1982, the parties jointly filed a Joint Motion for Dismissal of Complaint and Approval of Settlement. Accompanying the Motion was an Agreement of Settlement and Mutual Release and a Joint Affidavit in Support of Settlement Agreement.

It is clear from the reading of the above documents that the settlement effected by the parties, whereby the plaintiff is to receive $18,000 from the respondent in return for the respondent's agreement to forebear, is a commercial one. As the parties state, "In due course it readily became apparent that litigation of the involved issues would be both complex and costly * * *. Accordingly, in an effort to resolve their differences in a commercially reasonable manner and without the expense and uncertainty of further litigation, the parties have, after arms-length negotiations, reached * * * the settlement agreement * * *."

In view of the above, and in light of the cases and argument set forth in the Motion, it is

Ordered that the Joint Motion for Dismissal of Complaint and Approval of Settlement, is hereby granted and the instant proceeding is dismissed with prejudice.

(S) JOSEPH N. INGOLIA
Administrative Law Judge

FEDERAL MARITIME COMMISSION

DOCKET NO. 82-15

KERR STEAMSHIP COMPANY, INC.

v.

THE BOARD OF COMMISSIONERS OF THE PORT OF NEW ORLEANS AND

RYAN-WALSH STEVEDORING CO., INC.

NOTICE

September 16, 1982

Notice is given that no appeal has been taken to the August 10, 1982 order styled "Withdrawal of Complaint" in this proceeding and that the time within which the Commission could determine to review has expired. No such determination has been made and accordingly, the order has become administratively final.

(S) FRANCIS C. HURNEY
Secretary

FEDERAL MARITIME COMMISSION

DOCKET NO. 82-15

KERR STEAMSHIP COMPANY, INC.

v.

THE BOARD OF COMMISSIONERS OF THE PORT OF NEW ORLEANS

AND RYAN-WALSH STEVEDORING CO., INC.

WITHDRAWAL OF COMPLAINT

Finalized September 16, 1982

By motion dated and served July 21, 1982, the complainant in this proceeding moves for leave to withdraw its complaint and for an order of dismissal without prejudice.

The complainant points out that a suit has been filed in the United States District Court for the Eastern District of Louisiana, New Orleans Division, entitled, "The Board of Commissioners of the Port of New Orleans v. Kerr Steamship Co., Inc., and Ryan-Walsh Stevedoring Co., Inc., Civil Action 81-4691." This suit concerns certain demurrage charges, and crossclaims have been filed by Kerr Steamship Co., Inc., in such suit.

The complainant states that since liability for the demurrage charges will be decided by the United States District Court in this named suit, that the expenses to all parties in the present proceeding before the Federal Maritime Commission (No. 82-15) will in all probability be not justified. Therefore the complainant in No. 82-15 desires withdrawal of the complaint in No. 82-15 without prejudice.

One respondent, the Board of Commissioners of the Port of New Orleans (the Board), opposes the motion, and alternatively suggests, or moves, that the complaint be dismissed with prejudice, or that the motion to withdraw without prejudice be granted only upon the two conditions, that Kerr pay the Board its costs and expenses and that Kerr covenant not to bring an action against the Board on this matter in the future. The Board points out that the parties are exchanging written testimony and an oral hearing has been scheduled, and that the Board has incurred costs in defending itself in the subject case, No. 82-15.

Also, since it appeared that the proceeding in the District Court might not settle all the matters raised in the complaint in No. 82-15, particularly regarding the allegation of a violation of section 17 of the

Shipping Act, Kerr's request made at the prehearing conference, for a stay then was denied.

Insofar as the Board suggests withdrawal with prejudice, this amounts to a motion by the Board, to which other parties would be entitled to reply.

No response to Kerr's motion for leave to withdraw the complaint, has been made by Ryan-Walsh Stevedoring Co., Inc., nor by Hearing Counsel.

It is now not certain whether the District Court case will resolve all of the questions brought in No. 82-15, but there is some probability that the ruling of the District Court may make it unnecessary for the complainant to pursue its complaint in No. 82-15. Therefore, in view of this possibility, it is concluded that the complainant's motion should be granted subject to condition.

Complainant's motion hereby is granted and it is allowed to withdraw its complaint without prejudice but subject to the condition, that any party may file an appropriate motion for or against reopening the complaint in No. 82-15, depending upon the outcome of the proceeding before the District Court in its Civil Action 81-4691, with such motion for or against reopening in No. 82-15 to be filed within 30 days following the ruling of the District Court.

(S) CHARLES E. MORGAN
Administrative Law Judge

FEDERAL MARITIME COMMISSION

DOCKET NO. 82-25

SUN CHEMICAL EXPORT CORPORATION

v.

LYKES BROTHERS STEAMSHIP CORP.

NOTICE

September 16, 1982

Notice is given that no appeal has been taken to the August 12, 1982 order of discontinuance in this proceeding and that the time within which the Commission could determine to review has expired. No such determination has been made and accordingly, the order has become administratively final.

(S) FRANCIS C. HURNEY
Secretary

FEDERAL MARITIME COMMISSION

DOCKET NO. 82-25

SUN CHEMICAL EXPORT CORPORATION

v.

LYKES BROTHERS STEAMSHIP COMPANY

NOTICE OF (1) WITHDRAWAL OF COMPLAINT
(2) CANCELLATION OF TUESDAY, AUGUST 17, 1982, HEARING
(3) DISCONTINUANCE OF PROCEEDING

Finalized September 16, 1982

A letter, dated August 2, 1982 (received August 5, 1982), to the Presiding Administrative Law Judge, states:

Reference the subject Docket.

> Mr. Anthony J. Calzaretta of our company had no authority to file this complaint.
>
> I have communicated with Mr. David W. Gunther, Manager-Traffic Advisory Services of Lykes Bros. Steamship Co., Inc., stating that Sun Chemical Corporation is withdrawing the above complaint and will not file future complaints on the same matter.

Yours truly,
(S) JERRY R. BOLZAK
Jerry R. Bolzak
Director of Corporate
Transportation & Distribution

Upon consideration of the above, it is *ordered* that:

(A) The complaint herein is withdrawn.

(B) The hearing in this proceeding, set for Tuesday, August 17, 1982, is cancelled.

(C) This proceeding is discontinued.

(S) WILLIAM BEASLEY HARRIS
Administrative Law Judge

FEDERAL MARITIME COMMISSION

DOCKET NO. 81-35

LUIS A. AYALA COLON, SUCRS., INC.

v.

BENEDICT SHIPPING INTERNATIONAL, INC.

NOTICE

September 17, 1982

Notice is given that no appeal has been taken to the July 14, 1982 Order of Discontinuance as reconsidered by order served August 12, 1982 in this proceeding and that the time within which the Commission could determine to review has expired. No such determination has been made and accordingly, the dismissal has become administratively final.

(S) FRANCIS C. HURNEY
Secretary

FEDERAL MARITIME COMMISSION

DOCKET NO. 81-35

LUIS A. AYALA COLON, SUCRS., INC.

v.

BENEDICT SHIPPING INTERNATIONAL, INC.

NOTICE ON MOTION FOR RECONSIDERATION AND REQUEST VOLUNTARY DISMISSAL OF COMPLAINT

Finalized September 17, 1982

On July 14, 1982, the Presiding Administrative Law Judge served an order discontinuing this proceeding for failure of the complainant to comply with a proper order of this Commission (to submit a status report on or before July 1, 1982) and to prosecute diligently the complaint.

In the instant motion served August 3, 1982 (received August 9, 1982), the complainant states, among other things, that the case in the U.S. District Court for the District of Puerto Rico, Civil Action 81-0786 consolidated with Civil Action 81-1712, unfortunately, for reasons beyond the control of the complainant or its legal representative said case has been delayed more than expected; that the complainant's failure to file a status report was not deliberate or intentional as the parties had not yet received a decision from the U.S. District Court Judge which was expected at any moment; that to continue this complaint before the Commission would achieve no justiciable purpose.

The complainant requests it be allowed to voluntarily dismiss its claim and to discontinue the present case without prejudice.

DISCUSSION

The complainant served the instant motion within 20 days of the July 14, 1982, order requested to be reconsidered (the motion was received within 26 days). The motion did not answer why the lawyer could not have filed the requested status report within the time ordered. It is possible he was confused prosecuting the cause in this Commission and the Court in Puerto Rico. Because of the possible confusion, and less than 30 days have passed since the July 14, 1982, order, the said order has been reconsidered. The request of the complainant to be allowed to voluntarily dismiss its claim will be granted. The request to discontinue the present case without prejudice is made in the face of the fact that the complaint in this case was served May 19, 1981, so that the present case will be discontinued only.

Upon the reconsideration and consideration of the above the July 14, 1982, order herein having been reconsidered, said order will be vacated. The motion to voluntarily dismiss the claim herein is granted and the proceeding discontinued.

Wherefore, it is *ordered*, subject to review by the Commission, as provided in the Commission's Rules of Practice and Procedure, that:

(A) The July 14, 1982, order herein discontinuing the proceeding for failure to prosecute, is reconsidered and upon reconsideration is vacated.

(B) Complainant's motion for its voluntary dismissal of the complaint is granted.

(C) This proceeding is discontinued.

(S) WILLIAM BEASLEY HARRIS
Administrative Law Judge

FEDERAL MARITIME COMMISSION

DOCKET NO. 81-35

LUIS A. AYALA COLON, SUCRS., INC.

v.

BENEDICT SHIPPING INTERNATIONAL, INC.

Jose F. Sarraga for complainant.

Harry A. Ezratty for respondent.

PROCEEDING DISCONTINUED FOR FAILURE TO PROSECUTE

Finalized September 17, 1982

By notice served May 26, 1982, the parties were ordered to file on or before Thursday, July 1, 1982, an up-to-date status report and include therein reasons for the continuance of this Docket No. 81-35, as well as a schedule for proceeding, should proceeding be desired. The respondent served a status report July 1, 1982 (received July 6, 1982), which is really a motion to dismiss and for reconsideration of May 26, 1982 order. The complainant has not submitted the requested status report.

Upon consideration of the above, the record herein and that the complaint herein was served May 19, 1981, the Presiding Administrative Law Judge *finds* and *concludes* that the complainant has failed to comply with a proper order of this Commission and has failed to prosecute diligently in this Commission the complaint; that as a result thereof this proceeding should be discontinued.

Wherefore, it is *ordered*, subject to review by the Commission as provided in the Commission's Rules of Practice and Procedure, that:

This proceeding is discontinued for failure of the complainant to prosecute its claim diligently in this Commission.

(S) WILLIAM BEASLEY HARRIS
Administrative Law Judge

FEDERAL MARITIME COMMISSION

DOCKET NO. 81-43

INDEPENDENT FREIGHT FORWARDER LICENSE NO. 1483, TOKYO EXPRESS CO., INC. AND KOZO AND KATHLEEN KIMURA D/B/A COSMOS TRADING COMPANY

ORDER ADOPTING INITIAL DECISION

September 17, 1982 (Finalized November 8, 1982)

This proceeding was initiated by Order of Investigation and Hearing served July 7, 1981 to determine whether Tokyo Express Co., Inc.: (1) violated section 16, Initial Paragraph, Shipping Act, 1916, 46 U.S.C. § 815, by obtaining transportation at less than applicable tariff rates through the device of collecting "compensation" on the shipments of Cosmos Trading Company, a company owned by Tokyo's principals; (2) violated section 16, Initial Paragraph, by obtaining transportation at less than applicable tariff rates by falsely declaring cargo measurements to ocean carriers; (3) violated sections 510.23(d), (e), (j) and (k) of Commission General Order 4, 46 C.F.R. § 510.23 (1980), by withholding information from its principals, by marking up the ocean freight and other charges without separately invoicing the shipper for actual cost and by failing to maintain books and records in accordance with the requirements of the Commission's General Order 4; (4) should have its license suspended or revoked because it is no longer "fit" to carry on the business of forwarding; and (5) should be assessed civil penalties pursuant to section 32(e) of the Shipping Act, 46 U.S.C. § 831(e) for any violations of the Act found.

On April 20, 1982, Administrative Law Judge Charles E. Morgan served his Initial Decision which: (1) approved the settlement agreement between Tokyo and the Commission's Bureau of Hearings and Field Operations (Hearing Counsel), but increased the civil penalty settlement from $15,000 to $20,000; and, (2) found that the revocation or suspension of Tokyo's ocean freight forwarder license is not warranted by the record in this proceeding. This decision is before the Commission on Tokyo's Exceptions, and Hearing Counsel's supporting Reply, to the Presiding Officer's increase of the civil penalty.

BACKGROUND

The record before the Presiding Officer consisted of Hearing Counsel's request for admissions to Tokyo, Tokyo's admissions, uncontested affidavits, confidential financial data, and a Settlement Agreement, the essential parts of which are summarized below.

Tokyo is a California corporation, 80% of which is owned by Kozo and Kathleen Kimura. Mrs. Kimura is employed part-time as the company's secretary, while Mr. Kimura is President and works full-time. Toshinori Saiki owns 20% of Tokyo, is Vice President, and is employed full-time.

The Kimuras were also co-owners of Cosmos Trading Company from 1975 to 1979, at which time the company appears to have been dissolved. Mr. Kimura admitted that Cosmos was a purchasing agent for his brother's Japanese electrical contracting company as well as purchasing agent for Nippon Ace, Ltd. of Okinawa, Japan. During the period November 29, 1977 to June 15, 1979, Mr. Kimura acted as purchasing agent and forwarder on 29 shipments for the above-mentioned companies. Cosmos was named as the shipper on the bills of lading and Tokyo invoiced the consignees for the freight and other charges. Tokyo invoiced approximately $14,000 in excess of the actual freight charges, as well as approximately $2,500 in excess of actual drayage charges on these shipments.[1] In addition, Tokyo invoiced the consignees for a total of approximately $500 in forklift charges when no such charge was assessed on any of the shipments. Tokyo also misdeclared the cubic measurements of the 29 shipments.[2] Tokyo received a total of $276 in freight forwarder compensation on these shipments.

In the Settlement Agreement, Tokyo admitted that it engaged in activities that may be violative of section 16, Initial Paragraph, and General Order 4, as alleged in the Order of Investigation. To avoid the expense of litigation, Tokyo agreed to pay a civil penalty of $15,000 by executing a promissory note in favor of the Commission. The Agreement provides that Tokyo will pay $1,500 within 30 days of its approval by the Commission and the balance in installments of $2,250 at 6 month intervals. Tokyo also agreed to take reasonable measures to avoid any future unlawful conduct and to inform owners, directors, officers and employees of the Settlement Agreement's terms.

INITIAL DECISION

The Presiding Officer found that the Settlement Agreement is generally fair and consistent with the public interest, except for the penalty amount which he increased to $20,000. He based the increase in penalty on findings that Tokyo had realized between $16,500 and $25,000 in additional revenue as a result of the alleged unlawful activity, and that

[1] Tokyo paid approximately $27,000 in freight charges and $823 in drayage. The Presiding Officer found approximately $2,000 in drayage overcharges. The record, however, indicates a total of $2,512 in such overcharges.

[2] The record does not indicate the freight savings that Tokyo realized from the misdeclarations. However, Hearing Counsel alleges that Tokyo's activities generated approximately $25,000 in profit. The overcharges to shippers total approximately $17,000. It appears therefore that the misdeclarations amounted to $8,000.

Tokyo's salary increases undermined its claim of financial hardship resulting from its 1981 operations. Tokyo's corporate officers, rather than the employees, were deemed the recipients of the salary increases, because Tokyo's expenses for employee benefits were decreasing during the period relevant to this proceeding.[3] The Presiding Officer found that the stockholders' current equity and increases in entertainment and travel expenses also warranted an "upward adjustment in the proposed settlement figure of $15,000".[4] The penalty was therefore increased from $15,000 to $20,000 by the addition of two installments of $2,500.

Finally, the Presiding Officer found that the revocation or suspension of Tokyo's license was not warranted under the circumstances presented in this case.

POSITION OF THE PARTIES

Tokyo and Hearing Counsel urge the Commission to approve the proposed civil penalty because it is within a "zone of reasonableness" and allegedly meets the Commission's criteria for approving settlements. These criteria are said to include the furtherance of the Commission's enforcement policy, the respondent's ability to pay, the respondent's cooperation with the Commission's staff and the taking of remedial action.

Respondent and Hearing Counsel point out that Tokyo took immediate corrective action when it became aware of the alleged unlawful activity and that it fully cooperated with the Commission's staff throughout this proceeding. In addition, the $15,000 penalty and the legal expenses associated with this proceeding are said to have "eliminated any economic benefit that might have enured from the violations." Respondent also notes that the Presiding Officer did not find that salary expenses were so "unreasonably high" that they warranted an increase of the penalty. In the absence of such a finding, and given the confidential exhibits which allegedly demonstrate that Tokyo would suffer "serious financial hardship" if the penalty amount is increased, Tokyo urges the Commission to approve the $15,000 penalty.

Finally, the parties point out that the Commission has indicated that it will engage in every presumption which favors a finding that a settlement is fair, correct and valid. In this regard, Hearing Counsel argues that the Commission should not adopt the increased penalty because to do so could create the impression "that amounts agreed to

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[3] In 1979, 1980 and 1981 Tokyo had salary expenses of approximately $110,853, $167,000 and $195,864, respectively. In 1980, the only year for which exact figures were presented, Mr. Kimura received a salary of $52,400, Mr. Saiki, $39,300 and Mrs. Kimura, $13,400. Cost for employee benefits declined from $9,546 in 1980 to $1,230 in 1981. Mr. Kimura, in a July 27, 1981 letter to Hearing Counsel, advised that Tokyo had six employees, including himself and his wife.

[4] Tokyo's travel and entertainment expenses increased from $10,075 in 1979, to $17,175 in 1980, to $29,016 in 1981.

during settlement will be subjected to adjustment by Administrative Law Judges even when the amount is fair and reasonable to both parties to the dispute."

DISCUSSION

Upon review of the record and Tokyo's Exceptions, the Commission finds that the Respondents' arguments generally constitute matters presented to and properly disposed of by the Presiding Officer. The Commission further finds that the Presiding Officer did not abuse his discretion by conditioning his approval of the proposed Settlement. The Commission will therefore adopt the Presiding Officer's Initial Decision in this proceeding.

Tokyo's only exception to the Initial Decision challenges the Presiding Officer's increase in the civil penalty agreed to between it and Hearing Counsel. After carefully considering the matter, the Commission finds that the Presiding Officer's action is both procedurally proper and substantively correct under the circumstances.

Section 32(e) of the Shipping Act, 1916, 46 U.S.C. § 31(e), authorizes the Commission to assess or compromise all civil penalties provided for in that Act. Pursuant to this authority, the Commission has adopted procedural regulations which authorize Hearing Counsel, as the prosecutor in assessment proceedings, to enter into stipulations and proposed settlements of the civil penalties that could be levied.[5] However, the settlement of a formal assessment proceeding must, in the first instance, be approved by the presiding officer.

While settlements are generally presumed to be fair, correct and valid, presiding officers are not compelled to accept the offer of settlement against their better judgment. *Pinkus v. Reilly*, 178 F.Supp. 399 (1959). On the contrary, a presiding officer has an obligation to ensure that the proffered settlement is consistent with the regulatory objectives of the Shipping Act, 1916, including its penalty provisions. The legislative history of section 32 indicates that the Act's penalty provisions are designed to ensure a sufficient penalty to deter the offender or others from transgressing the Act and the Commission's regulations.[6] The penalty amount necessary to achieve these objectives turns, in part, on the nature of the violation and the financial benefit derived, as well as the factors presented in mitigation.[7]

In this proceeding, the record supports the Presiding Officer's adjustment of the proposed settlement. First, Tokyo has realized some

[5] See 46 C.F.R. § 505.3 (1981); 44 F.R. 67660 (1979).

[6] Senate Report 92-1014, 92nd Cong., 2d Sess., reprinted in [1972] *U.S. Code Cong. and Ad. News*, 3121; House Report No. 96-232, 96th Cong., 1st Sess., reprinted in [1979] *U.S. Code Cong. and Ad. News 302.*

[7] *Behring International Inc. - Independent Ocean Freight Forwarder License No. 910* - Initial Decision served March 17, 1981, Notice of Administrative Finality served June 30, 1981 (23 F.M.C. 973).

$25,000 in profit from its activities, and there is no evidence of record which would indicate that Tokyo has made restitution to the affected shippers. Second, the serious nature of the violations warrants the increased penalty proposed by the Presiding Officer. Tokyo has not only admitted misdeclaring cargo measurements, but also invoicing its principals for charges that either were not incurred or were in excess of those actually incurred.

The Commission does not believe that a $20,000 penalty will cause the "serious financial hardship" that Tokyo alleges. Stockholders' equity and increased entertainment and salary expenses evidence Tokyo's ability to bear a $5,000 increase in the penalty. Moreover, the payment procedure derived by the Presiding Officer, *i.e.* adding two additional installments rather than increasing the installment payments already provided, should serve to minimize the impact of the increased penalty.

THEREFORE, IT IS ORDERED, That Tokyo's Exceptions in this proceeding are denied.

IT IS FURTHER ORDERED, That the Settlement Agreement arrived at in this proceeding is approved on the condition that:

1. It be modified as provided for in the Presiding Officer's Initial Decision; and
2. The Commission receive within 45 days of the service of this Order an executed copy of the Settlement Agreement and promissory note modified as required above.

IT IS FURTHER ORDERED, That if the above conditions are met the Commission will adopt the Presiding Officer's Initial Decision and discontinue this proceeding.

IT IS FURTHER ORDERED, That if the above conditions are not met, these proceedings will be remanded to the Presiding Officer for further hearings on the merits of the issues raised in this proceeding.

By the Commission.

(S) FRANCIS C. HURNEY
Secretary

FEDERAL MARITIME COMMISSION

DOCKET NO. 81-43

INDEPENDENT FREIGHT FORWARDER LICENSE NO. 1483

TOKYO EXPRESS CO., INC., AND KOZO AND KATHLEEN KIMURA D/B/A COSMOS TRADING COMPANY

Settlement jointly proposed by the Bureau of Hearings and Field Operations and by the respondents approved in principle; provided that the conditions of settlement include, among others, payment of $20,000 by Tokyo Express, rather than the $15,000 proposed by the parties, to compromise, pursuant to section 32(e) of the Shipping Act, 1916, 46 U.S.C. section 831(e), all civil penalty claims arising from certain violations of the Shipping Act and of General Order 4 of the Commission.

Tokyo Express found to have taken corrective steps to effect its present and future compliance with the Act; and under the circumstances, revocation or suspension of its ocean freight forwarder license not warranted.

Eliot J. Halperin for the respondents.

John Robert Ewers, Joseph B. Slunt and *Janet F. Katz* as Hearing Counsel.

INITIAL DECISION [1] OF CHARLES E. MORGAN, ADMINISTRATIVE LAW JUDGE

Adopted September 17, 1982

Before considering the issues in this proceeding, there is one preliminary matter. It concerns the motion for a protective order filed by the respondents, relative to certain confidential exhibits submitted by the respondents in support of the proposed settlement herein. The data submitted concerns only respondents' ability to pay a penalty, and does not bear on any other matters in issue. The data consists of copies of financial statements, including balance sheets, income statements, changes in financial position, and an income tax return. Hearing Counsel do not oppose the motion. Inasmuch as the data largely is sensitive private information, and because it does not bear upon the allegations of violation of the Shipping Act, the motion to treat the said data as confidential hereby is granted. Rule 167 of the Commission's Rules of Practice and Procedure (46 CFR 502.167). This rule in part provides that any information given pursuant thereto may be used by the presiding officer or by the Commission if it is deemed necessary to a correct decision in the proceeding.

[1] This decision will become the decision of the Commission in the absence of review thereof by the Commission (Rule 227, Rules of Practice and Procedure, 46 CFR 502.227).

This proceeding was instituted by order of investigation and hearing served July 7, 1981, pursuant to sections 1, 16, 22, 32 and 44 of the Shipping Act, 1916 (the Act), and section 510.9 of General Order 4 (46 C.F.R. 510.9), to determine:

1. Whether Tokyo Express' relation with Cosmos was of such a nature that Tokyo Express and Kozo and Kathleen Kimura, through their ownership of Cosmos, violated section 16, Initial Paragraph, by obtaining transportation by water for property at less than the rates and charges which would otherwise be applicable through the device of collecting "compensation" on shipments on which Tokyo Express was the forwarder and Cosmos was the shipper.

2. Whether Tokyo Express violated section 16, Initial Paragraph, by obtaining transportation by water for property at less than the rates and charges which would otherwise be applicable through the device of falsely declaring the cargo measurements to ocean common carriers.

3. Whether Tokyo Express violated section 510.23(d) of General Order 4 by charging shipper clients other than actual ocean freight, drayage and accessorial service.

4. Whether Tokyo Express violated section 510.23(e) of General Order 4 by withholding information relative to a forwarding transaction from clients in regard to charges.

5. Whether Tokyo Express violated section 510.23(j) of General Order 4 by not using invoices that stated separately as to each shipment actual charges for ocean freight, insurance and accessorial service.

6. Whether Tokyo Express violated section 510.23(k) of General Order 4 by failing to maintain records and books of account in the required manner.

7. Whether civil penalties should be assessed against Tokyo Express and Kozo and Kathleen Kimura pursuant to section 32(e) of the Shipping Act, 1916, for violations of section 16 of the Shipping Act, 1916, and/or the Commission's rules and regulations and, if so, the amount of any such penalty which should be imposed.

8. Whether Tokyo Express' independent ocean freight forwarder license should be suspended or revoked pursuant to section 44(d) of the Shipping Act, 1916, for:

> a. willful violations of section 16, Initial Paragraph, of the Shipping Act, 1916, and/or sections 510.23(d), (e), (j) or (k) of the Commission's Rules and Regulations; or
>
> b. such conduct as the Commission finds renders Tokyo Express unfit to carry on the business of forwarding in accordance with section 510.9(e) of the General Order 4.

In lieu of a hearing, and in order to avoid the delays and expenses of extended litigation, the parties agreed upon a settlement. The formal record herein, in addition to the proposed settlement, includes Hearing Counsel's request for admission dated August 7, 1981, and the record includes Tokyo Express' answer dated August 18, 1981, confirming the truth of 80 of the 81 proposed facts. As to the other item, fact number 8, the answer was that Kozo and Kathleen Kimura *were* co-owners of Cosmos Trading Company (Cosmos), but that Cosmos was no longer in existence.

The record also includes the affidavit of Mr. Kozo Kimura, president of Tokyo Express, and the affidavit of Lyndon E. Berezowsky, a former investigator for the Commission. Finally, the record includes the financial data referred to above and ruled confidential of Tokyo Express Co., Inc.

The stipulated facts show that Kozo Kimura and his wife Kathleen own 80 percent of Tokyo Express. He is president and she is secretary. He works full time, and she part time. Toshinori Saiki owns 20 percent, is vice president, and works full time.

The Kimuras were co-owners of Cosmos Trading Company from 1975 to some time in 1979, when Cosmos became no longer in existence. Using the Cosmos name, Kozo Kimura became purchasing agent for his brother, who owned a Japanese electrical contracting company. Mr. Kimura also became purchasing agent for Nippon Ace, Ltd., in Okinawa, Japan. Kimura made purchases for his brother's company (Nakae Denki Kenetsu Co., Ltd.), as well as for Nippon Ace, with checks drawn on Tokyo Express. Later such checks were drawn on Cosmos beginning on or about November 1, 1977.

The stipulation states that Mr. Kimura acted as purchasing agent for 30 shipments during the period November 29, 1977, to June 15, 1979. Actually, a close check of listed invoice numbers shows 29 shipments.

On these 29 shipments, Tokyo Express acted as the freight forwarder, and Cosmos was listed as shipper on the bills of lading.

On the shipments, Tokyo Express paid the ocean carriers a total for ocean freight of $23,400.60. However, Tokyo Express, as freight forwarder, invoiced the actual shippers (not Cosmos) a total of $37,322.68 for ocean freight, or a total overcharge of $13,922.08.

Similarly, for drayage, Tokyo paid out a total of $823.00, but invoiced the shippers $2,885.00, or a total overcharge of $2,062.00.

Similarly, for forklift charges, Tokyo paid out nothing, but invoiced $550.00 total, all overcharges.

The composite total for ocean freight, cartage, and forklift charges charged by Tokyo Express for these 29 shipments was $40,757.68, with $24,223.60 paid for such services, and a composite overcharge of $16,534.08.

Hearing Counsel state as one of their criteria for settlement that ". . . the excess profit generated by the activities of Tokyo Express was approximately $25,000 . . . ." Hearing Counsel do not explain what other shipments or activities may have been included in their $25,000 calculation. Counsel for Tokyo Express do not offer any comparable figures, but do state that the relevant criteria for settlement include respondents' inability to pay, cost of collecting the claim, effect on enforcement policy, among others.

Further stipulated facts include that Tokyo Express did not maintain receipts and documents to support the charges on the above 29 shipments, and Tokyo Express declared cubic measurements which were less than the actual measurement of the cargoes.

Mr. Kimura, in his affidavit, states that Tokyo Express is a small company doing business primarily in the Japanese community of San Francisco, that it has always sought to deal fairly with its clients and has fully cooperated with the Federal Maritime Commission, and that as soon as he learned of the impropriety of Tokyo Express' relationship with Cosmos, that the operations of Cosmos were terminated immediately. Tokyo Express has only a "few employees, including me and my wife."

Kimura states also that he wishes to continue the employment of these few employees and that any settlement amount greater than the agreed $15,000 would impose a severe burden, especially in view of the currently depressed conditions, and the considerable legal fees already incurred.

Mr. Kimura's salary in 1980 was $52,400, Vice President Saiki's was $39,300, and Mrs. Kimura's was $13,400, the first two working full time, and Mrs. Kimura part time. Also in 1980, other salaries and wages (of non-officers) were $61,975, making the total compensation of officers and others $167,075.

In 1979, the comparable total was $110,853.23. In 1981, total salaries were $195,864.34.

There is no explanation why salaries jumped to such a total in 1981, as compared with 1980, especially in view of the fact that Tokyo Express' profit in 1980 disappeared in 1981. Because there were only a few employees besides the officers and because employee benefits were only $1,230 in 1981, compared with $9,546 in 1980, and $10,075.30 in 1979, it is reasonable to conclude that Tokyo Express had at the most the same and probably a lesser number of employees in 1981 compared with 1980 and 1979. In view of this conclusion, it is further concluded that the officers' compensation paid to the Kimuras and to Saiki in total was increased very considerably in 1981. (All figures for 1981 are shown as unaudited.)

It is concluded further that the financial results of Tokyo Express would have been better in 1981 than as shown in the confidential data, were it not for such increases in officers' compensation in 1981.

In view of the above facts regarding officer compensation, also the large increase in 1981 in entertainment and travel expenses, the present stockholders' equity in Tokyo Express, and especially in view of the fact that Tokyo Express was enriched by its unlawful activities to the extent of $16,534 to $25,000, it would seem that some upward adjustment should be made in the proposed settlement figure of $15,000.

In mitigation of Tokyo Express' past illegal activities is the statement of former District Investigator Berezowsky, that Mr. Kimura told him that Kimura had no beneficial interest in the shipments forwarded to his brother's company in Japan, that Kimura had begun a separate operation (from his freight forwarder business) as a tariffed non-vessel operating common carrier for household goods under the name, Tokyo Express Shipping Company, Inc. (the forwarder business operates under the name Tokyo Express Co., Inc.), that under this new tariff, there have been no misdeclarations of cargo measurements to the ocean carriers, that ocean freight charges were itemized to the shippers in the NVOCC bill of lading and the tariff rate was properly applied, that other ancillary charges, including packing, crating and drayage to the warehouse were itemized on a Tokyo Express invoice, that Mr. Kimura made available for inspection documentation on all other shipments of Tokyo Express, that Mr. Kimura maintained copies of bills of lading and invoices in both chronological and alphabetical orders.

Mr. Berezowsky concluded that a review of 20 complete shipment files from July 1, 1980, to January 1, 1981, showed that the files were complete and were maintained in an orderly manner, that there was no evidence of misdeclarations, and that all charges were itemized properly on invoices to shippers. Mr. Berezowsky found no violations of the Commission's General Order 4 or of the Act during this period of 1980.

The proposed settlement includes provision for payment to the Federal Maritime Commission by Tokyo Express of the sum of $15,000, in installments. The first installment of $1,500 is due on or before 30 days following approval by the Commission of the proposed settlement. Thereafter, $2,250 would be paid every six months, for a period of 36 months.

It is concluded and found that the proposed settlement terms are generally fair and consistent with the public interest, *except* that the payment to the Commission by Tokyo Express should be $20,000 (in lieu of the proposed $15,000). The first installment will remain $1,500; the next six installments will remain $2,250 for each six months for 36 months, for a subtotal of $15,000; and there will be two further installments of $2,500, each of which shall be due at six month intervals following the originally provided installment payments. These last two installments of $2,500 each will be due respectively, 42 months, and 48 months, following the approval by the Commission of the proposed settlement as herein modified. Thus, the effect of the revision approved herein will merely add two installment payments and Tokyo Express will have another year to pay.

Revocation of the existing license of Tokyo Express as an independent ocean freight forwarder would be an extreme sanction. Tokyo

Express has not evidenced an intent presently or in the future to engage in conduct violative of the Shipping Act. Rather, Tokyo Express has taken steps to comply with the Act. It further is concluded and found that revocation or suspension of Tokyo Express' ocean freight forwarder license is not warranted.

(S) CHARLES E. MORGAN
Administrative Law Judge

FEDERAL MARITIME COMMISSION

SPECIAL DOCKET NO. 919

APPLICATION OF PACIFIC WESTBOUND CONFERENCE ON BEHALF OF KOREA MARINE TRANSPORT CO., LTD. FOR THE BENEFIT OF MITSUI AND COMPANY (U.S.A.), INC.

Initial Decision denying permission to waive collection of a portion of freight charges reversed. Application for permission to waive collection of $143,610.40 from the shipper granted.

Open minimum established by Conference for individual rates of member carriers may not serve as basis for computing freight charges.

Carrier's consistent requests for the filing and application of rates at minimum level evince intent of having on file a rate matching the open minimum established by the Conference at any given time.

In order to avoid discrimination among shippers similar relief will be extended to earlier shipments.

Mark R. Weaver for Korea Marine Transport Co., Ltd.

Patricia Petzar for Pacific Westbound Conference.

REPORT AND ORDER

September 24, 1982

BY THE COMMISSION: (ALAN GREEN, JR., *Chairman*; THOMAS F. MOAKLEY, *Vice Chairman*; JAMES JOSEPH CAREY, RICHARD J. DASCHBACH AND JAMES V. DAY, *Commissioners*)

This proceeding, instituted pursuant to the provisions of section 18(b)(3) of the Shipping Act, 1916 (46 U.S.C. § 817(b)(3)), and Rule 92(a) of the Commission's Rules of Practice and Procedure (46 C.F.R. § 502.92(a)), is before the Commission on Exceptions filed by Korea Marine Transport Co., Ltd. (KMTC) and the Pacific Westbound Conference (PWC) to the Initial Decision of Administrative Law Judge William Beasley Harris, denying permission to waive collection of $143,610.40 in freight charges [1] on two shipments of woodpulp from Seattle, Washington to Kaohsiung, Taiwan.

[1] Pacific Westbound Conference Local and Overland Tariff No. 11-FMC 19.

BACKGROUND

Effective February 1, 1981, PWC opened its rate on woodpulp thereby permitting individual carriers to establish their own rates, subject to a specified minimum established by the Conference.[2] On March 31, 1981 KMTC, a PWC member line, instructed PWC's tariff compiler to file a rate for woodpulp to Kaohsiung/Keelung at the minimum level allowed by the Conference of $51.00 WT,[3] which was to become effective April 1, 1981. Due to error, no such rate was filed until April 7, 1982, when a tariff supplement showing a rate of $67.00 WT was filed by PWC on behalf of KMTC.[4]

The Mitsui and Company (U.S.A.), Inc. shipments at issue moved on December 5, 1981. In the absence of a specific commodity rate, freight charges in the amount of $196,023.60 were assessed on the basis of the PWC "Cargo NOS" rate of $250.00 W/M. Mitsui prepaid $52,413.20, computed on the basis of a $64.00 WT rate, which reflected the open minimum in effect at the time of shipment. KMTC now seeks permission to waive collection of the remaining balance of $143,610.40.

The application furthermore seeks permission:

> to waive the assessment of the "Cargo NOS" rate of $250.00 WT erroneously applicable to Kaohsiung/Keelung from the dates of April 1 through July 4, 1981 (when the rate should have been $51.00 WT), July 5, 1981 through October 31, 1981 (when the rate should have been $53.00 WT), and November 1, 1981 through March 31, 1982 (when the rate should have been $64.00 WT), and April 1, through April 5, 1982 (when the rate should have been $67.00 WT, the error being corrected on April 6, 1982), per 17th revised page 835.

DISCUSSION

Section 18(b)(3) grants the Commission discretion to permit a carrier or conference of carriers to waive collection of a portion of the freight charges payable under the tariff in effect at the time of shipment where it appears that there is an error in the tariff due to inadvertence in failing to file a new tariff, provided, that prior to applying for a refund or waiver, the carrier filed a tariff upon which such refund or waiver would be based, that the application be timely filed and that grant of a waiver will not result in discrimination among shippers.[5]

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[2] 10th Rev. Page No. 285, effective February 1, 1981.

[3] Individual rates are filed by PWC on behalf of its members in separate supplements to the tariff.

[4] The open minimum of $48.00 WT for Woodpulp (Not over 1.56 m^3/KT), destination Kaohsiung/Keelung set by PWC on February 1, 1981, rose by April 1, 1982 to $67.00 WT.

[5] The Presiding Officer denied the application on the theory that there was a $64.00 rate on file on December 5, 1981, which obviated the need for a waiver. However, the $64.00 rate which appears in the tariff on 6th revised page 285A, effective November 15, 1981, was not a commodity rate but the minimum established by the Conference for rates to be filed by individual carrier members. Therefore, it cannot serve as a basis for computing freight. *Chevron Chemical International, Inc. v. Barber Blue Sea*

Continued

KMTC requested the filing of a $51.00 WT rate.[6] The application seeks a waiver on the basis of a $64.00 WT rate. The corrected tariff sets forth a rate of $67.00 WT. The issue therefore becomes what was the rate KMTC intended to have on file before the shipments moved, and whether the corrected tariff reasonably reflects that rate.

It should be noted that subsequent to the Conference opening its rate on woodpulp, KMTC requested the filing of a rate at the level of the open minimum in effect on March 31, 1981, *i.e.* $51.00 WT. Likewise, the $64.00 WT rate KMTC now seeks permission to apply, matches the minimum in effect on December 5, 1981, the date the shipment moved.[7] This indicates KMTC's intent to take advantage of the open rate provision by having on file a rate at the minimum level allowed by the Conference at the time of shipment.

With respect to the $67.00 WT rate which appears in the amended tariff, the application states that it includes a 10% general rate increase which went into effect in April, 1982. Under Rule 3.1.2 of the conference tariff,[8] this increase was inapplicable to cargo received by a conference carrier prior to the effective date of the increase. The shipments here moved on December 5, 1981. Applying the provisions of the rule, and disregarding the general rate increase, the rate set forth in the amended tariff amounts, therefore, to $64.00, the rate upon which the request for a waiver is based.

Even disregarding the general rate increase, the waiver would be based on a $53.00 or $64.00 rate (after the incorporation of the bunker surcharge),[9] but not on the $51.00 rate originally requested to be filed by KMTC. However, in *Nepera Chemical, Inc. v. Federal Maritime Commission*, 662 F.2d 18 (D.C. Cir. 1981), the court, in reversing the Commission's denial of a waiver, noted that while the corrected tariff

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Line, 20 F.M.C. 594 (1978); *Petition for Reconsideration denied*, 20 F.M.C. 806 (1978); *affirmed without opinion sub nom. Chevron Chemical International, Inc. v. FMC*, 600 F.2d 279 (D.C. Cir. 1979) (Table). He also denied the request for waivers relating back from April 1, 1981, to April 5, 1982, on the basis of the 180-day limitation of section 18(b)(3) for applying for refunds and waivers.

[6] The tariff page which set forth the $51.00 open minimum, also projected an increase in this minimum to $53.00, effective July 2, 1981. KMTC thus was on notice that the $51.00 rate would no longer be applicable on July 2, 1981. *Furthermore, as explained in the application*, the open minimum of $64.00 in effect at the date of shipment does not represent an increase in the $53.00 minimum, but results from the incorporation of $11.00 from the bunker surcharge of $13.00 which was then in effect. 13th rev. page 285 effective April 1, 1981. This reduced the bunker surcharge to $2.00. Freight computed on the basis of either $53.00, plus $13.00 bunker surcharge per ton, or $64.00, plus a $2.00 bunker surcharge yields the same amount.

[7] While KMTC had no rate for woodpulp to Kaohsiung/Keelung it has had a rate on file to Busan since February 1, 1981. The rate to Busan shows increases which reflect the Conference's open minimum from $48.00 on February 1, 1981, to $51.00 on April 1, 1981, to $53.00 on July 2, 1981, to $64.00 on November 1, 1981 and to $67.00 by April 1, 1982. *Thus, the changes in the rates to Busan would* also confirm the intent of the carrier to take advantage of the minimum level established by the Conference for *filing an independent rate*.

[8] 5th Rev. Page 58, effective August 1, 1979.

[9] See note 6, *supra*.

must reflect a rate "which was intended to be applicable by both shipper and carrier," the legislative history of section 18(b)(3) is "silent on the issue of whether the intended and filed rates need be precisely equivalent." Although mindful that the remedy not be used as a means for obtaining rebates or result in discrimination among shippers, the court suggested that in view of its remedial purpose the statute should be given a reasonable construction.[10]

In conclusion, it appears that from April 1, 1981 KMTC intended to have a rate on file which would meet the Conference's open minimum, which at the time of the shipment here was set at $64.00 and that, after the deduction of the 10% general rate increase from the $67.00 rate, the amended tariff does set forth the rate of $64.00, as intended. *Japan Line (USA) Ltd., for the Benefit of Nomura (America) Corp.*, 22 F.M.C. 825 (1980). Hence, the requirements of the statute have been met.

Finally, in order to avoid any discriminatory treatment of shippers, the rate upon which the waiver is based is made applicable to shipments which took place at the time the rate should have been filed. *See Application of Pacific Westbound Conference on Behalf of Sea-Land Service, Inc., for the Benefit of Minnesota Minning & Manufacturing Co.*, 21 S.R.R. 793 (1982). As explained, the rate set forth in the amended tariff reflects the $53.00 minimum which went into effect on July 5, 1981. This $53.00 rate represents a $2.00 projected increase over the $51.00 minimum in effect on April 1, 1981, which KMTC had requested be filed. Consequently, the rate upon which the waiver is based will relate back to April 1, 1981.

THEREFORE, IT IS ORDERED, That the Exceptions of Pacific Westbound Conference are granted;

IT IS FURTHER ORDERED, That the Initial Decision issued in this proceeding is reversed;

IT IS FURTHER ORDERED, That Korea Marine Transport Co., Ltd. is granted permission to waive collection from Mitsui and Company (USA), Inc., of $143,610.40 of the freight charges payable on the two shipments of woodpulp which moved on December 5, 1981.

IT IS FURTHER ORDERED, That the Pacific Westbound Conference shall promptly publish in its tariff as a supplement on behalf of Korea Marine Transport Co., Ltd., the following notice:

> Notice is hereby given, as required by the decision of the Federal Maritime Commission in Special Docket No. 919 for the purposes of refund or waiver of freight charges on any

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[10] See note 6 *supra*. There is no reason to believe that the waiver here has been requested as a means of obtaining rebates. The carriers were free to establish their own rates within the open minimums in effect from time to time which were well below the previous Conference rate of $94.00. The $64.00 rate which appears in the amended tariff reflects, as mentioned, the $53.00 rate, the open minimum in effect on July 5, 1981.

shipments of woodpulp (not over 1.56 m^3K/T) to Kaohsiung/Keelung, from April 1, 1981, through July 4, 1981, the rate is \$51.00 WT; from July 5, 1981, through October 31, 1981, the rate is \$53.00 WT; from November 1, 1981 through March 31, 1982, the rate is \$64.00 WT; and from April 1, 1982 through April 6, 1982 the rate is \$67.00 WT, applicable to KMTC, subject to all applicable rules, regulations, terms and conditions of said rate and this tariff.

FINALLY, IT IS ORDERED, That this proceeding is discontinued.

(S) FRANCIS C. HURNEY
Secretary

FEDERAL MARITIME COMMISSION

DOCKET NO. 82-17

INTERNATIONAL HARVESTER COMPANY

v.

SOUTH AFRICAN MARINE CORP., LTD.

NOTICE

October 4, 1982

Notice is given that no exceptions have been filed to the August 30, 1982 initial decision in this proceeding and the time within which the Commission could determine to review that decision has expired. No such determination has been made and accordingly, that decision has become administratively final.

(S) JOSEPH C. POLKING
Assistant Secretary

FEDERAL MARITIME COMMISSION

DOCKET NO. 82-17

INTERNATIONAL HARVESTER COMPANY

v.

SOUTH AFRICAN MARINE CORPORATION, LTD.

Complainants, a shipper and freight bill auditor, alleged that respondent carrier overcharged the shipper on two shipments of automobile parts for assembly in violation of section 18(b)(3) of the Shipping Act, 1916, for which complainant shipper seeks $21,385.97 in reparation. Complainants allege that respondent failed to rate the individual boxed packages of each shipment under a low special boxed rate of $84.75 per cubic meter but either charged the entire shipment under an unboxed rate of $109.25 or portions of one shipment under a higher boxed rate of $91.25. Respondent contended that it followed the bill of lading descriptions, that the claims had been filed too late under the tariff rule, that complainant shipper had not shown it had paid the freight, that the two shipments were not completely boxed, and that the tariff did not clearly allow rating by individual boxed portions. It is *held*:

(1) Respondent's preliminary defenses that the tariff barred claims submitted more than six months after shipment, that the bill of lading descriptions governed, and that complainant shipper had not shown proof of payment of the freight are not valid as a matter of law or, as to the last defense, because complainants submitted proof of payment by the shipper;

(2) The tariff item in question governing the commodities shipped is more reasonably read to mean that shipments consisting of pieces or packages of automobile parts for assembly should be rated by boxed and unboxed portions and assessed the boxed and unboxed rates respectively. Even respondent, when the bill of lading so broke down the shipments, rated them in that fashion on one shipment. Even if the tariff did not clearly show that the shipments should be so broken down, respondent's inability to clarify the tariff item shows that the tariff is ambiguous, in which case the law has always held that the ambiguity must be construed against the carrier, not the shipper;

(3) The best available calculation of the overcharge is $21,385.97. Reparation is awarded in that amount with interest as calculated under the Commission's General Order 16, Amendment 40, 46 CFR 502.253.

Russell S. Ragsdell for complainants.

David A. Brauner for respondent.

INITIAL DECISION [1] OF NORMAN D. KLINE, ADMINISTRATIVE LAW JUDGE

Finalized October 4, 1982

This case began with the filing of a complaint which was served on March 18, 1982. Complainant, International Harvester Company (IHC), is a manufacturer of truck parts with a home office in Chicago, Illinois. Complainant, Continental Freight Data Systems, Inc., (CONDATA), is a freight bill auditing firm located at South Holland, Illinois. Complainants alleged that respondent South African Marine Corporation, Ltd. (Safmarine), a carrier by ocean vessel, transported two shipments of truck parts for assembly from Baltimore, Maryland, to Durban, South Africa, in May and July of 1980 on respondent's vessels *Iktinos* and *Ghikas* respectively and overcharged the shipments, in violation of section 18(b)(3) of the Shipping Act, 1916 (the Act). Complainants originally calculated the alleged overcharge to be $22,497.76 but later amended this amount, first to $22,370.97, and finally, to $21,385.97, upon which last figure they now rest. Complainants requested that the complaint be handled under the shortened procedure set forth in Subpart K of the Commission's Rules of Practice and Procedure, 46 CFR 502.181 *et seq.* In support of their complaint, complainants attached various documents consisting of claim forms prepared by CONDATA, bills of lading, invoices of forwarding charges, seller's invoices, and packing lists.

In response to the complaint, respondent Safmarine filed an answering memorandum of facts and arguments on April 6, 1982. Respondent agreed to the use of the shortened procedure. In addition, respondent contended that it had no knowledge of the actual nature of the goods shipped except as reflected on the shipping documents prepared by complainants. Respondent cited its tariff rule (Article 16 of the U.S. South and East Africa Conference Southbound Tariff No. 6, F.M.C. No. 8) by which respondent is not obligated to consider claims based on alleged rating errors if the claims are presented after the shipment leaves the custody of the carrier or if claims are submitted more than six months from date of shipment. (However, respondent noted that its tariff notifies shippers of their rights to file complaints with the Commission within the statutory two-year period provided by section 22 of the Act.) Respondent also contended that its tariff provides that the commodity description set forth in the bill of lading shall determine the rate to be applied.

In addition to the above contentions, respondent asserted several affirmative defenses. First, respondent contended that complainants had

[1] This decision will become the decision of the Commission in the absence of review thereof by the Commission (Rule 227, Rules of Practice and Procedure, 46 CFR 502.227).

failed to show that they paid the freight because they had failed to provide paid freight bills as required by Rule 186, 46 CFR 502.186. Second, respondent contended that complainants were seeking to have the two shipments rated under a special rate for completely boxed automobiles, knock down, of $84.75 per cubic meter, instead of the rate applicable to unboxed automobiles which was $109.25 per cubic meter. Respondent, citing the packing lists submitted with the two shipments, contended that the shipments contained were not completely boxed since both of them contained portions consisting of unboxed bundles of rails as well as boxed truck parts. Therefore, according to respondent, the special lower rate of $84.75 as well as another special boxed rate of $91.25 for boxed automobiles and parts would not apply because the shipments cannot be broken down into their boxed and unboxed portions under the tariff but must be considered as an entirety, in which case neither shipment was completely boxed. Respondent also cited another tariff rule (Note 4 to the special rates) which further requires that shipments must be completely boxed on skids and so noted on the dock receipt and bill of lading, requirements that were not met as to the two shipments in question. In short, respondent argued that the two shipments were not completely boxed and therefore were not entitled to either of the two lower special rates for boxed automobiles and parts, $84.75 or $91.25. Before I could proceed to the merits of the ultimate issue concerning whether the shipments or any portion of them were entitled to either of the two lower rates for boxed automobiles and parts, it was necessary to clear the case of several preliminary technical problems and to ensure that the record was adequately developed at minimal cost and delay in the spirit of the shortened procedure which both parties had requested.

RESOLUTION OF PRELIMINARY TECHNICAL ISSUES

The preliminary technical issues arose from the complaint and answering memorandum. They dealt with the following matters: (1) respondent's defense that the claims had been submitted more than six months after date of shipment; (2) respondent's defense that its tariff provides that the description on the bill of lading determines the rate to be applied; (3) complainants failure to provide paid freight bills as evidence of payment of freight; and (4) the unclear status of CONDATA, a freight auditing firm, which had not paid the freight, as a complainant in the case. These matters can be quickly resolved and dismissed so that the matter can proceed to the essential question concerning the proper rating of the goods shipped.

First, as to the defense that the claims were not submitted within six months after date of shipment, it is well settled that rules in tariffs restricting the time for claims to be submitted to carriers are not valid defenses in complaint cases before the Commission inasmuch as section

22 of the Act permits complaints to be filed within two years after the cause of action accrues. See, e.g., *Sun Co. v. Lykes Bros.*, 20 F.M.C. 67, 69 (1977); *Kraft Foods v. F.M.C.*, 538 F. 2d 445 (D.C. Cir. 1976); *Polychrome Corp. v. Hamburg-America Line*, 15 F.M.C. 220, 222 (1972); *Union Carbide Corp. v. Nippon Yusen Kaisha (N.Y.K. Lines)*, 24 F.M.C. 159, 162 (1981).[2]

Second, as to the defense that respondent's tariff requires the carrier to follow the commodity description on the bill of lading when rating the shipment, this may explain why a carrier believes that overcharge claims submitted after the goods have left the carrier's custody and cannot be re-examined are unfair but it does not bar a reparation claim under longstanding Commission precedent. As has been held in countless cases of this type, a shipper is entitled to show what was actually shipped notwithstanding bill of lading commodity descriptions or tariff rules requiring notations of one type or another to be inserted on bills of lading. *Sanrio Ltd. v. Maersk Line*, 23 F.M.C. 150, 159-164, 189 (1980); *Western Publishing Co. v. Hapag Lloyd AG*, 13 SRR 16, 17 (1972); *Sun Co. v. Lykes Bros.*, cited above, 20 F.M.C. at 69-70; *Durite Corp. Ltd. v. Sea-Land*, 20 F.M.C. 674, 675-676 (1978), affirmed under the name *Sea-Land Service, Inc. v. F.M.C.*, 610 F. 2d 1000 (D.C. Cir. 1979); *Cities Service International, Inc. v. Lykes Bros.*, 19 F.M.C. 128(1976); *Union Carbide Corporation v. American and Australian Steamship Line*, 17 F.M.C. 177, 178 (1973).

As to respondent's contention that complainants failed to provide paid freight bills as evidence that the shipper IHC paid the freight, complainants cured this problem by submission of evidence and explanations in response to my instructions issued in a preliminary ruling. (See Order to Supplement the Record, May 6, 1982, pp. 6-7 n. 2.) Because payment of freight by complainant or an assignment of the claim to complainant is a jurisdictional prerequisite if a complainant seeks reparation in an overcharge case, it is necessary that the record show that complainant so qualifies. See, e.g., *Sanrio, Inc. v. Maersk Line*, 19 SRR 907, 908 (1979), and the numerous cases cited therein; *3M v. Hapag-Lloyd*, 23 F.M.C. 352 (1980). Although the complaint alleged that IHC had been subjected to payment of the overcharge, the supporting evidence, which consisted of a forwarder's invoices to IHC purportedly covering the shipments involved, did not appear to correlate exactly with the amount of ocean freight due and paid. (See ruling cited above, p. 7 n. 2, and my letter of instructions dated June 29, 1982,

[2] Moreover, the Commission has recently issued a new regulation which will prohibit carriers from imposing time limits of six months or otherwise less than two years after the cause of action accrues for shippers desiring to file overcharge claims. Therefore, in the future the six-months' defense will no longer appear in these cases. See General Orders 13 and 38; Docket No. 81-51, Time Limit for Filing of Overcharge Claims; 25 F.M.C. 185 (1982).

p. 2.) In response to my instructions, complainants submitted additional evidence and explanations consisting of copies of the forwarder's debit memoranda to IHC and a further sworn statement explaining how the vouchers and invoices reflect payment. (See complainant's supplemental arguments and evidence, May 26, 1982, para. 2 and appendix 1; verified statement of Nils G. Wickstrom, received July 27, 1982, p. 1.) This evidence shows payment by IHC on IHC's vouchers of ocean freight for shipments listed on the forwarder's debit memoranda which show identical lot numbers as those shown on the packing lists and on IHC's invoices which accompanied the shipments in question. There is thus ample proof of payment of ocean freight for these shipments by IHC.

Fourth, as to the status of CONDATA, although CONDATA is not a shipper and did not pay the freight or obtain an assignment of the shipper's claim, it has standing to file a complaint alleging a violation of the Act. Any person may file such a complaint. See, e.g. *Cargill, Inc. v. Waterman Steamship Corporation*, 24 F.M.C. 442, 460 (1981); *Anglo Canadian Ship. Co., Ltd. v. Mitsui S.S. Co., Ltd.*, 4 F.M.B. 535, 539 (1955); *Ace Machinery Co. v. HapagLloyd*, 16 SRR 1258, 1262 (1976). However, CONDATA is not entitled to recover reparation if a violation has been shown, such reparation being due to the shipper. Moreover, as a corporation, the Commission's rules preclude CONDATA from representing IHC and since the only appearance entered for IHC is by an F.M.C. practitioner, Mr. Russell S. Ragsdell, who stated in the complaint that he was authorized to act on behalf of IHC, it appeared that CONDATA was not represented as well as being not entitled to recover reparation. See Rule 21(a), 46 CFR 502.21(a); *Wilmot Engineering Company v. United States Lines, Inc.*, 19 F.M.C. 403 (1976). To make a long story short, I advised CONDATA that under the circumstances I would either dismiss CONDATA as a party complainant or allow it to remain in the case as a complainant which was alleging a violation of the Act but was not seeking reparation. (See ruling of May 6, 1982, cited above, pp. 8-9.) In response to this ruling, CONDATA, through the registered F.M.C. practitioner, Mr. Ragsdell, agreed that it would be considered a nominal complainant which was not seeking reparation. (See complainant's supplemental arguments and evidence, May 26, 1982, para. 1.)

Having disposed of the four preliminary technical issues and problems, the matter is ripe for decision on the merits of complainants' contentions that portions of the two shipments were entitled to the lower of two special rates for boxed automobiles and parts.

DISCUSSION AND CONCLUSIONS

THE CONTENTIONS OF THE PARTIES

The main issue in this case is simply whether the two shipments which consisted of numerous boxes of truck parts for assembly plus several bundles of "rails" should have been rated only under an unboxed rate of $109.25 W/M (in practice, per cubic meter) or whether the shipments should have been broken down by their boxed and unboxed portions and assessed one of the lower special rates for boxed automobiles and parts, either $91.25 W/M or $84.75 W/M, as to the boxed portions. The question arises because respondent's tariff (United States/South and East Africa Conference South Bound Freight Tariff No. 6, F.M.C. No. 8) at the time of the shipments published three different rates for automobiles, trucks, etc. and parts for assembly as Item No. 350. (Copies of the relevant tariff pages in effect at the time of shipments are attached in the appendix to this Initial Decision for ready reference.) As seen by the tariff pages cited, the rate of $109.25 appears to apply to commodities described in Item No. 350 if they are "Unboxed" and are destined to ports in the "Capetown/Durban Range." As also seen from the tariff pages, however, a special rate of $91.25 applies to the commodity shipped if "Completely Boxed (Completely Knocked Down)" to the same range of ports and an even lower special rate of $84.75 applies to such "completely boxed" commodities "On quantities of 150 Metric tons or more" which are shipped "from one loading port to one discharge port from one shipper to one consignee." To make the matter more complex, the tariff also publishes four conditions, called "Notes," which appear to apply to all three rates. Thus, Note 1 states that the rates apply "on packages or pieces weighing up to and including 5080 KGS., each." Note 2 states: "Other than completely boxed must be assessed the unboxed rate." Note 3 states that "Accessories, Parts and Tires (when accompanying shipments of automobiles) will be assessed the completely boxed rate . . ."; and Note 4 states that "On K.D. Automobiles and Manufacturer's parts for assembly completely boxed on skids and so noted on Dock Receipt and Bill of Lading freight will be calculated on overall measurement less skids."

Complainants contend that the two shipments should be broken down by boxed and unboxed portions and that the boxed portions should be assessed the rate of $84.75 whereas the unboxed bundles should be assessed the unboxed rate of $109.25. They have done this for both shipments, calculated the total freight, including any additional charges such as heavy lift and bunker surcharge, and conclude that total freight on such basis amounts to some $21,385.97 less than what IHC actually paid on the two shipments. Accordingly they claim that respondent overcharged IHC by that amount for which IHC seeks reparation.

Respondent, in its first answering pleading, contended that the shipments should not be broken down into their boxed and unboxed portions for rating purposes. Respondent argued that Note 2 of the tariff item, cited above, stating that "other than completely boxed must be assessed the unboxed rate" means that the entire shipment must be completely boxed and that since each shipment contained some portions which were unboxed, the entire shipment should be assessed the unboxed rate of $109.25. Respondent also cited Note 4 providing that automobile parts for assembly completely boxed on skids and so noted on the dock receipt would be measured on overall measurement less skids. Respondent claimed that there was no evidence that either shipment was "completely boxed on skids" or that such notations were made on bills of lading or dock receipts. Complainants, in their supplemental arguments, of course disputed respondent's interpretations of the tariff and of Notes 2 and 4, contending that nothing in the tariff precluded rating the shipments by their boxed and unboxed portions and that Note 4 merely indicated how the carrier would determine measurement of a package of automobile parts on skids, i.e., that the shipper would not be charged for the cubic measurement of the skids. (See complainant's supplemental arguments, May 26, 1982, para. 3.) Complainants also contended that the lower special rate of $84.75 was properly applicable to the boxed portions of the shipments because, as the tariff required, both shipments exceeded 150 metric tons of boxed freight and both were consigned to one port of discharge (Durban) and were loaded at one port (Baltimore). (Id.)

In its final reply of May 27, 1982, submitted in response to my rulings of May 6, 1982, ordering supplemental arguments and evidence, as provided by Rule 184, 46 CFR 502.184, respondent appeared to be less certain of its argument that both shipments had to be completely boxed in all of their portions in order to qualify for either of the two lower special rates. Respondent acknowledged the fact that respondent itself had rated the two shipments inconsistently, rating the first (*Iktinos*) shipment by breaking out the boxed and unboxed portions, applying the $91.25 rate for the former portion and the $109.25 rate for the unboxed portion but rating the second shipment (*Ghikas*) merely by applying the unboxed rate of $109.25 to the entire shipment (674.426 cubic meters) without any breakdown.[3] Respondent noted, however, that on the first shipment, the bill of lading (on which the carrier presumably relied) had itself broken the shipment into boxed and unboxed portions whereas the bill of lading for the second shipment showed no such breakdown. However, because respondent itself had rated the first shipment apparently under complainants' interpretation (except for the application of the $91.25 special rate rather than $81.75 special rate) respondent made further inquiries, requesting a clarification of tariff Item No.

[3] In fairness to respondent, it should be pointed out that respondent noted that the bills of lading and shipping documents were filled out by claimant rather than respondent and that part of the confusion resulting in different methods of rating the two shipments may therefore have stemmed from the inconsistent descriptions contained in the bills of lading.

350 from the Chairman of the United States/South and East Africa Conference, Mr. Charles F. Fischer. Respondent received a letter of attempted clarification from Mr. Fischer, which stated that "each package or piece of the shipment must be considered separately so that the rating on a single bill of lading presumably could be split between boxed and unboxed commodities." However, Mr. Fischer went on to describe the purpose of Note 2 in such a way that "respondent confesses itself to be at this point uncertain itself as to the proper application of the tariff." (Respondent's supplemental submission, May 27, 1982, p. 3). To this statement, complainants respond by stating that Mr. Fischer's letter supports their contentions and note that respondent's own confessed uncertainty as to the meaning of the tariff demonstrates an ambiguity in the tariff which the Commission holds must be construed against the carrier. (Complainant's Response to Defendant's (sic) Supplemental Submission, July 27, 1982, p. 2.)

WHY COMPLAINANTS' CONTENTIONS ARE VALID

There are both facts in this case as well as principles of law that support complainants' argument that both shipments should have been rated by applying the boxed rate for the boxed portions of the shipments and the unboxed rates for the unboxed portions.

In point of fact, as noted above, respondent itself, when provided a filled-in bill of lading by the forwarder which showed that the shipment on the *Iktinos* consisted of "116 boxes" and "8 bundles," applied the special boxed rate of $91.25 to the boxed portion (787.049 cubic meters) and the unboxed rate of $109.25 to the unboxed portion (6.898 cubic meters.) (See bill of lading attached to the complaint as Exhibit "B", page 2.) On the second shipment (*the Ghikas*), when presented a bill of lading showing only "92 packages" and "674.426" cubic meters, respondent merely applied the unboxed rate of $109.25 per cubic meter to the total measurement of the undivided shipment, 674.426 cubic meters. This suggests that when respondent is informed that a portion of the shipment of automobile parts for assembly is in boxes, it will rate that portion under the boxed special rate. In other words, respondent's rating clerks may in practice accept the interpretation of Item No. 350 advocated by complainants as to separation of the shipment into boxed and unboxed portions.[4]

A second basis for concluding that both shipments should be rated by their boxed and unboxed portions is the opinion of Mr. Fischer, the

[4] It may be true that it is not the carrier's intent or practice which ultimately determines how a tariff is to be interpreted. Cf. *National Cable & Metal Co. v. American Hawaiian S.S. Co.*, 2 U.S.M.C. 470, 473 (1941); *Allied Chemical, S.A. v. Farrell Lines, Inc.*, 23 F.M.C. 375, 398 (1980). However, the fact that a carrier has, in effect, interpreted its tariff rule in a way which is against its own pecuniary interest by allowing a lower special boxed rate on a portion of the shipment lends support to complainants' arguments that such an interpretation is more reasonable than one contrary.

Conference Chairman, mentioned above. In his letter, as complainants have noted, Mr. Fischer twice indicated that shipments under tariff Item No. 350 should be rated by each individual package or piece as shown on the bill of lading. Thus, he states in relevant part: [5]

> In determining whether the "Completely Boxed" or the "Unboxeds" rate should apply *each package or piece* in the shipment must be considered separately. Thus, one ocean Bill of Lading may have some cargo under this Tariff item number rated as "Completely Boxed" and other freight rated as "Unboxed." (Emphasis in the original.)
>
> The stipulation under note 2--which reads "Other than Completely Boxed must be assessed the Unboxed rate" applies separately to each individual package or piece on the Bill of Lading.
>
> The note was originally placed in the Tariff to clarify the assessment or freight on set up vehicles which wer (sic) partially boxed.

A third basis indicating that the tariff item No. 350 contemplated rating shipments of automobiles and automobile parts for assembly by individual packages or pieces rather than by the shipment as an entirety is Note 1 in the tariff. As quoted earlier, this Note states that the rates apply "on packages or pieces weighing up to and including 5080 kgs., each." It is somewhat difficult to conceive how such a Note could reasonably be interpreted as applying to a gross shipment rather than to the "packages or pieces" which are the component parts of the shipment, especially with such a size limitation of only 5.080 metric tons. (The packing lists for the two shipments show that the total weight for each was several hundred thousand kilograms consisting of numerous packages or pieces weighing under 5,000 kilograms each.)

Finally, respondent cites Note 2 in the tariff, which states that "other than completely boxed must be assessed the unboxed rate." Respondent seems to find some confusion in Mr. Fischer's explanation of this Note, however. Because Mr. Fischer explained that the purpose of the Note was to clarify the assessment of freight on set up vehicles which were not completely boxed and because the subject shipments contained unboxed bundles of rails which were presumably parts of vehicles, respondent sees a problem in that each boxed vehicle or part in the shipments was not therefore completely boxed. I do not necessarily agree with respondent's analysis since the Note supposedly was designed to apply to "set up" vehicles, according to Mr. Fischer, not knock down vehicles and parts as the shipments appear to have com-

[5] The complete letter of Mr. Fischer is attached to respondent's supplemental submission dated May 27, 1982.

prised.[6] However, even if each supposedly boxed vehicle part cannot be considered completely boxed because some bundles of rails in the shipments were unboxed, thereby requiring every individual boxed vehicle or part thereof to be assessed an unboxed rate, such a result would not be permissible under applicable principles of law. First, it seems to represent a "strained and unnatural construction of the tariff" which one is not permitted to employ when applying tariffs. See, e.g., *Bulkley Denton Overseas, S.A. v. Blue Star Shipping Corp.*, 8 F.M.C. 137, 140 (1964); *Thomas G. Crowe et al. v. Southern S.S. et al.*, 1 U.S.S.B. 145, 147 (1929). Moreover, even if respondent's interpretation is not strained, respondent has confirmed the fact that tariff Item No. 350 with its various "Notes" and conditions is ambiguous, and it is ancient law that ambiguities in tariffs are construed against the carrier, not the shipper. See, e.g., *Bulkley Dunton Overseas, S.A. v. Blue Star Shipping Corp.*, 8 F.M.C. 137, 140 (1964); *Thomas G. Crowe et al. v. Southern S.S. Co. et al.*, cited above, 1 U.S.S.B. at 147; *Eli Lilly S.A. v. Mitsui O.S.K. Lines, Ltd.*, 24 F.M.C. 534, 537 (1982); *United States v. Hellenic Lines, Ltd.*, 14 F.M.C. 255, 260 (1971); *Sacramento-Yolo Port Dist. v. Fred F. Noonan Co., Inc.* 9 F.M.C. 551, 558 (1966); *Dow Corning Corp. v. Atlantic Container Line, Inc.*, 24 F.M.C. 14, 22 (1981) and the numerous cases cited therein.

On a number of grounds, therefore, I find that this record supports the conclusion that the two shipments rated under tariff Item No. 350 should be rated by individual pieces or packages and that for each piece or package that is boxed, either of two special rates ($91.25 or $84.75 per cubic meter) should apply, but for each piece or package that is unboxed, the unboxed rate of $109.25 per cubic meter applies. I find, furthermore, that of the two special lower rates for boxed pieces or packages, the shipments qualified for the lower of them, i.e., the rate of $84.75 per cubic meter. This is because the shipments moved from one loading port (Baltimore) to one port of discharge (Durban) and from one shipper International Harvester Company of Chicago, Illinois, to one consignee, International Harvester Company (S.A.) Pty. Ltd., of Durban, as the bills of lading show. Moreover, the shipments weighed more than 150 metric tons in their entirety, as the packing lists show. Thus, all the conditions set for the $84.75 rate have been met as shown in the tariff.

[6] It is possible that I may not have correctly understood respondent's apparent confusion as to Mr. Fischer's explanations as explained by respondent in its supplemental submission of May 27, 1982, p. 3. However, respondent appears to be so confused by its attempt to explain the purported confusion in Mr. Fischer's explanations that it confessed itself "uncertain itself as to the proper application of the tariff" and expressed no objection if I were to seek to unravel Mr. Fischer's explanations by going directly to Mr. Fischer.

CALCULATION OF THE AMOUNT OF OVERCHARGE AND REPARATION

Complainants originally alleged that IHC had been overcharged in the amount of $22,497.76. However, during the course of the proceeding it became clear that this figure was not sufficiently accurate. Accordingly, complainants recomputed the amount two more times and finally have calculated it as $21,385.97. This last amount appears to be the most accurate of the three calculations, has not been challenged by respondent, and considering the time and expense necessary to make further refinements, should suffice.[7]

The calculations supporting the figure of $21,385.97 as the total amount of overcharges for which reparation is sought on the two shipments is shown in detail in the record. (See Complainant's Response to Defendant's Supplemental Submission, received July 27, 1982.) For the first shipment on the *Iktinos*, the overcharge is shown as $5,115.84. The record shows that the only difference between complainants' calculations of freight due and those shown on respondent's bill of lading for this shipment is that respondent rated the boxed portion of the shipment at the higher boxed rate of $91.25 whereas complainants rated the boxed portion of the shipment at the lower boxed rate of $84.75 on the ground that the shipment moved from one shipper to one consignee and from one port of loading to one port of discharge, thereby qualifying under the tariff for the lower of the two special boxed rates, as I mentioned above. As for the rest of the charges (unboxed portion of the shipment, heavy lift, and bunker surcharge) the parties do not differ. The calculations are shown as follows:

[7] The first calculations of the overcharges were not sufficiently accurate because complainants had merely rated the entire cubic measurement of the shipments under the $84.75 rate without breaking the shipment down into boxed and unboxed portions. The second calculation was an improvement but it merely factored in the unboxed portion on the *Ghikas* shipment. On my inquiries and instructions, complainants calculated the overcharge a third time by accounting for the boxed and unboxed portions of both shipments. On the *Iktinos* shipment, complainants used the breakdowns shown on the bill of lading without re-measuring each package of the entire shipment of 124 packages by using the packing list dimensions for each package. On the *Ghikas* shipment, complainants had to use the packing list to re-measure seven unboxed bundles of rails because the bill of lading contained no breakdown but otherwise relied upon the total measurement for the 92 packages shown on the bill of lading. It is possible that had complainants re-measured all 92 packages by using the packing list, they may have arrived at a different total measurement than that shown on the bill of lading. However, as complainants explained in a supplemental sworn statement responding to my inquiries, such an exercise would take more time and cost more than it was worth in terms of possible refinements, and complainants were prepared to accept the bill of lading figures for total measurement. Similarly, to determine if a heavy lift charge was applicable to the *Ghikas* shipment merely because one was applied to the *Iktinos* shipment, as I had noted in my inquiries, by acquiring old tariff pages and re-measuring or re-weighing the entire *Ghikas* shipment would be time-consuming and out of proportion to any possible adjustment, assuming any adjustment were in fact necessary. (See verified statement of Nils G. Wickstrom, received August 17, 1982.) Respondent has not challenged these calculations and I advised all parties that unless I heard to the contrary, I would find that the last calculations were sufficiently reasonable. (See my letter to Messrs. Ragsdell and Brauner, dated August 13, 1982.)

Boxed Rate:	787.049 CBM	@ 84.75 per CBM	$66,702.40
Unboxed Rate (rails):	7.898 CBM	@ 109.25 per CBM	753.61
Heavy Lift	70.35 CBM	@ 3.90 per CBM	274.37
Bunker Surcharge:	793.947 CBM	@ 30.00 per CBM	23,818.41
		TOTAL CHARGE	$91,548.79
		TOTAL PAID:	$96,664.63
		CORRECTED TO:	91,548.79
		OVERCHARGE	$5,115.84

On the second shipment on the *Ghikas*, complainants measured the portion of the shipment consisting of unboxed bundles of rails, taking the measurement data from the packing list because the bill of lading did not break the shipment down into boxed and unboxed portions. They determined that the unboxed portion of the shipment measured 10.339 CBM and applied the unboxed rate of $109.25 per CBM to that portion. They subtracted that portion from the total cubic measurement shown on the bill of lading for the shipment (674.426 CBM) and applied the lower boxed rate of $84.75 per CBM to the remainder of the shipment which consisted of boxed packages. There was no heavy lift charge shown on the bill of lading for this shipment. The result was a calculation of overcharge amounting to $16,270.13 as shown below:

Boxed Rate:	664.087 CBM	@ 84.75 per CBM	$56,281.37
Unboxed Rate (rails):	10.339 CBM	@ 109.25 per CBM	1,129.54
Bunker Surcharge:	674.426	@ 29.00 per CBM	19,558.35
		TOTAL CHARGE	$76,969.26
		TOTAL PAID:	$93,239.39
		CORRECTED TO:	76,969.26
		OVERCHARGE	$16,270.13

TOTAL OVERCHARGES	
Iktinos shipment:	$5,115.84
Ghikas shipment :	16,270.13
	$21,385.97

In view of the passage of time since the shipments occurred and consequent dispersal of the goods shipped, I find reliance on the bills of lading and packing list to compute the amount of overcharge to be reasonable and that further attempts to refine these amounts by even more calculations for the sake of relatively minimal adjustments to be more costly and burdensome than would be justified, as I explained in footnote 7 above. Accordingly, I conclude that respondent Safmarine has overcharged the shipper-complainant, International Harvester Company, in the amount of $21,385.97. In accordance with the Commission's standing regulation, respondent shall therefore pay IHC such amount together with interest computed under the formula provided by that regulation. See General Order 16, Amdt. 40; 46 CFR 502.253, 24 F.M.C. 145 (1981).[8]

(S) NORMAN D. KLINE
Administrative Law Judge

[8] The regulation cited provides that simple interest will accrue from "date of payment of freight charges to the date reparations are paid." It also provides that "[t]he rate of interest will be calculated by averaging the monthly rates on six-month U.S. Treasury bills commencing with the rate for the month that freight charges were paid and concluding with the latest available monthly Treasury bill rate at the time reparations are awarded." The Commission also stated that where facts are not reasonably ascertainable, parties could settle overcharge cases, in which case the amount of interest could be left to the parties. See 24 F.M.C. at 149, and the text of 46 CFR 502.253.

APPENDIX

UNITED STATES/SOUTH AND EAST AFRICA CONFERENCE	Revision	Page
	First	161
SOUTH BOUND FREIGHT TARIFF NO. 6 F.M.C. NO. 8	Cancels	Page
FROM: United States Atlantic and Gulf Ports	Original	161
TO: Ports in Southwest, South, Southeast and East Africa and the Islands of Malagasy Republic (Madagascar), Reunion, Mauritius, Comoros, Ascension, Seychelles, St. Helena, as named herein	Effective Date	
	March 1, 1980	
UNLESS OTHERWISE HEREIN PROVIDED RATES APPLY PER CUBIC METER OR 1000 KILOS, WHICHEVER PRODUCES THE GREATER REVENUE	Correction	566

C—DENOTES "CONTRACT" RATES S—DENOTES "SINGLE" RATES
(SEE RULE 14 FOR "NON-CONTRACT" RATES)

UNLESS OTHERWISE SPECIFICALLY INDICATED RATES SHOWN HEREIN APPLY TO CAPETOWN. FOR APPLICATION OF RATES TO OTHER PORTS WITHIN THE SCOPE OF THIS TARIFF SEE PAGE 6

COMMODITY CODE	COMMODITY DESCRIPTION AND PACKAGING	TYPE	RATE BASIS	CAPE TOWN	ITEM NO.
	A—Continued				
	AUTOMOBILES, PASSENGER AND COMMERCIAL *				
	(Subject to Notes 1, 2, 3 and 4)				350
	Completely Boxed:				
	+Capetown/Durban Range	C		91.25	
	+SPECIAL RATE				
	Completely boxed (Completely Knocked Down) Capetown/Durban Range On quantities of 150 Metric tons or more. Rate applies from one loading port to one discharge port from one shipper to one consignee. Subject to Tariff Rules and Regulations	C		84.75	
	Unboxed: *				
	+Capetown/Durban Range	C		109.25	

* — Freight to be assessed on overall measurement less bumpers.

\+ — Usual differentials to other ports as shown on Page 6.

NOTE 1: Rates apply on packages or pieces weighing up to and including 5080 KGS., each

NOTE 2: Other than completely boxed must be assessed the unboxed rate.

NOTE 3: Accessories, Parts and Tires (when accompanying shipments of automobiles) will be assessed the completely boxed rate, but subject to carriage at risk of cargo and Bill of Lading to be claused "Unprotected at shippers risk."

NOTE 4: On K.D. Automobiles and Manufacturer's parts for assembly completely boxed on skids and so noted on Dock Receipt and Bill of Lading freight will be calculated on overall measurement less skids.

This is an all inclusive classification and embraces Automobiles; Bodies; Trucks; Buses; Chasis; Trailers; Truck or Truck Tractor Type and Dump Trucks.

A — Increase

APPENDIX

UNITED STATES/SOUTH AND EAST AFRICA CONFERENCE		Revision	Page
		Second	161
SOUTH BOUND FREIGHT TARIFF NO. 6	F.M.C. NO. 8	Cancels	Page
FROM: United States Atlantic and Gulf Ports		First	161
TO: Ports in Southwest, South, Southeast and East Africa and the Islands of Malagasy Republic (Madagascar), Reunion, Mauritius, Comoros, Ascension, Seychelles, St. Helena, as named herein		Effective Date: June 24, 1980	
UNLESS OTHERWISE HEREIN PROVIDED RATES APPLY PER CUBIC METER OR 1000 KILOS, WHICHEVER PRODUCES THE GREATER REVENUE		Correction	1043

C—DENOTES "CONTRACT" RATES S—DENOTES "SINGLE" RATES
(SEE RULE 14 FOR "NON-CONTRACT" RATES)

UNLESS OTHERWISE SPECIFICALLY INDICATED RATES SHOWN HEREIN APPLY TO CAPETOWN. FOR APPLICATION OF RATES TO OTHER PORTS WITHIN THE SCOPE OF THIS TARIFF SEE PAGE 6

COMMODITY CODE	COMMODITY DESCRIPTION AND PACKAGING	TYPE	RATE BASIS	CAPE TOWN	ITEM NO.
	A—Continued				
	AUTOMOBILES, PASSENGER AND COMMERCIAL*				
	(Subject to Notes 1, 2, 3 and 4)				
	Completely Boxed:				
	+Capetown/Durban Range	C		91.25	
	+SPECIAL RATE				
	Completely boxed (Completely Knocked Down) Capetown/Durban Range On quantities of 150 Metric tons or more. Rate applies from one loading port to one discharge port from one shipper to one consignee. Subject to Tariff Rules and Regulations	C		84.75	
	Unboxed:*				
	+Capetown/Durban Range	C		109.25	

* — Freight to be assessed on overall measurement less bumpers.
\+ — *Usual differentials to other ports as shown on Page 6.*

NOTE 1: Rates apply on packages or pieces weighing up to and including 5080 KGS., each

NOTE 2: Other than completely boxed must be assessed the unboxed rate.

NOTE 3: Accessories, Parts and Tires (when accompanying shipments of automobiles) will be assessed the completely boxed rate, but subject to carriage at risk of cargo and *Bill of Lading to be claused "Unprotected at* shippers risk."

NOTE 4: *On K.D. Automobiles and Manufacturer's parts for assembly* completely boxed on skids and so noted on Dock Receipt and Bill of Lading freight will be calculated on overall measurement less skids.

This is an all inclusive classification and embraces Automobiles; Bodies; Trucks; Buses; Chasis; *Trailers; Truck or Truck Tractor Type and Dump Trucks.*

• SPECIAL RATE (R)

Truck — Weigh. approx. 7420 Kgs. & meas. approximately 44.690 CBM each.
Truck — Weigh. approx. 11,360 Kgs. & meas. approximately 50.505 CBM each.
• NOTE: *Subject to ten percent (10%) reduction off Tariff Rate & fifteen percent* (15%) reduction off Heavy Lift & Long Length charges applicable at *time of shipment.* To Dar-es-Salaam Only — (Eff. thru 9/22/80)

FEDERAL MARITIME COMMISSION

DOCKET NO. 77-7

AGREEMENT NOS. 9929-6, 10266-3 AND 10374

ORDER OF FURTHER INVESTIGATION AND HEARING

October 6, 1982

Agreement No. 9929-5, which was the subject of the earlier investigation and hearing in this proceeding, had two distinct parts. Part I called for the joint operation of a LASH and conventional vessel service by Hapag-Lloyd, A.G. (Hapag-Lloyd), Intercontinental Transport B.V. (ICT) and Compagnie Generale Maritime (CGM) (Proponents). This service was to be known as "Combi Line." Part II of the Agreement would have authorized Proponents to cross-charter container space from one another on any and all vessels separately operated by them in the trade. Because Agreement No. 9929-5 did not adequately reflect the distinct activity proposed by Proponents, the Commission divided it into separate agreements. Part I, the Combi Line Joint LASH service between Hapag-Lloyd and ICT became Agreement No. 9929-6; and Part II which authorized the cross-charter container arrangement among Hapag-Lloyd, ICT and CGM became Agreement No. 10374. The Commission's order approving Agreement No. 10374 authorized Hapag-Lloyd on the one hand and ICT/CGM, on the other hand to exercise separate votes in any conference or rate agreement of which they might be members.

On review, the U.S. Court of Appeals for the District of Columbia Circuit found, *inter alia*, that the voting provision authorized by the Commission's order appeared to expand the scope of anticompetitive authority proposed by the Proponents. While recognizing the Commission's statutory authority to modify a proposed agreement, the court held that modifications which expand the anticompetitive authority contemplated by Proponents must be preceded by notice and opportunity for hearing. *Sea-Land Service, Inc. v. FMC*, 653 F.2d 544 (D.C. Cir. 1981). The court remanded the proceeding in part because the factual record with respect to voting did not adequately support the contention that multiple voting restricted the scope of Agreement No. 10374.

By Order served October 9, 1981, the Commission, in response to the court's remand, directed the parties to this proceeding to, address:

> Whether, in light of its own structure and the structure of Agreement Nos. 9929-6 and 10266-3, Agreement No. 10374 should provide that Hapag Lloyd, on the one hand, and ICT/CGM, on the other hand, shall exercise separate votes in

> conferences or rate agreements with respect to their respective container services, and the impact on competition in the trades of such a provision. Submissions by the parties on this issue should include, if possible, a discussion as to how Hapag and ICT/CGM have voted on conference and rate agreement decisions regarding container services since Agreement No. 10374 was given final approval by the Commission on December 28, 1979;

Although the proceeding on remand was limited to the submission of affidavits of fact and memoranda of law on the impact of the voting provisions, the parties were given the opportunity to submit recommendations as to the necessity for further proceedings and form that they should take. After reviewing the submissions of the parties, the Commission has concluded that further evidentiary hearings are required.

The issue to be resolved with respect to voting is whether the members of Agreement No. 10374 have an identity of interest when measured against the guidelines established by the Commission in *Johnson Scanstar, Agreement No. 9973-3*, 21 F.M.C. 218 (1978). Whether the *Johnson Scanstar* factors exist here is primarily a factual dispute which cannot be resolved from the face of the documents submitted by the parties. Moreover, none of the submissions provide any probative evidence which would show whether the parties to Agreement No. 10374 have, in fact, engaged in bloc voting. Accordingly, a further hearing will be instituted on the voting issue.

THEREFORE, IT IS ORDERED, That pursuant to sections 15 and 22 of the Shipping Act, 1916 (46 U.S.C. §§ 814, 821) an investigation is hereby instituted to determine whether Agreement 10374 should be modified to provide that the parties to that agreement can exercise only a single vote in any conference or rate agreement in the trades covered by Agreement No. 10374;

IT IS FURTHER ORDERED, That this matter be assigned to an Administrative Law Judge for public hearing and decision within the time limitations of Rule 61 of the Commission's Rules of Practice and Procedure (46 C.F.R. § 502.61) at a date and place to be hereafter determined by the Administrative Law Judge. This hearing shall include oral testimony and cross-examination in the discretion of the Presiding Officer only upon a proper showing that there are genuine issues of material fact that cannot be resolved on the basis of sworn statements, affidavits, depositions, or other documents, or that the nature of the matters in issue otherwise requires an oral hearing and cross-examination for the development of an adequate record;

IT IS FURTHER ORDERED, That notice of this Order be published in the *Federal Register* and that a copy thereof be served upon all parties of record;

IT IS FURTHER ORDERED, That other persons having an interest in participating in this proceeding may file petitions for leave to intervene in accordance with Rule 502.72 of the Commission's Rules (46 C.F.R. § 502.72);

IT IS FURTHER ORDERED, That all future notices, orders, or decisions issued in this proceeding, Including notice of the time and place of hearing or prehearing conference, be mailed directly to all parties of record; and

IT IS FURTHER ORDERED, That all documents submitted by any party of record in this proceeding shall be directed to the Secretary, Federal Maritime Commission, Washington, D.C. 20573, in accordance with section 502.118 of the Commission's Rules of Practice and Procedure (46 C.F.R. § 502.118) as well as being mailed directly to all other parties of record.

By the Commission.*

(S) JOSEPH C. POLKING
Assistant Secretary

Commissioner Richard J. Daschbach, dissenting.

This is yet another agonizing step in a case in which the Commission by a 3-2 vote (Commissioners Daschbach and Day dissenting) totally rewrote the presiding Administrative Law Judge's well-reasoned and legally sound initial decision. Judge Stanley M. Levy's January 30, 1979 Order, to which no exceptions were filed, *inter alia*, embodied a compromise between the proponents and protestants of the relevant agreements.

The Commission majority's June 5, 1979 decision pursuing some nebulous and nonsensical theory of procedural and philosophical purity has resulted in over three torturous years of legal wrangling. For what purpose?

I dissent.

* Commissioner Richard J. Daschbach's dissent is attached.

FEDERAL MARITIME COMMISSION

DOCKET NO. 82-20

COMBI LINE JOINT SERVICE

(AGREEMENT NO. 9929)

ORDER OF DISCONTINUANCE

October 6, 1982

Agreement No. 9929 is a cooperative working arrangement between Hapag-Lloyd A.G. and Intercontinental Transport, B.V., two common carriers by water in the foreign commerce of the United States. It authorizes the parties to conduct a two-vessel LASH joint service trading in the name of "Combi Line" between Europe and the United States Gulf Coast.

On March 24, 1982 the Commission issued an Order directing the parties to Agreement No. 9929 to show cause why that Agreement should not be cancelled pursuant to section 15 of the Shipping Act, 1916 (46 U.S.C. § 814) because it was inactive and, as a result, no longer represented an active working arrangement between the parties nor met a serious transportation need, important public benefit or valid regulatory purpose.

In response to the Commission's Order to Show Cause, the parties filed an amendment, Agreement No. 9929-7, terminating Agreement No. 9929 effective April 30, 1982. Agreement No. 9929-7 was approved pursuant to delegated authority on June 11, 1982.

THEREFORE, IT IS ORDERED, That this proceeding is discontinued.

By the Commission.

(S) JOSEPH C. POLKING
Assistant Secretary

FEDERAL MARITIME COMMISSION

DOCKET NO. 81-57

TRACTORS AND FARM EQUIPMENT, LTD.

v.

WATERMAN STEAMSHIP CORP. AND COSMOS SHIPPING COMPANY

ORDER ON APPEAL

October 8, 1982

This proceeding was initiated upon the complaint of Tractors and Farm Equipment, Ltd. against Waterman Steamship Corporation and Cosmos Shipping Company, Inc. alleging violations of sections 14 Fourth and 44 of the Shipping Act, 1916 (46 U.S.C. § 812, and § 841(b)) and section 121 of the Bills of Lading Act, (49 U.S.C. § 812).[1] Complainant seeks reparations in the amount of $618,941.12.

On April 1, 1982, Administrative Law Judge Norman D. Kline issued a decision wherein he granted Cosmos' Motion to Dismiss.[2] Tractors filed an appeal to this ruling to which Cosmos replied.[3]

THE PRESIDING OFFICER'S RULING

The Presiding Officer found that section 22 of the Shipping Act, 1916, (46 U.S.C. § 821) does not provide Complainant with a "right of action" for alleged violations of section 44 of the Act.[4] (Ruling at 24). He held that section 44 is a licensing provision which does not proscribe any activity, amenable to a section 22 complaint, "other than perhaps operating without a license or bond." (Ruling at 28).

[1] The original complaint alleged only Bills of Lading Act violations. The Shipping Act allegations are set forth, albeit inartfully, in a September 14, 1981 letter from Complainant to the Commission's Secretary. At a prehearing conference held on January 26, 1982, the Presiding Officer accepted the September 14 letter and Complainant's explanations of its allegations as an amendment to the original complaint.

[2] Cosmos' Motion to Dismiss was originally denied by Administrative Law Judge Paul Fitzpatrick at a prehearing conference held on January 26, 1982. Shortly thereafter, Judge Fitzpatrick left the Commission and the proceeding was reassigned to Judge Kline. Judge Kline, in considering Cosmos' request for leave to appeal Judge Fitzpatrick's ruling denying its Motion to Dismiss, reviewed the merits of the Motion. Upon review, Judge Kline reversed Judge Fitzpatrick's January 26 ruling and dismissed the proceeding.

[3] Rule 227(b) of the Commission's Rules of Practice and Procedure, 46 C.F.R. 502.227(b), grants an automatic right of appeal to the Commission when a motion to dismiss is granted in whole or in part.

[4] The Presiding Officer also questioned whether Complainant's cause of action against Cosmos was not more "like a tort action, specifically one in fraud and deceit," rather than an action cognizable under section 22 or 44 of the Shipping Act, 1916. (Ruling at 19).

The Presiding Officer found that Congress enacted the fitness provisions of section 44 for the sole purpose of enabling the Commission to police the activities of licensed forwarders and to ensure that only qualified applicants were licensed. He believed that these provisions were not intended to authorize private persons to file section 22 complaints that only allege violations of section 44 of the Act.[5] The Presiding Officer viewed the relief accorded private parties in these situations as being limited to requesting the Commission to institute its own investigation under the fitness standards of section 44 of the Act (Ruling at 24).

POSITIONS OF THE PARTIES

Tractors first argues that Judge Kline improperly reversed Judge Fitzpatrick's denial of Cosmos' Motion to Dismiss. It points out that the only matter pending before Judge Kline was Cosmos' Motion for Leave to Appeal Judge Fitzpatrick's ruling pursuant to Rule 153 of the Commission's Rules of Practice and Procedure, 46 C.F.R. § 502.153.

Tractors also argues that the Presiding Officer erred in finding that section 44 may not be violated within the meaning of section 22 of the Act. Tractors points to that portion of the legislative history of section 44 which indicates that the Commission's regulatory authority over forwarders was intended to prevent recurrences of malpractices that were prevalent in the forwarding industry. It also notes that section 44(c) specifically authorizes the Commission to ensure a forwarder's financial responsibility and the performance of its contractual obligations.[6] Tractors argues that the Presiding Officer improperly failed to recognize that Congress intended the Commission to ensure the proper performance of services and not merely issue licenses. Tractors submits that the Shipping Act is violated when an ocean freight forwarder does not supply services in accordance with its contractual arrangements.[7]

Cosmos supports the Presiding Officer's Order of Dismissal. Cosmos argues that Tractors has failed to state a cause of action under the Shipping Act, 1916. It submits that Complainant's allegations raise issues relating to the issuance of a false bill of lading and a conspiracy

[5] The Presiding Officer acknowledged, however, that a private party could file a complaint seeking reparations from a forwarder for financial injury caused by a violation of a substantive provision of the 1916 Act, such as section 16 First or 17 (46 U.S.C. §§ 815 and 816). He also found that a private party might obtain reparations if a forwarder "operates without a license or bond and that fact causes direct and proximate harm" (Ruling at 29).

[6] Section 44(c) provides:

> The Commission shall prescribe reasonable rules and regulations to be observed by independent ocean freight forwarders and no such license shall be issued or remain in force unless such forwarder shall have furnished a bond or other security approved by the Commission in such form and amount as in the opinion of the Commission will insure financial responsibility and the supply of services in accordance with contract, agreement, or arrangements therefor.

[7] Tractors also argues that Congress did not intend to vitiate section 22 remedies when it enacted section 44.

to defraud, neither of which are cognizable under any section of that Act. Cosmos contends that the Commission may not assume section 22 jurisdiction unless a direct and basic charge of a violation of a substantive provision of the Act is alleged (*U.S. Navigation Co. v. Cunard S.S. Co.*, 284 U.S. 474 (1932)). Cosmos concludes that the language of section 44 and its legislative history support its contention that the statute is a licensing provision which cannot be violated within the meaning of section 22.

DISCUSSION

The Commission finds, without prejudging the merits of the allegations, that Tractors' complaint against Cosmos is cognizable under section 44 of the Act. We reach this conclusion because the allegations, if true, could support a finding that Cosmos violated certain provisions of Commission General Order No. 4 which results in a violation of section 44 of the Act.[8] The Commission will therefore grant Tractors' appeal and reverse the Presiding Officer's dismissal of Cosmos from this proceeding.[9]

Section 44 of the Act provides in pertinent part:

> A forwarder's license shall be issued to any qualified applicant therefor if it is found by the Commission that the applicant . . . is fit, willing, and able to properly carry on the business of forwarding and to conform to the provisions of the Act and the requirements, rules, and regulations of the Commission (Section 44(b)).

Paragraph (c) of section 44 states that "the Commission shall prescribe reasonable rules and regulations to be observed by independent ocean freight forwarders." Finally, section 44(d) provides, in part, that a forwarder's license may:

> [U]pon complaint, or the Commission's own initiative, after notice and hearing, be suspended or revoked for willful failure to comply with any provision of this Act, or with any lawful order, rule, or regulation of the Commission.

---

[8] General Order No. 4 (G.O. 4) prescribes regulations governing the operations, practices and conduct of ocean freight forwarders. At the time of the shipments at issue, section 510.23 of G.O. 4 (46 C.F.R. § 510.23 (1980)) required a licensee to refuse to participate in a transaction where the licensee believed that its principal has made an error, misrepresentation or omission from any export declaration, bill of lading, or other document in connection with the shipment. It further prohibited a licensee from filing or assisting in the filing of any document which such licensee had reason to believe was false or fraudulent.

[9] Our disposition of Tractors' appeal on the merits obviates the need to address its procedural challenge to Judge Kline's reversal of Judge Fitzpatrick's earlier ruling on Cosmos' Motion to Dismiss. Nevertheless, we would point out that we do not consider Judge Kline's action improper. A presiding officer may properly reconsider and reverse interlocutory rulings made prior to the initial decision, whether those rulings are made by him or her or by a previously assigned administrative law judge. *See Knight v. Lane*, 228 U.S. 6 (1912); *Bookman v. U.S.*, 453 F.2d 1263 (Ct. Cl. 1972); *Faircrest Site Opposition v. Levi*, 418 F.Supp. 1099 (N.D. Ohio 1976).

Section 22 of the Act, provides in relevant part:

> That any person may file with the Board a sworn complaint setting forth any violation of this Act by a[n] . . . other person subject to the Act, and asking reparations for the injury, if any, caused thereby.

Section 44 not only authorizes the Commission to license forwarders and prescribe forwarder rules, it also requires that these rules "be observed by" forwarders. The regulations mandated by section 44 were intended to preclude licensees from engaging in certain malpractices that had become prevalent in the freight forwarding industry.[10] Because section 44(c) requires forwarders to obey the Commission's regulations, it therefore follows that a violation of the regulations also violates section 44 of the Act.

A statutory violation could result even if the authorizing statute does not expressly command obedience of the underlying regulations. This is so because a lawfully adopted regulation is but an extension of the statute pursuant to which the regulation is promulgated.[11] As such, a violation of a Commission regulation which explains, interprets and implements a substantive provision of the 1916 Act will also result in a violation of the statutory provision which the breached regulations implement. *Admission, Withdrawal and Expulsion. Self-Policing Reports. Shippers' Request and Complaints - Outward Continental North Pacific Freight Conference*, 10 F.M.C. 349, 354 (1967) affirmed *sub nom. Outward Continental North Pacific Freight Conference v. F.M.C.*, 385 F.2d 981 (D.C. Cir. 1967).[12] As the Commission explained in denying rehearing in *Admission to Conference Membership - Pacific Coast European Conference*, 9 F.M.C. 241 (1966); affirmed *sub nom. Pacific Coast European Conference v. F.M.C.*, 376 F.2d 785 (D.C. Cir. 1968):

> . . . General Order No. 9 was necessary to carry out the provisions of the [Shipping] Act and was intended to effectively insure that the Congressional intent behind the "reasonable and equal provision [of section 15] was realized" . . . In . . . this proceeding we found that respondents agreement failed to

[10] The legislative history of section 44 indicates that this statute was enacted because of Congress' interest in the need to establish and *maintain* standards of fitness consistent with a forwarder's fiduciary responsibilities and to aid the Commission in *preventing* the malpractices that had become prevalent in the forwarding industry. To achieve its objectives, Congress not only directed the Commission to consider, among other things, an applicant's willingness to conform to the Commission's regulations before issuing a freight forwarder license, but also directed it to prescribe reasonable rules and regulations "*to be observed*" by ocean freight forwarders. See Senate Report 691, 87th Cong., 1st Sess. (1961); Senate Report 1096, 87th Cong., 1st Sess. (1961); *Hugo Zanelli and Company*, 18 F.M.C. 60, 74 (1974); *Investigation of Practices, Operations, Actions and Agreements of Ocean Freight Forwarders*, 6 F.M.B. 327 (1961).

[11] Davis, Administrative Law of the Seventies § 5.03 at 147 (1976).

[12] *Compare Unapproved Section 15 Agreements - Gulf/United Kingdom Conference*, 7 F.M.C. 536 (1963), where the involved general order did not explain, interpret or implement a substantive provision of the 1916 Act.

> meet the requirements of General Order No. 9. Therefore, since General Order No. 9 was . . . [an] 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. (9 F.M.C. at 262).

The rationale the Commission expressed in *Admission to Conference Membership and Outward Continental, supra,* has been recognized by the courts for many years. In *Atchison, Topeka & Santa Fe Railway Co. v. Scarlett,* 300 U.S. 471 (1936), the Supreme Court, in finding that the railroad had fulfilled its duty by complying with the Interstate Commerce Commission's regulations implementing the Safety Appliance Act, remarked:

> The regulation having been made by the Commission in pursuance of constitutional statutory authority, it [the regulation] has the same force as though prescribed in terms by the statute (at 474).

Similarly, in *Westmoreland v. Laird,* 364 F.Supp. 948, 951 (E.D. N.C. 1973), *aff'd* 485 F.2d 1237 (4th Cir. 1973), the court in disposing of a federal employee's claim of an unlawful discharge stated:

> An administrative regulation promulgated within the authority granted by statute has the force of law and . . . a violation of a valid administrative regulation, even by the authority promulgating same, constitutes in legal effect, a violation of the statute.

The courts have also found statutory violations where there have been infractions of the implementing regulations that are enforced through legislatively imposed penalties.[13] In *United States v. Grimaud,* 220 U.S. 506 (1911), the Supreme Court reviewed a criminal indictment charging violations of the Forest Reserve Act and its implementing regulations. In upholding the indictment, the Court established a three-pronged test for a statutory violation premised on an implementing regulation: a congressionally mandated general standard, lawfully adopted implementing regulations, and finally, a statutory penalty for violating the regulation.

[13] In *United States v. Howard,* 352 U.S. 212 (1957), the Supreme Court construed a state regulation as "the law of the state" for the purpose of a criminal prosecution. There, the Federal Black Bass Act of May 20, 1926, 44 Stat. 576, made it unlawful for a person to deliver for transportation any black bass or other fish if such transportation is contrary to the law of the state. The Florida legislature had created a state agency to regulate the management of fresh-water fish and authorized it to promulgate regulations to effect its statutory mandates. The legislature also provided a misdemeanor penalty for violations of the agency's regulations. The agency, pursuant to its authority, promulgated regulations prohibiting the transportation of certain fish outside of the state. The Court, upon review of a federal criminal prosecution for violation of the Federal Black Bass Act, held that the agency's regulations, as enforced by the state's misdemeanor provisions, is a "law" of the State of Florida for the purposes of the federal statute.

In *Grimaud, supra,* Congress had created a statutory scheme which authorized the President to designate certain lands as "forest reservations." The Secretary of Agriculture was authorized to make rules and regulations to protect the reservations and regulate their use. Violations of the statute or the implementing regulations were subject to a fine of $500 and/or 12 months imprisonment. The Court found that Congress had not improperly delegated its legislative authority to declare activity unlawful, but rather had vested the Secretary of Agriculture with the authority to fill in the details of the statute. As the Court explained, Congress may enact a statute which gives the executive branch:

> The power to fill up the details by the establishment of administrative rules and regulations, the violations of which could be punished by fine . . . or penalties fixed by Congress, *or measured by the injury done. Grimaud, supra,* at 517 (Emphasis added).

The Court, therefore, affirmed the indictment and noted that Congress, not the Secretary of Agriculture, had declared violations of the regulations to be unlawful.[14]

Likewise, in *United States v. Hark,* 320 U.S. 531 (1944), a case involving criminal indictments charging violations of the Emergency Price Control Act of 1942 and its implementing regulations, the Court citing *Grimaud* with approval, noted that:

> . . . though the regulation calls the statutory penalties into play, the statute, not the regulation, creates the offense and imposes punishment for violations. *Hark* at 536 (footnote and citation omitted).

In this proceeding, Tractors' allegations, if proven, could support a finding that Cosmos violated the provisions of G.O. 4. Because those regulations are designed to interpret, explain and implement section 44 and are enforced through the penalty provision of section 32(c), 46 U.S.C. § 831(c), their violation results in a violation of section 44 and establishes a cause of action for reparations under section 22 of the Act.

THEREFORE, IT IS ORDERED, That Tractors' Appeal from the Presiding Officer's dismissal of Cosmos as a Respondent in this proceeding is granted to the extent indicated above; and

IT IS FURTHER ORDERED, That the Presiding Officer's ruling of April 1, 1982, is reversed; and

IT IS FURTHER ORDERED, That Tractors' request for oral argument is denied; and

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[14] The Court distinguished *United States v. Eaton,* 144 U.S. 667 (1892), where the statute required certain books to be kept under the supervision of the Commissioner of Internal Revenue. The statute also authorized the Commissioner to make rules for carrying the statute into effect. However, because the statute in *Eaton,* unlike the *Grimaud* statute, did not impose a penalty for violation of the Commissioner's regulatory pronouncements, the Court dismissed the indictment charging violations of the statute and the Commission's implementing regulations.

IT IS FURTHER ORDERED, That this proceeding is remanded to the Presiding Officer for further hearing and decision on the merits of the complaint.

By the Commission.

(S) JOSEPH C. POLKING
Assistant Secretary

FEDERAL MARITIME COMMISSION

DOCKET NO. 82-6

WESTERN PIONEER, INC. - POSSIBLE VIOLATION OF SECTION 2,

INTERCOASTAL SHIPPING ACT, 1933

NOTICE

October 8, 1982

Notice is given that no exceptions have been filed to the September 1, 1982 initial decision in this proceeding and the time within which the Commission could determine to review that decision has expired. No such determination has been made and accordingly, that decision has become administratively final.

(S) JOSEPH C. POLKING
Assistant Secretary

FEDERAL MARITIME COMMISSION

DOCKET NO. 82-6
WESTERN PIONEER, INC.-POSSIBLE VIOLATION OF SECTION 2, INTERCOASTAL SHIPPING ACT, 1933

Respondent is a "common carrier by water in interstate commerce," as that term is defined in unnumbered section, preceding section 2 of the Shipping Act, 1916, 46 U.S.C. 801.

Respondent is in violation of section 2, Intercoastal Shipping Act, 1933, 46 U.S.C. 844, for failure to have its tariff on file with the Federal Maritime Commission.

Civil penalty found not to be warranted, however, respondents ordered to cease and desist from conducting operations as a common carrier by water in interstate commerce until such time as there is on file with the Commission a schedule (tariff) showing all the rates, fares and charges for or in connection with such operations.

Harold E. Mesirow and *Richard D. Gluck* for Western Pioneer, Inc.

John Robert Ewers for Bureau of Hearings and Field Operations.

Joseph B. Slunt and *Aaron W. Reese* for Office of Hearing Counsel.

INITIAL DECISION [1] OF SEYMOUR GLANZER, ADMINISTRATIVE LAW JUDGE

Finalized October 8, 1982

This proceeding was instituted by Order of Investigation and Hearing (Order), served January 18, 1982, to determine whether the respondent, Western Pioneer (Western), had violated section 2 of the Intercoastal Shipping Act, 1933, 46 U.S.C. 844, by engaging in operations as a common carrier by water without having a tariff on file with the Federal Maritime Commission and, if so, to determine whether penalties should be assessed against Western.

Specifically, the Order required the determination of the following issues:

1. Whether Western is a "common carrier by water in interstate commerce" as that term is defined in unnumbered section preceding section 2 of the Shipping Act, 1916, as amended, 46 U.S.C. 801 (for obvious reasons, the unnumbered section is sometimes referred to as section 1 of the Shipping Act, 1916);

[1] This decision will become the decision of the Commission in the absence of review thereof by the Commission (Rule 227, Rules of Practice and Procedure, 46 CFR 502.227).

2. Whether Western is in violation of section 2, Intercoastal Shipping Act, 1933, 46 U.S.C. 844, for failure to have its tariff on file with the Federal Maritime Commission; and
3. Whether civil penalties should be assessed against Western pursuant to section 32 of the Shipping Act, 1916, 46 U.S.C. 831(e), if it is found to be in violation of section 2, Intercoastal Shipping Act, 1933, and, if so, the amount of any such penalty which should be imposed, taking into consideration factors in possible mitigation of such a penalty.

The matter is before me for final determination on submissions which are tantamount to a joint proposed settlement.

PROCEDURAL BACKGROUND TO THE SETTLEMENT

Shortly after the Order instituting this proceeding was issued, I was advised by counsel for respondent and by Hearing Counsel orally, that they were undertaking discovery procedures, informally, in the belief that all issues were susceptible to settlement. At a later prehearing conference, counsel confirmed that advice. In accordance with an agenda established at the prehearing conference, counsel entered into a Joint Stipulation of Relevant Facts,[2] which they submitted on July 23, 1982. Simultaneously, Western's counsel submitted another document, entitled Respondents' Offer of Proposed Settlement and Argument in Support Thereof. Hearing Counsel considered that document to be a motion for termination of the proceeding to which it desired to reply.[3] On August 6, 1982, Hearing Counsel filed its Reply.[4]

There is no real dispute between Western's counsel and Hearing Counsel on the legal issues. The only fault that Hearing Counsel finds

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[2] Attached to the Joint Stipulation are the following:
(1) Affidavit of Max Soriano, Western's Vice President and General Counsel;
(2) Mr. Soriano's second affidavit;
(3) Affidavit of Earl K. Peterson, quondam in-house accountant for Western (1975-1980);
(4) Letter, dated February 10, 1978, from the Commission's staff (Newton Frank for Albert J. Klingel, Jr., Director, Bureau of Industry Economics) to Western (Peterson);
(5) Affidavit of Albert E. Holman, Western's Traffic and Pricing Manager;
(6) Letter, dated February 13, 1978, from Western (Soriano) to the Commission (Klingel);
(7) Letter, dated April 18, 1978, from Western (Holman) to the Commission's San Francisco office (L.A. Hammond);
(8) Letter, dated May 22, 1978, from the Commission (James A. Warner, Chief, Domestic Tariff Branch) to Western (Holman);
(9) Western file memorandum (Holman) dated May 30, 1978;
(10) Letter (Transmittal No. 5), dated June 21, 1978, Western (Holman) to the Commission (Bureau of Domestic Regulation);
(11) Letter (Transmittal No. 6), dated June 21, 1978, Western (Holman) to the Commission (Bureau of Domestic Regulation);
(12) Supplement No. 1 to FMC-F No. 3 canceling FMC-F No. 3, effective June 30, 1978;
(13) Supplement No. 3 to FMC-F No. 2, canceling FMC-F No. 2, effective June 30, 1978.

[3] Letter dated July 29, 1982, from Hearing Counsel to me.

[4] The Reply is entitled Reply of Hearing Counsel to Respondent's Offer of Proposed Settlement and Argument in Support Thereof. '

with Western's Offer is that it does not go far enough in explicitly addressing the three issues enumerated in the Order.

Hearing Counsel perceives the Offer as a motion to terminate the case without assessment of a civil penalty (Issue No. 3), on condition that Western file a tariff with the Commission. Hearing Counsel do not object to this disposition of Issue No. 3, but do ask for findings with respect to the other issues. Accordingly, Hearing Counsel want Western to be found to be a common carrier by water in interstate commerce (Issue No. 1) and to be in violation of section 2 of the Intercoastal Shipping Act (Issue No. 2). To remedy the violation, Hearing Counsel seek an Order requiring Western to cease and desist from operating as a common carrier by water in interstate commerce until it files an appropriate tariff with the Commission. It is implicit in the very nature of Western's offer that Hearing Counsel's position with respect to Issue No. 3 makes Hearing Counsel's views with respect to Issues No. 1 and No. 2 agreeable to Western. This, together with the fact that Western has not sought leave to respond to Hearing Counsel's Reply, warrants the conclusion that the various submissions are the equivalent of a jointly proposed settlement.

THE STIPULATION

By way of introduction, the parties agree that the stipulated facts address the issues raised in the Order by describing Western's past and present operation, and by explaining the reasons why, after consultation with the Commission's staff, Western discontinued the filing of its tariff with the Commission in 1978. They add that the stipulated facts are drawn from and based on relevant information and documents set forth in n. 2, *supra*. These, then, are the stipulated facts: [5]

1. Western is the successor to Pioneer Alaska Lines, a contract water carrier which began service to Alaska in 1958. Western purchased the assets of Pioneer Alaska Lines in 1972 and Western has operated between the Pacific Northwest and Western Alaska since that time.

2. Between 1972 and 1976, Western maintained two types of service: a common carrier service offered to all types of shippers, and a specialized service which served only the fisheries trade.

3. During 1975 and 1976, Western's common carrier operation was conducted with two vessels, the *Western Pioneer* and the *Pribilof*. Due to a fire, the *Western Pioneer* was withdrawn permanently from service in January 1976. The *Pribilof* was withdrawn from Western's service at the end of the same year when its charter expired.

4. Thereafter, the only vessels Western continued to operate were those serving the fisheries trade. These vessels were and are operated

[5] The stipulation was edited to conform to terminology and usages which appear elsewhere in this decision. No substantive changes were made.

pursuant to provisions found in 46 U.S.C. §§ 88(b), 367 and 404, which exempt vessels engaged solely in the fisheries trade from certain Coast Guard inspection requirements. In contrast, the *Western Pioneer* and the *Pribilof* had been inspected by the Coast Guard and had been eligible for unlimited general cargo operations.

5. The annual income and operating statements (Form FMC-64) submitted to the Commission by Western for the period 1972-1976 reported specific, detailed data concerning only the company's common carrier operations involving the *Western Pioneer* and the *Pribilof*. Information about the operation of Western's fisheries vessels was also reported on Form FMC-64, but only as a separate and distinct item on Schedule 302, separate and apart from Western's common carrier operations. This method of reporting was consistent with past accounting practice used by Western's accountant, and it was never challenged by the Commission.

6. Western followed this separate form of reporting information because it believed that its fisheries service was not a common carrier undertaking. In fact, the Coast Guard insisted that the fisheries vessels could not qualify for the inspection exemption unless they carried only cargo that was directly fisheries related.

7. As noted above, the operation of both Western's non-fisheries related vessels had ceased by the end of 1976. However, Western received an inquiry from the Commission dated February 10, 1978, requesting operating and income data for the year 1977, and enclosing a copy of Form FMC-64. By letter dated February 13, 1978. Western asked the Commission whether it was any longer required to file such reports, inasmuch as the two inspected vessels which it had used in unlimited general cargo service were not operated by Western in 1977. Western was advised by the Commission that only common carrier vessel operations had to be reported. On that basis, Western did not file a report in 1977, and discontinued filing of any further FMC-64 reports.

8. In April 1978, Western received a telephone inquiry from the Commission's staff office in San Francisco requesting copies of bills of lading used on Western's vessels. By transmittal letter dated April 18, 1978, Western sent to the San Francisco office sample bills of lading from each of Western's four vessels, and a copy of Western's tariff.

9. By letter dated May 22, 1978, the Chief of the Commission's Domestic Tariff Branch informed Western that the Commission was "in receipt of information that your company is no longer operating as a common carrier by water in the Alaska trade." This letter advised Western that its then-effective tariff FMC-F No. 2 should be canceled if Western did not "intend to provide the service set forth in this publication," and it enclosed a specimen copy of a cancellation supplement for the Western tariff. The letter asked Western to notify the Commission "[i]f our information concerning your discontinuance is correct."

10. On May 30, 1978, Western's Traffic and Pricing Manager spoke with a Commission staff person concerning the specific explanatory language to be used on the Western cancellation supplement, and he was advised that the statement ". . . cancelled in its entirety account discontinuance of our common carrier operation" would be acceptable. He was also advised by the staff person that it would be permissible to postpone cancellation of the existing Western tariff for 30 days, until Western could issue a memorandum type tariff.

11. In approximately March and November of 1979, Commission field investigators visited Western to discuss and review its operations, including the discontinuation of its tariff filings with the Commission. Although these investigators tentatively concluded that they felt Western was operating as a common carrier on a limited basis, Western advised them that both the Coast Guard and the Commission had previously said that Western was *not* operating as a common carrier. At the conclusion of their visit, the Commission investigators did not caution Western to file a tariff with the Commission, nor did they contact Western later to advise it of any potential violations.

12. Western publishes and maintains a memorandum freight tariff, establishing rates on more than 400 commodities, for the carriage of cargo between Seattle and Bellingham, Washington, on the one hand and ports in Alaska and the Aleutian Islands on the other.

13. Western limits its service to the fisheries trade in order to preserve the exemption of its vessels from Coast Guard inspection requirements pursuant to 46 U.S.C. §§ 88(b), 367 and 404.

14. Western offers its services to all shippers and consignees in the trade it serves, subject to the fisheries trade limitation discussed in stipulation number 13.

15. Western issues bills of lading for all cargo carried.

16. Western provides regular service between the ports named in its tariff. Some services, however, are seasonal as a result of weather conditions and the seasonal peculiarities of the fishing trade.

17. Western advertises its sailings.

18. Western accepts responsibility for the carriage of cargo, pursuant to the provisions of its tariff and bill of lading.

THE STATUTES INVOLVED

As pertinent, the unnumbered section preceding section 2 of the Shipping Act provides the following definition of a "common carrier by water in interstate commerce":

> The term "common carrier by water in interstate commerce" means a common carrier engaged in the transportation by water of . . . property on the high seas . . . on regular routes from port to port between one State . . . of the United States and any other State . . . of the United States. . . .

As pertinent, section 2 of the Intercoastal Shipping Act [6] provides:

> That every common carrier by water in intercoastal commerce shall file with the [Commission] and keep open to public inspection schedules showing all the rates, fares and charges for or in connection with transportation between intercoastal ports on its own route;

DISCUSSION

I.

WESTERN IS A COMMON CARRIER BY WATER IN INTERSTATE COMMERCE. IT IS IN VIOLATION OF SECTION 2 OF THE INTERCOASTAL SHIPPING ACT BECAUSE IT DOES NOT HAVE A TARIFF ON FILE WITH THE COMMISSION.

The law is well established that the term "common carrier," as used (although not defined) in the Shipping Act, means a common carrier at common law. *Philip R. Consolo v. Grace Line, Inc.*, 4 F.M.B. 293, 300 (1953); *Galveston Chamber of Commerce v. Saguenay Terminals*, 4 F.M.B. 375, 378 (1954); *Activities, Tariff Filing Practices and Carrier Status of Containerships, Inc.* (*Activities*), 9 F.M.C. 56, 62 (1965); *McAllister Brothers v. Norfolk Western Railway Company*, 20 F.M.C. 63, 65 (1977). Common carrier status is not determined by a rigid and unyielding dictionary definition, but is a flexible regulatory concept. The regulatory significance of a carrier's operation may be determined by considering a variety of recognized criteria, even though the absence of one or more of them does not rule out common carrier status. Rather, the determination is made upon consideration of the combined effect of those factors. *Activities, supra*, 9 F.M.C. at 65.

It is generally understood that among the factors to be considered are the following indicia: (1) the variety and type of cargo carried; (2) number of shippers; (3) type of solicitation utilized; (4) regularity of service and port coverage; (5) responsibility of the carrier towards the cargo; (6) issuance of bills of lading or other standardized contracts of carriage; and (7) method of establishing and charging rates. *United States v. Stephen Brothers Line*, 384 F.2d 118 (5th Cir. 1967); *McAllister Brothers v. Norfolk Western Railway Company, supra*; *Possible Violations of Section 18(a) of the Shipping Act, 1916, etc.*, 19 F.M.C. 44 (1975); *Activities, supra*; and *Investigation of Tariff Filing Practices of Carriers Between Contiguous States of the United States and Alaska* (*Investigation of Tariff Filing Practices*), 7 F.M.C. 305 (1962).

[6] Section 5 of the Intercoastal Shipping Act, 46 U.S.C. 845b, makes the provisions of that Act applicable "to every common carrier by water in interstate commerce, as defined in section 1 of the Shipping Act, 1916."

Measured against all of those enumerated indicia, Western's operations are those of a common carrier. Unquestionably, Western advertises its services (No. 3); it provides a regular service between points in the State of Washington and points in the State of Alaska (No. 4); under its bills of lading and tariff it is responsible for the cargo during carriage (No. 5); it issues bills of lading (No. 6); and it publishes a tariff of standard rates and charges and bills its customers accordingly (No. 7). Just as certainly, Western's operations are those of a common carrier under indicia Nos. 1 and 2, as will be seen.

It has been said that the most frequently mentioned characteristic of common carriage is the holding out, by a course of conduct, to accept goods from the general public to the extent of a carrier's ability to carry. *Activities, supra,* 9 F.M.C. at 62; *Transportation by Southeastern Terminals and S.S. Co.,* 2 U.S.M.C. 795, 797 (1946). But this does not mean it is necessary for a carrier to offer to carry all commodities for all shippers. "A line may be a common carrier of certain commodities as long as it is willing to carry those commodities for all who wish to ship them." *Investigation of Tariff Filing Practices, supra,* 7 F.M.C. at 318.

Thus, the limitation of service to shipments related to the fisheries trade does not change Western's status from that of a common carrier. Western's holding out has been made to all those willing to use its proffered service, and that includes any shipper of any commodity related to the fisheries trade.[7] A carrier may be a common carrier of only one commodity. *Activities, supra,* 9 F.M.C. at 65. Western's tariff lists more than 400 commodities. Here, of course, Western's holding out is to "all who wish to ship them," and that satisfies the test. After all, it is well settled that "The public does not mean everybody all the time." *Terminal Taxicab Co. v. Kutz,* 241 U.S. 252 (1916).

In consideration of the combined effect of the factors generally associated with common carrier status, I find that Western is a common carrier in interstate commerce.

Under the express provision of section 2 of the Intercoastal Shipping Act, common carrier operations in interstate commerce are prohibited unless the person engaged in such operation maintains an effective tariff on file with the Commission. *Transportation-U.S. Pacific Coast and Hawaii,* 3 U.S.M.C. 190, 195 (1950); *Investigation of Tariff Filing Practices, supra,* 7 F.M.C. at 330. Therefore, Western, which has been operating as a common carrier in interstate commerce without an effective tariff on file with the Commission, is found to be in violation of section 2 of the Intercoastal Shipping Act. Under the terms of the

[7] The stipulation does not mention the number of shippers using Western's services, but the fair inference to be drawn is that the number of shippers and consignees served is as extensive as its holding out and the industry it serves.

order which follows, it will be required, consistent with the terms of its own undertaking to do so, to have an effective tariff on file with the Commission prior to conducting any further common carrier operations.

II.

CIVIL PENALTY NOT WARRANTED

Sometime after the inception of this proceeding, Western came to understand, for the first time, that the specialized fisheries service it had been conducting since 1972 was and is a common carrier operation subject to the tariff filing requirements of the Intercoastal Shipping Act. Western's erroneous perception, i.e., that the fisheries service was not a common carrier operation, appears to have been shared by the Commission's staff when Western canceled its tariff in 1978.

There is no dispute that the mutual misperception of the fisheries service by Western and the Commission's staff resulted from a misunderstanding, by both of them, of the reach and purpose of laws administered by the United States Coast Guard and the effect of certain administrative determinations under those laws upon the coverage of the Intercoastal Shipping Act. There is also no dispute that, from 1972 to the present, Western fully and voluntarily disclosed all the facts concerning its carrier operations to the Commission staff.

Inasmuch as the stipulated facts and attachments suggest that Western was encouraged to substitute an unfiled memorandum tariff for the ones filed with the Commission until June 30, 1978, it is reasonable to conclude that when Western did cancel its filed tariffs, it did so in the belief that it was complying with and not thwarting regulation.

Nothing that occurred during the field office's investigation of Western in March and November 1979 alters the conclusion that Western continued to believe it was complying with regulation until it received the Order instituting this proceeding. It should be remembered that the investigators offered only a tentative conclusion that Western was operating as a common carrier in interstate commerce. As the attachments to the stipulation show, Western was assured that the tentative conclusion would be reviewed by the staff and that Western would be informed of the staff's determination. Inasmuch as Western was not informed of the results of the staff review, it was justified in continuing to believe in the validity of the Commission's staff's earlier, albeit mistaken, conclusion that the fisheries service was not common carriage.[8]

[8] The second Soriano affidavit, see n. 2, *supra*, contains the following uncontroverted passages:

Continued

It should be observed, in passing, that a staff position, whether expressed or implied, is not binding upon the Commission in carrying out its adjudicatory function. See, e.g., *Investigation of Tariff Filing Practices, supra,* 7 F.M.C. at 330:

> We take occasion here to point out, primarily for the future, that failure of Commission personnel to advise that an organization which has furnished full operating details is a common carrier, and required to file tariffs, in no way militates against Commission decision that the organization is a common carrier, and required to file. Neither would a direct statement by our staff that the organization is *not* a common carrier.

To the same effect, see *United States v. New York, New Haven and Hartford Railroad Company,* 276 F.2d 525, 535 (2 Cir. 1959), cert. denied, sub nom. *Tri-Continental Financial Corp. v. United States,* 362 U.S. 961 (1960) and sub nom. *Tri-Continental Financial Corp. v. Glenmore,* 362 U.S. 964 (1960).

Western, explicitly, and Hearing Counsel, implicitly, agree that Western did not intentionally violate the tariff filing requirements of the Intercoastal Shipping Act. Relying upon the mitigating factors they stipulated to, Hearing Counsel supports Western's request that no civil penalty be assessed in this proceeding.[9] Chief Administrative Law Judge John E. Cograve, in his recent Initial Decision in Docket No. 81-59, *General Transpac System-Possible Violations of Section 15, Shipping Act, 1916,* 25 F.M.C. 270 (1982), established that motive and intent are relevant to the determination of the amount, if any, of a civil penalty to be assessed in proceedings brought pursuant to section 32 of the Shipping Act. Upon a finding that "the degree of culpability was slight indeed," Judge Cograve concluded that "a penalty is neither dictated by the respondent's past actions resulting in the violation nor warranted as a deterrent to future unlawful activity by the respondent." Id. at 281.

On the facts here presented, the record is devoid of any evidence from which one might draw an inference that Western intended to violate the Intercoastal Shipping Act. I find that the violation of section

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In approximately March and November of 1979 investigators from the Federal Maritime Commission field office visited the office of Western Pioneer, Inc. to investigate the nature of our operation. In Particular [sic] the fact that we were no longer filing a tariff with the FMC. When they finished their last visit the investagators [sic] stated their tentative conclusion to us was that they felt we were operating as a common carrier on a limited basis. In turn we told them that in our view we were not operating as a common carrier and that both the FMC and the Coast Guard had already said so as well.

When the investigators left they did not caution us to file a tariff with the FMC. They said only that they would go back to San Francisco and review the matter with Washington and get back to us. We never heard from them again. The next communication to us on this was when the FMC in Washington issued it's [sic] order of investigation and hearing in January of this year.

[9] I construe Hearing Counsel's measured statement that it does not oppose Western's request for no monetary assessment to mean that Hearing Counsel are supporting Western's position on this issue.

2 of that Act was unintentional. Accordingly, I find that Western's past actions do not call for a penalty and that a penalty would serve no useful purpose to deter future unlawful activity in these circumstances.

Nevertheless, Western is in violation of section 2 of the Intercoastal Shipping Act now, and it will remain in violation if it continues to conduct common carriage operations without an effective tariff on file as required by section 2.

ORDER

Accordingly, it is ordered that Western Pioneer, Inc., cease and desist from acting as a common carrier of property by water in interstate commerce unless and until such time as it shall file with the Federal Maritime Commission and keep open to public inspection schedules (tariffs) showing all the rates, fares and charges for or in connection with transportation between intercoastal points on its own route.

(S) SEYMOUR GLANZER
Administrative Law Judge

FEDERAL MARITIME COMMISSION

DOCKET NO. 82-9

CARRIER INTERNATIONAL CORPORATION

v.

AMERICAN ATLANTIC LINES

NOTICE

October 8, 1982

Notice is given that no exceptions have been filed to the September 2, 1982 initial decision in this proceeding and the time within which the Commission could determine to review that decision has expired. No such determination has been made and accordingly, that decision has become administratively final.

(S) JOSEPH C. POLKING
Assistant Secretary

FEDERAL MARITIME COMMISSION

DOCKET NO. 82-9

CARRIER INTERNATIONAL CORPORATION

v.

AMERICAN ATLANTIC LINES

Respondent's tariff found unambiguous. Claim for reparation denied and complaint dismissed.

Henry L. Martin for complainant.

John P. Love for respondent.

INITIAL DECISION [1] OF JOHN E. COGRAVE, ADMINISTRATIVE LAW JDUGE

Finalized October 8, 1982

Carrier International Corporation seeks $23,255.30 as reparation for an alleged misapplication of rates by American Atlantic Lines. As described on the bill of lading, the shipment in question consisted of "refrigerating machines and air-conditioning machines." The shipment was delivered to American Atlantic's facilities packed in "export crates." American Atlantic placed the cargo on flatracks and loaded it into containers because the next of its vessels on berth was a containership. The shipment was rated as "Appliances, Commercial and Household, NOS" (U.S. Atlantic & Gulf Southeastern Caribbean Conference Freight Tariff FMC No. 9, 8th Revised Page 63). The rate under this item was $145.00 per ton W/M.

The nature, weight or dimensions of the shipment are not in issue. The sole question presented is whether the shipment should have been assessed the lump sum container rate of $1,850 per 20' container and $3,690 per 40' container. Complainant's basic contention is that since the shipment actually moved in containers, it is entitled to the container rate. Respondent however points to Rule 40 of the Southeastern Conference tariff and argues that since complainant's shipment met none of the Rule's requirements it is not entitled to the lump sum rate. Rule 40 provides in pertinent part:

> These rules and regulations govern the carriage of cargo in ocean carrier's (hereinafter called the Carrier) containers

[1] This decision will become the decision of the Commission in the absence of review thereof by the Commission (Rule 227, Rules of Practice and Procedure, 46 CFR 502.227).

> which the shipper or consolidator or inland common carrier, subject to prior booking arrangement with the Carrier, may file and ship the cargo therein pursuant to the following terms and conditions and will apply unless otherwise indicated, only when the container has been filled by shipper, consolidator or inland common carrier (as agent for the shipper) at his expense off the premises of the Carrier and/or unloaded by consignee at his expense off the premises of the carrier or port. . . .

This opening paragraph is followed by a series of conditions covering such things as the actual pick up of the container, the use by more than one shipper of a single container, liability for the container, and delivery to the carrier of the loaded container.[2]

A review of the circumstances giving rise to the complaint is necessary to place the complainant's claim for reparation in its proper perspective.

On authorization from Carrier International the complaint here was filed by Mr. Henry Martin, Vice President, Ocean Freight Consultants, Inc. (OFC).[3]

The complaint was based upon the fact that since the shipment had actually moved in containers, the container rate not the breakbulk rate should have applied. In a "Statement of Facts" attached to the complaint [4] Carrier International based its claim on the following:

> The shipment was rated as per rate on tariff page 63, 8th revision, "Appliances, Commercial and Household NOS" as class 4 $145.00 per ton 40 cu. ft. Normally the rate applied would be correct had the shipment not moved in containers since the tariff provides a special, lump sum rate of $1,850.00 per 20' container and $3,690.00 per 40' container for Trinidad. The applicable lump sum rate is based on full container without any condition that the container be house to house or pier to pier. We discussed this matter with Southeastern Caribbean Conference on 6/8/81 and they agreed with our interpretation that the container rate is applicable to all containerized shipments notwithstanding the fact that container moves house to house or pier to pier.

There follows a general statement on ambiguous tariffs and their construction against the maker of the tariff. Complainant's next statement of its position appears in its response to respondent's motion to dismiss.[5] Here complainant states that the "full container rate does not

[2] The text of Rule 40 is set out in the Appendix to this decision.

[3] The complaint was made necessary when respondent rejected Mr. Martin's claim against it. The record does not show the precise grounds for the denial.

[4] Complainant requested the Shortened Procedure of Subpart K of the Commission's Rules of Practice and Procedure. This was modified to allow respondent to use the discovery procedures in Subpart L.

[5] Reply of Carrier International dated April 6, 1982.

make reference to rule 40 and it is not conditioned upon the fact that shipment moved house to house or pier to pier." Complainant points to the rate on bottles to show that where a particular rate is conditioned on other provisions of the tariff, a notation to that effect is made. Additionally complainant states:

> Shipments not intended for containers do not have container numbers listed on the bill of lading as on the attached bill of lading, Attachment II. The bill of lading covering the shipment in dispute has container clearly printed on it confirming that the shipment was *intended and meant for movement in containers.* (Emphasis mine.)

The only inference to be drawn from this statement is that from the beginning Carrier International had intended that the shipment move in containers. The facts of record show otherwise. The container numbers which complainant rely upon at this stage of the case were added to the bill of lading by the complainant or its forwarder after being informed by the respondent that the cargo had been loaded into containers by the respondent and after the respondent gave the complainant the list of container numbers to facilitate the tracing of the shipment.[6] The original bill described the cargo as breakbulk and it was delivered to American Atlantic as breakbulk cargo.

Finally complainant, in its reply memorandum states:

> As for the application of Rule, if the $1,855 per container rate was conditioned upon any other provision of the tariff it should have been so noted. Shipments are clearly marked as moving in containers and hence entitled to container rate listed on page 159 [of the tariff].

It must be remembered that the basis for complainant's claim here is an alleged ambiguity in the respondent's tariff. However, complainant never says what that ambiguity is or where in the tariff it can be found. The only conclusion to be drawn is that complainant's notion of an ambiguity is as vague as the argument it offers in support of it. If I understand complainant, the argument demonstrates the alleged ambiguity as follows. Page 159 of the tariff provides for a full container rate to Trinidad. Nowhere on page 159 is there any reference to Rule 40 or any other condition which would affect complainant's right to that rate. Since there is no reference to Rule 40 on page 159 and its application to the full container rate an ambiguity is created which must be resolved

[6] This would not appear to be a deliberate attempt by complainant to mislead, but rather the result of a lack of knowledge on the part of Mr. Martin who it can be presumed was in possession of only those facts produced by his "audit" of Carrier International's freight bills. Since he was not privy to the circumstances of the shipment he apparently assumed the container numbers on the bill of lading were part of the original.

against the respondent as the maker of the rate, i.e., the full container rate is the proper rate.

Presumably as an example of how it was led astray, complainant cites respondent's tariff item on BOTTLES, Jars and Jugs, Glass or Plastic Empty, as showing that where a rate is conditioned upon some other provision of the tariff it is so noted on the page containing the rate. The item as it appears on 1st Rev. Page 69 is:

*BOTTLES, Jars and Jugs, Glass or Plastic
Empty
+ Plastic in carrier's containers minimum
1800 cubic feet to Trinidad........
+ Through June 14, 1980
*See also section A

Here, once again complainant does not say which notation it means. If it is referring to the specific provision for "Plastic in carrier's containers" then the argument is less than precise because there is no reference to another provision of the tariff. If however the reference is to the asterisk preceding "BOTTLES" then complainant, as it has throughout its assertion of this claim, simply ignores crucial points against it. The asterisk directs the reader's attention to the statement, "See also section A." Section A of respondent's tariff contains its full container rates and it need only be noted here that the item under which complainant's shipment was rated reads in relevant part:

*Appliances, Commercial and Household, NOS

* * *

*See also Section A

Thus, complainant was put on notice that full container rates were available to it under section A of the tariff.

While subject to the complexities of all ocean carrier tariffs, the format of respondent is reasonably designed to guide even the minimally diligent user through its intricacies. The Table of Contents runs from "Abbreviations and Symbols" (Rule 42) through Livestock, Other Animals, Poultry and Birds (Rule 38) to "Weights, Measurements and Disposition of Fractions" (Rule 49). Included in the Table is a specific reference to "Shipments in Shipper's/Carrier's Containers" which directs the user to Rule 40 and the conditions under which the full container rates found in Section A are available. But throughout this case complainant has refused to accept any obligation to acquaint itself with the provisions of the tariff. Instead it attempts to create an ambiguity because of the absence of any specific reference to Rule 40 on page 159 of the tariff.

If accepted, complainant's position would impose upon carriers the duty of establishing an elaborate cross-referencing system the complexity of which fairly boggles the mind. Under such a system the tariff page upon which a specific commodity rate appeared must also contain a specific cross reference to each and every rule, regulation, term or condition which could in any way affect the application of that rate to a particular shipment. The physical limitations of the page itself would preclude such a system, and complainant has not pointed to a single authority which would impose such a duty upon a carrier.

Tariffs must be read in whole not in part, *Storage Practices at Longview, Wash.*, 6 F.M.B. 178, 182 (1960); and a shipper is conclusively presumed to have knowledge of the rates, rules and regulations of the tariff. *Kraft Foods v. Moore McCormack Lines*, 17 F.M.C. 320, 322 (1974), rev'd on other grounds, 538 F. 2d 445. The failure of respondent to include a specific reference to Rule 40 on the tariff page bearing the full container rate did not render that rule inapplicable to complainant's shipment and since complainant did not comply with the terms of Rule 40 its shipment was not entitled to the full container rate.

Complainant makes the further argument that equity demands that it be given the full container rate. The carrier loaded the shipment into containers for its own convenience and since containerized shipments are easier to handle and are more economical, complainant contends that it is unfair to let respondent reap these benefits without giving complainant the benefit of the container rate. Respondent on the other hand points out that it bore the costs of loading the cargo into the containers. Complainant's position is dependent upon the establishment of a "windfall" by respondent because of its containerizing the shipment otherwise the equities would not be on complainant's side. The record is devoid of any such evidence.[7]

Finally respondent argues that complainant has no standing to bring its claim because it did not have title to the goods at the time of shipment.[8] Complainant paid the freight and this fact is dispositive of the issue. *Trane Co. v. South African Marine Co.*, 19 F.M.C. 375 (1976).

The complaint is dismissed.

(S) JOHN E. COGRAVE
Administrative Law Judge

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[7] This is not to say that equitable considerations enter into matters of tariff interpretation. *Union Carbide Inter-America v. Venezuelan Line*, 17 F.M.C. 181 (1973).

[8] Respondent's argument is constructed upon base of the Uniform Commercial Code (which is the law in every state) and the "Revised American Foreign Trade Definitions" adopted by a joint committee of the Chamber of Commerce of the U.S., the National Council of American Importers and the National Foreign Trade Council. Complainant has supplied a copy of the canceled check demonstrating that it paid the freight. Respondent says that even if complainant paid freight, it was only as a "conduit" for the consignee.

FEDERAL MARITIME COMMISSION

DOCKET NO. 80-75

CARGO EXPORT CORPORATION

v.

INTERMODAL CONTAINER SERVICE, LTD., ET AL.

NOTICE

October 12, 1982

Notice is given that no exceptions have been filed to the September 3, 1982 initial decision in this proceeding and the time within which the Commission could determine to review that decision has expired. No such determination has been made and accordingly, that decision has become administratively final.

(S) JOSEPH C. POLKING
Assistant Secretary

FEDERAL MARITIME COMMISSION

DOCKET NO. 80-75

CARGO EXPORT CORPORATION

v.

INTERMODAL CONTAINER SERVICE, LTD., ET AL.

Held:

(1) Where the Respondents filed a tariff change one day before the shipment took place, which change reflected a reduced rate, and the only errors in the tariff were of a technical nature, there was no violation of the Shipping Act, and relief under section 22, Shipping Act, 1916, is unwarranted.

(2) Where the record fails to disclose any causal connection between any violation of the Shipping Act and any damages alleged to have been suffered by the Complainant, relief under section 22 is unwarranted.

(3) Where the Complainant freight forwarder hires an NVOCC, which enables the forwarder to receive a commission 400 percent greater than it would have received had it hired the carrier directly; and where the forwarder or one of its principal officers received an additional $15,000 payment; and where the evidence established a conspiracy to defraud between the Respondent NVOCC and at least one principal officer of the Complainant; and where any damages which may have been suffered by the Complainant are the result of the Respondent NVOCC's misappropriation of the actual shipping charges—no relief will lie under section 22 in favor of the Complainant either with respect to the carrier and his agent or the NVOCC.

Anthony V. Barbiero for Complainant, Cargo Export Corporation.

Arthur A. Appleman for Respondent Intermodal Container Service, Ltd.

William J. Burke for Respondents Bangladesh Shipping Corporation and Peralta Shipping Corporation.

INITIAL DECISION [1] OF JOSEPH N. INGOLIA, ADMINISTRATIVE LAW JUDGE

Finalized October 12, 1982

BACKGROUND INFORMATION

This case began with the filing of Complaint pursuant to the provisions of section 22 of the Shipping Act of 1916 (46 U.S.C. 821). The Complaint was filed by Cargo Export Corporation (CEC) against Intermodal Container Service, Ltd., (Intermodal), the Bangladesh Shipping Corporation (BSC), and Peralta Shipping Corporation (Peralta). It al-

[1] This decision will become the decision of the Commission in the absence of review thereof by the Commission (Rule 227, Rules of Practice and Procedure, 46 C.F.R. 502.227).

leges that the Respondents knowingly and willfully combined and conspired to obtain and permit transportation by water at less than the rates otherwise applicable in violation of section 16 of the Shipping Act, 1916; subjected the Complainant to rates for transportation in violation of sections 14, 16 and 18 of the Shipping Act, 1916; and further engaged in an unlawful and unreasonable practice in violation of section 17 and unlawful retaliation in violation of section 14 of the Act. The Complaint seeks reparation and damages totalling $1,119,527.[2]

During the pendency of this proceeding, Respondent Intermodal, although properly served, failed to file any pleadings or to appear at any time. The Complainant, as well as both Peralta and BSC, filed a motion for a default judgment, and an Order To Show Cause why default judgment should not be entered against Intermodal was served.[3] Intermodal never responded to the Order To Show Cause. In addition, Peralta and BSC have filed a Motion To Dismiss this proceeding on the basis that: (1) additional parties not joined in the case are indispensable to the proceeding under Commission Rules of Practice and Procedure, 41, 42 and 62; (2) the Complaint is premature in that it seeks an "anticipatory refund" of monies from Peralta and BSC which are the subject of a suit in the United States District Court for the Eastern District of New York;[4] (3) the Commission lacks jurisdiction over certain conduct occurring in Bangladesh under the provisions of the Foreign Sovereign Immunities Act of 1976; and (4) the claim is barred by the statute of limitations.

This case was set down for hearing to begin on September 28, 1981. The parties did not submit a written stipulation of facts. However, some documents were stipulated and others were placed in the record through various witnesses. The documentary exhibits are referred to throughout this discussion as follows:

Stipulated Exhibit - SE
Complainant's Exhibit - C
Respondent's Exhibit - R

By Order served August 12, 1982, and on Motion of the Complainant, the record was reopened to admit the statement of the Complainant's principal witness. Pertinent excerpts from that testimony are set forth and commented on in Note 12, *infra*.

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[2] As will become evident from this decision, Complainant has, in effect, amended the Complaint both as to the specific nature of the alleged offenses and the amount of reparations and damages claimed.

[3] See Order To Show Cause, served August 31, 1981.

[4] There are several federal District Court cases pending or recently concluded which are related to this proceeding. They will be discussed as is necessary throughout this decision. It should be noted that these cases, one of which involves a criminal information and indictment, have caused some delay in the disposition of the instant case.

FINDINGS OF FACT

1. The Complainant, CEC, is a corporation organized and existing under the laws of the State of New York, whose principal office is located at 1975 Linden Boulevard, Elmont, Nassau County, New York. It is a licensed ocean freight forwarder and is subject to the rules and regulations of the Federal Maritime Commission.

2. The Respondent Intermodal is an NVOCC (Non-Vessel Operating Common Carrier).

3. The Respondent BSC is a common carrier as defined in the Shipping Act, 1916, is a foreign corporation, and is the national flag carrier of the government of Bangladesh. Its principal offices are located at Dacca, People's Republic of Bangladesh.

4. Peralta is the designated general agent of BSC in the United States, whose principal office is located at 25 Broadway, New York, New York.

5. In accordance with the Foreign Assistance Act of 1961,[5] as amended, the Administrator of the Agency for International Development (AID) entered into a loan agreement with the People's Republic of Bangladesh, the purpose of which was to supply financing for part of the cost of a fertilizer plant in Bangladesh.[6]

6. Pursuant to the Letter of Commitment, dated May 25, 1977, AID agreed to provide loan funds in the sum of $7,000,000.00 to the People's Republic of Bangladesh, structured as follows:

> Ashuganj Fertilizer and Chemical Co., Inc. (AFCC), acting on behalf of Bangladesh, established an account at the Pubali Bank at Dacca in Bangladesh. Through the Pubali Bank, AFCC arranged for letters of credit to be issued by the Manufacturers Hanover Trust Company (MHT), in favor of Foster Wheeler Limited (FWL). FWL is a foreign corporation based in Reading, England, which was the general contractor in charge of designing, supervising and erecting the fertilizer plant in Bangladesh.
>
> The first letter of credit, No. 727,000, was opened in favor of FWL on August 15, 1977. Pursuant to the letter of commitment, FWL was given the option to establish subsidiary letters of credit. Acting with MHT, FWL established a document called "transferred confirmed irrevocable straight credit," No. 727000E, in favor of CEC.
>
> CEC had been selected by FWL and approved by AFCC as the freight forwarder for the fertilizer plant project for all goods originating in the United States. It was part of CEC's duties to receive goods which had been manufactured for the project in the United States, to issue warehouse receipts to the

[5] See 22 U.S.C. 2151 *et seq.*

[6] SE-62.

suppliers and fabricators, and to generally handle, store and call forward the supplies at the request of FWL, and to arrange for shipment of those supplies to the project by either air or ocean carrier.

In order to use the letter of credit, shipment to any Bangladesh P.O.E. (Port of Entry) was to be made on vessels bearing the flag of a country "included in AID geographic code 941."

Ex. 62, 63, 64; Tr. 117-119.

7. In September of 1978, CEC received information from FWL indicating that a particular shipment of trucks was urgently needed and undertook to arrange the shipment. Ex. C-1, C-2, C-3; Tr. 118120, 126.

8. After receiving the order numbers of the trucks from FWL, CEC learned that they were being sold to FWL by Gateway Overseas, Inc. (Gateway), and CEC's Secretary/Treasurer called Gateway and secured the dimensions of the trucks and began looking for a suitable carrier. Tr. 127, 128.

9. CEC checked the sailing dates of various carriers, and in September of 1978, its Secretary/Treasurer called Peralta.[7] He gave them the cubic measurement and weight of the shipment and received a rate from Peralta. According to the Secretary/Treasurer, the base rate was $121.50, a 4% Suez charge, plus a $25.50 bunker charge—for a total of $151.86. He then applied this rate to the measurement tons of 1,440.3, which gave him $218,723.95, to which he added heavy lift charges, which increased the total charge to $238,528.73. Ex. SE-6; Tr. 134, 135.[8]

10. After talking with Peralta, CEC's Secretary/Treasurer contacted Intermodal and orally gave them the contract of carriage for an all-inclusive rate of $150 a ton. Tr. 137, 138.

11. CEC then prepared dock receipts for the trucks and sent them to Phoenix Manufacturing, which was the truck fabricator. The dock receipts contained the following pertinent information:

10	Dump Trucks	1528	cuft	EA	18,500	lbs.	EA
10	"A" Frame Trucks	2072	cuft	EA	17,000	lbs.	EA
1	Fuel Bowser	2069	cuft		16,600	lbs.	
10	Flat Bed Trailers	1864	cuft	EA	14,900	lbs.	EA
1	Ambulance	923	cuft		4,500	lbs.	

Ex. SE-4; Tr. 139.

[7] Complainant's witness testified he originally contacted Gateway between September 18 and September 22, 1978, and then called Peralta shortly thereafter. This seems unlikely since Intermodal called Peralta on September 13, 1978, *after* being contacted by CEC. In any event, the time sequence is not determinative of the issue involved.

[8] The computation mistakenly did not include a $4 "add-on" for Chalna. Tr. 136.

12. On September 13, 1978, Intermodal, by its Executive Vice-President, telephoned Peralta and spoke with the booking clerk in charge of the Bangladesh trade. An all-inclusive rate of $90 per 2240 lbs. or 40 cu.ft. from the United States to Chalna, Bangladesh, was quoted to Intermodal for transportation of the equipment described in paragraph 11 above. On September 20, 1978, Peralta confirmed the quoted booking in writing on behalf of BSC. Ex. R-7; Tr. 630-632, 640, 641.

13. As of September 20, 1978, and prior thereto, BSC had a tariff on file with the Commission entitled "Bangladesh National Line India, Pakistan, Bangladesh, Ceylon and Burma, Freight Tariff No. 1, F.M.C. No. 1, From: U.S. Atlantic and Gulf Ports To: India, Pakistan, Bangladesh, Ceylon and Burma Ports." Page 123 of the tariff was in pertinent part as follows: [9]

COMMODITY CODE	COMMODITY DESCRIPTION AND PACKAGING	RATE BASIS	BOMBAY CALCUTTA	COLOMBO	KARACHI	ITEM NO.
	AUTOMOBILES, S.U., K.D. OR C.K.D.:					85
	Busses					
	Chassis					
	Passenger Cars					
	Trucks including dump N.O.S.					
	Boxed		65.75	79.00	72.75	
	Unboxed (Rate to be assessed on overall measurements less bumpers)		82.00	98.00	90.50	
	AUTOMOBILE PARTS and Materials for Assembly N.O.S.		65.75	79.00	72.50	

Page 242 was almost blank except for the following entries:

	V					
	VALVES, N.O.S.		110.00	131.25	121.25	1560
	VANADIUM PENTOXIDE	W	70.75	84.50	78.00	1565

[9] Ex. SE-9.

Page 239 was, in pertinent part, as follows:

COMMODITY CODE	COMMODITY DESCRIPTION AND PACKAGING	RATE BASIS	BOMBAY CALCUTTA	COLOMBO	KARACHI	ITEM NO.
	TRUCKS:					
	Equipped with Mechanical Equipment or Devices N.O.S., Packed or Unpacked	)	121.50	145.00	121.50	1550
	Fork Lift	)				
	Tank, without special equipment other than pump: Boxed		72.75	87.25	72.75	

14. When Peralta booked the truck shipment, it knew that it would have to file a new tariff incorporating the $90.00 all-inclusive rate. It waited a period of time to insure that the booking would not be cancelled and then on October 10, 1978, filed a new corrected tariff page 242 as follows: [10]

(I)(R) VEHICLES
TO CHALNA ONLY
Minimum 32 units, viz: 90.00 (ALL INCLUSIVE)

		Lbs.	Cu.Ft.
1	Fuel Truck	16600	2069
1	Ambulance	4500	923
10	"A" Frame Trucks ea.	17000	2072
10	Dump Trucks ea.	17000	1526
10	Flatbed Trailers ea.	14900	1864

Expires November 13, 1978

15. On October 17, 1978, the truck shipment began from Philadelphia, Pennsylvania, aboard the *Banglar Maan*. Ex. SE-11.

[10] The effective date of the tariff was no later than October 16, 1978.

16. Peralta issued its own bill of lading for the truck shipment. The original was punch stamped "non-negotiable." Ex. C-12, C25.

17. On October 17, 1978, Intermodal issued its own bill of lading for the truck equipment, which showed prepaid freight charges of $216,045.00. Ex. C-4.

18. On October 23, 1978, CEC presented a sight draft to MHT drawn on the letter of credit described above, together with documentation including the Intermodal bill of lading. CEC received $216,200.00 from MHT. Ex. C-4, C-17.

19. Later, on November 6, 1978, CEC paid Intermodal $216,045.00 after receiving a bill from Intermodal for that amount. Ex. C-18; Tr. 290.

20. Also, on November 6, 1978, Intermodal by check paid CEC $21,604.50 (10 percent) in brokerage fees. Had CEC hired the carrier, BSC, directly, its fee could only have been $5,301.13 (2 1/2 percent).[11] Tr. 305.

21. By telex dated November 15, 1978, Peralta advised BSC not to release the cargo to the consignee since it was holding the original bill of lading for non-payment of the ocean freight in the amount of $129,627.00. Ex. SE-13.

22. By letter dated December 8, 1978, Intermodal requested that the cargo be remeasured saying it should be 53,103 cft. and not 57,612 cft. The Peralta employee responsible for the truck shipment believed Intermodal was "stalling" on payment for the shipments by requesting the remeasurement. Peralta then sent a letter to Intermodal asking for payment of the amount not in dispute. Ultimately, Peralta agreed to the lesser measurement and sent Intermodal a bill of lading showing reduced freight charges totalling $119,526.75, and requesting payment. Exs. SE-16 through SE-21, SE-66, 67.

23. In December of 1978, and through January of 1979, there was correspondence between Peralta, BSC and Intermodal regarding the latter's failure to pay the ocean freight and the fact that the cargo was not being released. During that period, BSC directed Peralta to contact CEC, and the attorney for Intermodal suggested a "quick solution" to the problem. Exs. SE-22 through SE-32, SE-68.

24. In addition, beginning on December 30, 1978, BSC began a series of correspondence with FWL, as well as Peralta, in which it sought payment of the ocean freight on the truck shipment. The correspond-

[11] The cancelled check evidencing payment was not available in CEC's records. Its witness testified, "We don't keep copies. It goes to the accounting department and they deposit it." Also, as will be noted and discussed more fully later, a criminal information was filed in the United States District Court, Southern District of New York, charging CEC's principal witness with criminal conspiracy. The information, among other charges, alleges the witness personally received $15,123.15 from Intermodal on November 6, 1978, with respect to the truck shipment. A plea of guilty to the information has been entered.

ence indicates that BSC wished to avoid legal proceedings. It requested that Peralta attempt to collect the freight charges without legal action but directed it to inform FWL that government ministry action would be taken. Nevertheless, Peralta did threaten legal action against FWL, and ultimately BSC sought to press its claim by seizing any property it could find belonging to FWL in Bangladesh. Finally, FWL's reputation and future prospects were endangered, and it paid the freight charges to BSC. Exs. SE-35 through SE-39.

25. In the meantime, Intermodal and CEC began corresponding with respect to Intermodal's failure to pay BSC. By letter dated February 14, 1979, Intermodal's President informed CEC's President that due to certain described "management misjudgments," Intermodal did not have the cash to pay BSC. As a result, CEC corresponded with FWL. In that correspondence, FWL asked why Intermodal was used at all and ultimately demanded that CEC pay BSC directly. SE-40 through SE-43, SE-45, 46, SE-48 through SE-51, SE-53 through SE-58, C-19 through C-23.

26. On April 27, 1979, CEC filed suit against Intermodal in the Supreme Court of the State of New York, County of New York. The Complaint contains the following pertinent provisions:

> THRID [sic]: Plaintiff entered into an agreement with the defendant whereby the defendant would containerize and deliver certain cargo for plaintiff and plaintiff's client, Foster Wheeler, Ltd of Bangledesh [sic] from the point of shipment to the point of destination. It was further agreed that upon delivery of the cargo, the defendant was to receive from the plaintiff the sum of $216,045.00 from which the defendant was to pay the carrier vessel the freight charge of transportation in the amount of $119,526.75.

Exs. R-1 through R-6.

27. Sometime in 1980, the United States of America brought suit against CEC in the United States District Court, Eastern District of New York, CV-80-0670. In that suit, the judge granted the Plaintiff's Motion for Summary Judgment by Order dated March 31, 1981. The pertinent parts of the Order are as follows:

> This is an action brought by the United States to recover $216,045 paid by the Agency for International Development ("A.I.D.") to Cargo Export Corporation ("CEC") pursuant to a Supplier's Certificate and Agreement (the "Form 282 Agreement") entered into to finance CEC's shipment of cargo to Bangladesh. A.I.D. seeks refund of its payment for the ocean freight charges alleging that CEC breached the Form 282 Agreement by transporting the cargo on a foreign flag vessel that was ineligible for AID financing and by improperly certifying that the vessel used was a United States flag vessel.

The United States has moved for summary judgment pursuant to Rule 56(a) of the Federal Rules of Civil Procedure. For the reasons set forth below, the motion is granted.

On October 23, 1978, CEC executed a Form 282 Agreement with A.I.D. which, through its incorporation of Letter of Credit #727000-E dated November 4, 1977, and issued by Manufacturers Hanover Trust Company in favor of CEC, enabled CEC to draw down sums to cover freight charges. The Form 282 Agreement specified, *inter alia*, that shipment was to be made in accordance with the terms of the Letter of Credit. The Letter of Credit specifically stated that shipment was to be made on vessels bearing the flag of a country included in A.I.D. Geographic Code 941, and flag ships of a "cooperating country," which the parties agree in this case was Bangladesh, were expressly excluded from the Code 941 list. Hence, under the terms of the Letter of Credit, the Bangladesh flag vessel, SS BANGLAR MANN, on which CEC transported the cargo here at issue to Bangladesh, was ineligible for A.I.D. financing. CEC argues that, because Code 941 was amended effective June 15, 1978, before the Form 282 Agreement was signed, to permit use of vessels of cooperating country registry, the shipment was eligible for A.I.D. financing under the terms of the Letter of Credit. However, plaintiff has established without genuine dispute from defendant that the amendment did not retroactively modify contractual requirements under already existing letters of credit, including the November 4, 1977 Letter of Credit at issue here. Indeed, in letters of August 8, 1979, and October 22, 1979, CEC acknowledged that it was not entitled to A.I.D. financing for this shipment. The parties agree that CEC might have obtained A.I.D. funds by requesting A.I.D.'s prior written waiver of the Code 941 restrictions. CEC, however, failed to make such a request. In fact, in its Form 282 Agreement, CEC represented that the ship to be used was a United States flag ship and thus eligible for A.I.D. financing, not that it was to be a ship of a cooperating country made eligible for financing under the amendment.

Accordingly, the record requires a conclusion that CEC breached the Form 282 Agreement in two respects: first, by its use of a Bangladesh flag vessel, a vessel expressly ineligible for A.I.D. financing, and second, by improperly certifying that the vessel was a United States flag ship. By breaching the terms of the Form 282 Agreement and of the Letter of Credit incorporated therein, CEC wrongfully obtained A.I.D. financing for this shipment and must, under the case law and contract, make "appropriate refund" to A.I.D. *See United States v. Framen Steel Supply Co.*, 435 F. Supp. 681, 685 (S.D.N.Y.

1977); *United States v. Emons Industries, Inc.*, 406 F. Supp. 355, 358 (S.D.N.Y. 1976).

28. In June of 1982, the United States Attorney for the Southern District of New York filed a criminal felony Information entitled, *United States v. Munsch*, 82 Cr. 0461. The Information charges CEC's principal witness with willful conspiracy with CEC's President and a former employee to defraud FWL, the World Bank and AID by making false, fictitious and fraudulent claims to AID and then with concealing and covering up material facts by trick, scheme and device. The more pertinent portions of the Information are as follows:

> 10. From in or about July 1975, up to and including December 1979, in the Southern District of New York and elsewhere, PAUL MUNSCH, the defendant, along with Eugene Pagano and Armand Ventura, who are named herein as coconspirators but not as defendants, unlawfully, wilfully, and knowingly did combine, conspire, confederate and agree together and with other persons to the United States Attorney known and unknown, to defraud FWL, the World Bank and the United States and its agencies thereof, to wit, the Agency for International Development ("AID") and to commit offenses against the United States, to wit, violations of Title 18, United States Code, Sections 287, 1001, 1341 and 1343.
>
> * * *
>
> 14. Among the means which the defendant and his co-conspirators would and did employ to effectuate and carry out the conspiracy were the following:
>
> (a) On four occasions, CEC solicited the services of a NVOCC to act as a middleman in order to inflate the cost of the ocean freight charged FWL and AID.
>
> (b) On these occasions, CEC would agree with the NVOCC on an ocean freight rate to charge FWL and AID which was significantly in excess of the ocean freight rate actually charged by the steamship line that carried the cargo.
>
> (c) Thereafter CEC would bill AID, and on one occasion the World Bank, at the inflated high rate without disclosing the actual lower rate charged by the steamship line for the shipment.
>
> (d) The defendant and his co-conspirators would then split the substantial difference between the high rates charged AID and the low rates charged by the steamship line with the NVOCC without disclosing, among other things, their excessive gain to FWL or AID.
>
> (e) The defendant and his co-conspirators employed their scheme on the first three cargoes they handled for the Bangladash [sic] Project. The first cargo was shipped on or

about November 17, 1977, and consisted of a bulky rock crushing and cement batching plant ("rock crusher"). Rather than offer the rock crusher to an ocean carrier of the Conference to ship, as required by the Contract, the defendant and his co-conspirators instead used a NVOCC to ship the rock crusher on the excluded BSC line. In this case, CEC billed the World Bank $158,039.12 for ocean freight, although BSC only charged $106,267.69 to actually ship the goods, for an undisclosed $51,708 profit to the defendant and his co-conspirators, which was split with the NVOCC and others.

(f) On the second and third cargoes of some appliances which were shipped together from Los Angeles on a Scindia ship, CEC billed AID $32,000 and $11,578.62, respectively, although Scindia charged only $23,857.79 and $10,480.99 to ship the goods, for an undisclosed total profit of $9,239.84 to the defendant and his co-conspirators, which was split with the NVOCC and others.

(g) CEC billed and received from AID $67,143.37 for costs incurred for handling, storing, and heavy lifting the rock crusher before the shipment, whereas in fact the actual cost was approximately $50,000.

(h) From in or about February 1978, up to and including August 1978, AID was billed $588,926.26 for ocean freight on 32 cargoes shipped on five Waterman ships. For these 32 cargoes, CEC invoiced AID at a rate approximately 10% higher than was charged by Waterman. In each instance, CEC received an invoice from Waterman for the 10% project discount rate but nevertheless billed AID at the higher non-discounted rate. The overcharges to AID for these claims exceeded $50,000.

(i) In or about October, 1978, CEC handled a large shipment of 31 trucks and an ambulance ("the truck shipment") to the Bangladesh Project. Again, rather than offer or book the truck shipment with the Conference as required by the Contract, CEC again used a NVOCC to ship the trucks on the excluded BSC line. For this truck shipment, CEC billed AID $216,045 for ocean freight but only had to pay BSC $119,526.75 to ship the trucks, for an undisclosed $96,518 profit which was split with the NVOCC.

* * *

(u) In or about September 1978, CEC agreed with a NVOCC to book the truck shipment from the United States to Bangladesh.

(v) On or about September 20, 1978, a NVOCC booked the truck shipment with BSC through Peralta.

(w) On or about October 17, 1978, a NVOCC issued a bill of lading for the truck shipment rated at $216,045.

(x) On or about October 23, 1978, CEC submitted a claim to AID through Manufacturers Hanover Trust Company for $216,045 for the ocean freight charges on the truck shipment.

(y) On or about October 23, 1978, CEC submitted an AID Form 282 to AID through Manufacturers Hanover Trust Company falsely certifying, among other things, that the ocean freight charges for the truck shipment were $216,045 and that the ocean carrier was a United States flag vessel.

(z) On or about October 26, 1978, Manufacturers Hanover Trust Company mailed a $216,045 check to CEC as payment for the truck shipment.

(aa) On or about November 6, 1978, a NVOCC issued a check to CEC for $21,604.50 and a check to defendant PAUL MUNSCH for $15,123.15 as part of the profit on the truck shipment.

Ex. R-13.

29. On June 24, 1982, Mr. Munsch pleaded guilty to the criminal information. Some of the more pertinent portions of it are as follows:

> THE DEFENDANT: In 1975 Cargo Export was designated as an exclusive freight forwarder to book ocean shipments from the United States to an AID finance project in Bangladesh.
>
> THE COURT: Excuse me. This is being taken down by the court reporter. So you will have to read it a little more slowly and distinctly.
>
> THE DEFENDANT: Yes, sir. Eugene Pagano was president, I was secretary-treasurer, Armand Ventura was director of marketing in charge of the Bangladesh project.
>
> Eugene Pagano, Armand Ventura and I, Paul Munsch, agreed to submit false certifications to the Agency for International Development showing high ocean freight rates to be paid to Cargo Export Corporation by the agency when in fact the true ocean freight rates were much lower. We did this by using an NVOCC as a middle. We split the difference between the higher rates and the lower rates between ourselves and others.
>
> There were three cargoes shipped to Bangladesh by Cargo Export that were falsely certified to the agency and in one case the World Bank by Cargo Export in the fall of 1977.

One cargo of a rock crusher aboard a Bangladesh vessel we billed 158,000, but the actual cost was only $106,000. Two cargoes of house appliances that were shipped on an Indian vessel we billed at 32,000 and 11,000, but the actual cost was only 24,000 and 10,000 respectively.

When we billed we had to complete government forms which were falsely certified. Eugene Pagano and I, Paul Munsch, in the fall of 1977, falsely certified to the agency that the handling cost for the rock crusher that we had shipped to Bangladesh aboard a Bangladesh vessel was $67,000 when in fact the true cost was approximately $50,000.

Eugene Pagano and I, Paul Munsch, for a period of February 1978 through the fall of 1978, shipped 32 cargoes aboard five vessels to Bangladesh for which we falsely certified to the agency 32 times that the ocean freight was 10 percent higher than the true cost, which amounted to $52,000.

During the course of the AID investigation I created ten credit memos which Gene Pagano had knowledge of in order to balance the prior billings to AID for the cargo shipped on Waterman vessels.

Eugene and I, Paul Munsch, in the fall of 1978, shipped a cargo of trucks to Bangladesh aboard a Bangladesh vessel for which we falsely certified to the agency that the ocean freight was $216,000 when I knew the ocean freight was much lower. The difference was split between ourselves and others.

It was also falsely certified to the agency that the vessels carrying trucks was a U.S. flag vessel.

* * *

Q. And you and the other officers of CEC, namely, Eugene Pagano and Armand Ventura, combined and conspired and agreed together that you would defraud AID and Foster Wheeler in connection with your participation as the exclusive freight forwarder for this project?

A. Yes, sir.

Q. And it was part of that conspiracy that you would present claims for payment for expenses in connection with freight shipments which you knew were in part false and fraudulent?

A. Yes, sir.

Q. And in order to do that you solicited the services of a nonvessel operating common carrier, or NVOCC, to act as a middleman in order to inflate the cost?

A. Yes, sir.

Q. And on those occasions you agreed with the NVOCC to charge Foster Wheeler and AID a freight rate which was substantially in excess of the freight rate actually charged?

A. Yes, sir.

Q. And thereafter you billed AID at the inflated rate without disclosing the actual lower rate?

A. Yes, sir.

* * *

Q. And on another occasion in about October 1978, in connection with a shipment of 31 trucks and an ambulance, you billed $216,000 for ocean freight but only paid out $119,000, for an undisclosed profit of about $96,500?

A. Yes, sir.

Q. How did these overcharges come to light?

A. Well, on the $216,000 shipment I knew what the NVOCC was going to pay. On the first three I did not know. But to my knowledge, I know that they work on a 40 percent—approximately 40 percent markup.

Q. Which you didn't really have to pay, and you split that markup with them?

A. Yes, we got a percentage of that.

Q. So CEC received substantial amounts?

A. Yes.

Q. And you knew they were receiving substantial amounts on all these overcharges?

A. Yes. If you compare it to the brokerage that the conference carriers pay, yes, we did receive much more.

Q. Were you a stockholder in CEC?

A. Yes, sir.

Q. And did you receive additional dividends? How did this money appear? Did it appear on your books or was it off your books?

A. No, it was all deposited in the corporation.

Q. And you paid corporate income taxes on it?

A. I believe so. My accountant does all that, sir.

Q. But you received increased dividends as a result of this?

A. I personally?

Q. Yes.

A. Yes. Well, we took—we got some personal money out of it, sir.

Q. And you knew that this was a fraud on the Agency for International Development?

A. Yes, sir.

Q. And you knew that that was an agency operating under the auspices of the United States Department of State?

A. Yes, sir.

Q. Have you gone over with your attorney the complete information, all of the charges made in it, including all of the overt acts that are alleged?

A. Yes, sir.

Q. Are all of them, all of those charges, accurate?
A. Yes, sir.

* * *

THE COURT: The court finds that the plea is knowledgeable and voluntary and that it has a basis in fact.

Mr. Munsch, how do you plead to the information, guilty or not guilty?

THE DEFENDANT: Guilty, your Honor.

Ex. R-14.

30. In June of 1982, the United States Attorney for the Southern District of New York indicted the President of CEC and one of its former employees in a case styled *United States v. Pagano, et al.*, 82 Cr. 0433. The indictment contains the same charges as are contained in the criminal Information discussed in paragraphs 28 and 29, above. Mr. Pagano has pleaded not guilty to the charges. Ex. R-15.

ULTIMATE FINDINGS OF FACT

31. The Complainant has failed in its burden to show that co-respondents BSC and Peralta violated the Shipping Act in any substantive manner.

32. Even if the facts were sufficient to show a substantive violation, the record is devoid of any evidence which establishes that the Complainant suffered damages and is entitled to reparations under section 22 as a result of those damages.

33. Any damages suffered by the Complainant were due to Intermodal's (the NVOCC) illegal actions, and especially its failure to pay the freight charges to BSC. Further, the Complainant is itself at fault in that it knew or should have known of what was transpiring both with respect to the filing of a new tariff and the failure of Intermodal to pay the freight charges.

34. The record establishes that the Complainant, through one or more of its officers, conspired to defraud the United States (AID) regarding the truck shipment involved here.

35. The facts of record do not warrant any judgment in favor of the Complainant, either as to co-respondents BSC and Peralta or as to Intermodal. While the latter did not appear in the proceeding, and was obviously engaged in illegal conduct respecting the truck shipment, it is clear that the Complainant took part in that conduct. Also, it is clear that any damages the Complainant may have suffered as a result of Intermodal's actions were not the result of violations of the Shipping Act, but rather resulted from Intermodal's failure to complete the illegal scheme it was engaged in with CEC, i.e., it did not pay the actual shipping charges after splitting the excess charges received from AID with CEC.

DISCUSSION AND CONCLUSIONS

As has been noted, the Respondent has filed a Motion to Dismiss this proceeding based on various factors. They include argument regarding the absence of indispensable parties, prematurity, jurisdiction and immunity, and untimeliness. We have concluded that the Commission does have jurisdiction to render a decision on the merits in this proceeding. The Initial Decision on the merits makes any further ruling on the Respondent's dismissal motion unnecessary and, therefore, no such ruling will be forthcoming herein.

Section 22 of the Shipping Act, 1916, provides in pertinent part:

> SEC. 22. (a) That any person may file with the board a sworn complaint setting forth any violation of this Act by a common carrier by water, or other person subject to this Act, and asking reparation for the injury, if any, caused thereby. . . . The board, if the complaint is filed within two years after the cause of action accrued, may direct the payment, on or before a day named, of full reparation to the complainant for the injury caused by such violation.

Case law has established certain well-settled rules and principals. In reparation proceedings, the claimant has the burden of establishing by a preponderance of the evidence that the respondent exacted charges in excess of those lawfully applicable. *Madeplac S.A. Industria de Madeiras v. L. Figuriedo Navegacao S.A. a/k/a Frota Amazonica, S.A.*, Docket 75-45, Adoption of Initial Decision, dated 4/12/78, page 3, 16 F.M.C. 87, aff'd 21 F.M.C. 214 (1978). Further, even if the rate under investigation is a new rate, in a complaint proceeding the burden of proof is upon the complainant. *Hawaii Meat Co., Ltd. v. Matson Navigation Co.*, 21 F.M.C. 43 (1978). See also *West Gulf Maritime Assn. v. Port of Houston Authority*, 21 F.M.C. 244 (1978), aff'd 610 F.2d 1001, cert. denied 449 U.S. 822.

As to adherence to the tariff rate, in the light of violations claimed under section 22, it is unlawful to charge or demand or collect or receive a greater or less different compensation for transportation of property than the rates, fares and/or charges which are specified in tariffs filed with the Commission and in effect on the date of the shipment. *Aluminum Products of Puerto Rico, Inc. v. Trans-Caribbean Motor Transport, Inc.*, 5 F.M.B. 1 (1956), *Corn Products Co. v. Hamburg-Amerika Lines*, 10 F.M.C. 388 (1966). The rate of the carrier as filed in the tariff is the only lawful charge. *Ocean Freight Consultants, Inc. v. Bank Line Ltd.*, 9 F.M.C. 211 (1966). Further, with respect to tariff rules and regulations, there is a presumption that the shipper's knowledge of the lawful rate is conclusively presumed. *Kraft Foods v. Moore McCormack Lines, Inc.*, 17 F.M.C. 320, 323 note 4 (1974), citing 227 U.S. 639. Finally on this point, the legality of the actions of a common carrier by water can only be judged against the rates and charges which are specified in its tariffs on file with the Commission and duly published and in effect at that time. A shipper and carrier are free to negotiate whatever terms they may wish. Until those understandings are fixed as specified by the Shipping Act, the Federal Maritime Commission is not involved. *Sidney-Williams Co. v. Maersk Line*, 20 F.M.C. 324 (1977).

Finally, as to reparations claimed under section 22, it is well-settled that while "any person" may file a complaint, reparation may be awarded only to a complainant who has shown that it was injured by a violation of the statute. *Williams, Clarke Co., Inc. v. Sea-Land Service, Inc.*, Order on Remand, S.D. No. 489, dated 11/29/77. Section 22 does not "require" the award of reparations even when a violation has been found. The language of the section is that the Commission "may" direct the payment of full reparation for injury caused by the violation. The language is permissive, not mandatory, and the mere fact that a violation of the Shipping Act has occurred does not compel a grant of reparations. *Philip R. Consolo v. Flota Mercante Grancolumbiana*, 7 F.M.C. 635 (1963); *Parsons & Whittemore, Inc. v. Johnson Line, et al.*, 7 F.M.C. 731 (1963). Further, no principle of equity or justice authorizes the Commission to base an award of reparation to any party upon that party's prospective reliance upon the unlawful act of another. *L'Aluminum Francois v. American Export Lines, Inc.*, 8 F.M.C. 87 (1964); and finally, businessmen engaged in the import and export trade are not innocent, but rather negligent when they make no effort to determine and follow through on the cost of shipping services they intend to utilize. Unilateral assumptions by shippers, unrelated to a misleading act of a carrier, will not support equitable relief. A shipper is charged with knowledge of the correct rate, and the only lawful rate is the one on file with the Commission. *Bernard Bauman Corp. v. American Export Lines, Inc.*, 8 F.M.C. 155 (1964), citing 262 F.2d 474.

Despite the holdings in the above-cited cases, the Complainant here would have the Commission determine that BSC and Peralta "have violated the Shipping Act as well as the rules of this Commission, such that the Respondents should be held in damages in an amount equal to 213,429.40." In support of its contention that the Respondents demanded and collected "untariffed" rates, the Complainant notes that (1) the tariff was not filed until October 16, 1978, (2) the symbols I & R were used erroneously, (3) the tariff correction was filed on the wrong page at least with respect to those trucks which were specially equipped, (4) the corrected tariff continued the wrong cubic measurement of 57,612 cft., instead of 53.103 cft. The Complainant asserts that BSC and Peralta "virtually ignored its filed tariff rates, offering contracts of carriage at whatever the market would bear." It states that BSC and Peralta's practice of filing tariff changes within one day of sailing "was not calculated to give notice as required by the Commission, but appears to have been motivated by the Responent's [sic] attempt to disguise its practice of operating outside of its filed tariffs." The Complainant concludes that BSC and Peralta's actions resulted in an unreasonable preference in favor of Intermodal against CEC and "amounted to unreasonable prejudice and unjust discrimination against the Complainant," and that BSC and Peralta collected untariffed rates in violation of the rules of the Commission. Generally, in support of its views, CEC cites *First International Development Corporation v. Shipper's Overseas Services, Inc.*, 23 F.M.C. 47 (1980), *Roco Worldwide, Inc., v. Constellation Navigation*, 660 F.2d 992 (4th Cir. 1981); and *Trans Pacific Freight Conference of Japan/Korea v. F.M.C.*, 650 F.2d 1235 (CA, DC, 1980).

On the basis of BSC and Peralta's dealings with Intermodal, the Complainant argues that the "Respondent BSC/Peralta engaged in unlawful practices within the boundaries of the United States in attempting to secure collection of its untariffed freight charges." It seems to consider BSC and Peralta guilty of wrongdoing because they did not notify CEC when Intermodal defaulted, and cites a debt owed by Intermodal to BSC and Peralta on a previous shipment as a possible reason for BSC and Peralta's actions. CEC then concludes that "the contractual liabilities created bwteeen [sic] the Respondent, BSC/Peralta, and the Respondent, Intermodal, were such that Intermodal alone was responsible for the payment of freight charges." It then argues that BSC and Peralta "coerced Complainant's principal to pay for freight charges in the sum of $119,516.75, for which it was not obligated to pay." CEC finally alleges that BSC and Peralta violated sections 817 and 815 of the Shipping Act.

The Complainant also alleges that BSC and Peralta's actions outside the United States are "subject to the jurisdiction of this Commission" and that such actions "constitute unreasonable practice in violation of the Shipping Act as well as the Hamburg Convention."

Finally, the Complainant "computes" the reparations due it totalling $213,429.40, asserting that $93,902.65 is the difference between "the higher tariff rate and the lower special rate." It states the remaining $119,526.75 is due to it as reparations "penalizing the Respondent BSC/Peralta for unlawful practices within and without the United States in collecting $119,526.75 freight charges from Complainant's ultimate user and principal."

In answer to the Complainant's arguments, BSC and Peralta state:

> If this claim has any merit at all, it lies only against the defaulting lead co-respondent, Intermodal Container Service, Ltd. ("Intermodal"). As to all other respondents it is an artificial claim based solely on their solvency. At most, Complainant has proven: (a) harmless clerical error by co-respondent Peralta Shipping Corporation ("Peralta"), and (b) enforcement of a written security agreement in accordance with its terms

> and applicable law by the other co-respondent, Bangladesh Shipping Corporation ("Bangladesh"). Such proof does not justify the windfall bonanza sought from these litigating respondents.

The Respondents point out that the Complainant's use of Intermodal allowed CEC to receive a 400 percent higher commission than it would otherwise have received. They pointed out that their dealings with Intermodal were documented and not oral as was Intermodal's agreement with CEC. They note that Intermodal was unavailable to give its version of the agreement and that "all we have is the word of Complainant's operating officer."

As to the case law cited by the Complainant, the Respondents note that *International Development Corp. v. Ship's Overseas Services, Inc., supra,* has been reversed on jurisdictional grounds in *Ship's Overseas Services, Inc. v. Federal Maritime Commission,* 670 F.2d 304 (D.C. Cir. 1984). Even further, they differentiate the facts of the above case from those present in the instant case.

As to the tariff violations cited by the Complainant, the Respondent Peralta asserts there were no violations of the Shipping Act. It argues that there was an offer of business from Intermodal with whom Peralta negotiated a commercially reasonable rate, that it prepared the new tariff upon the specifications and measurements given it by Intermodal, that the tariff was on file before the vessel sailed and that the freight collected was in accordance with the amended tariff. It states that at most the "Complainant has raised a quibble over a typographical error in a citation, the use of two code letters in a tariff instead of one, and the choice of a page on which a tariff amendment appears—matters which, if proven, never harmed Complainant."

On the basis of the facts presented in this case, and the case law applicable to those facts, we must hold that the Complainant is not entitled to relief under section 22 of the Shipping Act. First of all, even if we were to accept all of the Complainant's evidence as fact—and we do not—it still would have failed in its burden. We agree with the Respondent that Peralta's dealings with Intermodal, *which was hired by the Complainant* to handle the shipment, were entirely proper. They, in effect, negotiated a special rate for the truck equipment, which was a lower rate than that previously on file, and the new rate was filed prior to the date of shipment. The Complainant's assertion that the filing "was not calculated to give notice" is an entirely gratuitous statement unsupported by any evidence of record. Indeed, if the shipment was as large and as important to CEC as its principal witness states it was, it is inconceivable that it did not know or should not reasonably have known of the new tariff and the new rate. Further, in light of statements made by CEC's principal witness in pleading guilty to the criminal conspiracy Information, such an argument is frivolous. The witness clearly stated that CEC and Intermodal knew what the actual freight charges were. Indeed, from them they computed their respective shares of the excess they illegally obtained from AID. As to the use of the initials I and R, the tariff page on which the new rate was filed, and the original error in measurement, as well as similar matters, these are technical errors, as the Complainant itself admits in its Post Trial Memorandum of Law at page 27. Some occurred because of Intermodal's actions, and not those of Peralta. More importantly, if CEC had exercised the care and diligence it should have, it would have possessed the knowledge the law presumes it to have. *Kraft Foods* and *Bernard Bauman, supra.*

With regard to BSC and Peralta's actions in attempting to collect the freight rate after Intermodal defaulted, we do not believe they violate any section of the Shipping Act. When BSC did not receive the freight charges due, it contacted the "notify party" (FWL) as set forth on the bill of lading. It asked for payment and waited a reasonable time. When payment was not forthcoming, it exerted pressure through its government and otherwise and finally secured the funds due it. Whether it did so under a separate agreement, as it alleges, or under the bill of lading, CEC has no cause to complain. It seems to argue that once it paid Intermodal, its responsibility ceased, but this is completely untenable. Intermodal was working for CEC and/or the shipper or consignee, not BSC or Peralta. There was no duty on BSC and Peralta to monitor what went on between Intermodal and CEC. They carried the goods and sought the payment due them from the shipper or consignee (notify party). That Intermodal embezzled or misappropriated the funds given them by CEC certainly cannot be imputed to BSC or Peralta and be used by CEC as a basis for a reparations claim against BSC and Peralta.

So here, even if we found the facts that the Complainant would have us find, we could not rule in his favor because they do not establish a wrong under the Shipping Act, nor a basis for a finding of reparations. However, there is more to consider. This record is replete with indications that the dealings between Intermodal and the Complainant were not the normal arm's-length business transactions one might expect. For example, the record indicates that CEC not only received a 400 percent larger commission by using Intermodal rather than dealing with BSC directly, but that its principal witness received a check for over $15,000 besides. In addition, CEC, through at least one of its officers, fraudulently obtained federal funds from AID by falsifying records. On at least two separate occasions, it erroneously stated that Intermodal was being paid to containerize the shipment, when in fact it was not. Even more to the point, it appears that CEC engaged in a course of conduct using Intermodal and others whereby it defrauded the United States and others by overstating the shipping charges and then splitting the proceeds of those overcharges with its co-conspirators. A reading of the exhibits in evidence which relate to the pending or completed related federal court cases clearly indicates that CEC is before us with unclean hands. In essence, we believe that what happened here is all too clear. CEC hired Intermodal knowing the freight rates it was collecting from AID were inflated. It secured the money from AID by false pretense, gave it to Intermodal, and then on the same day received its share of the excess freight rates from Intermodal. Whether it knew every detail of the truck shipment is not really important, the fact is it was well aware of what was transpiring. Its mistake was that it relied on Intermodal to complete the transaction. It did not foresee that Intermodal would fail to pay any of the freight charges, and it now seeks to be "made whole" because of Intermodal's failure to complete what between them was a fraudulent and illegal activity. Of course, in light of the facts as found and the case law previously cited, any such holding on our part would be completely erroneous. So here, we find in favor of the Respondents BSC and Peralta and hereby deny the relief sought by the Complainant. As to Intermodal, and the Order to Show Cause why it should not have a default judgment rendered against it, we would ordinarily find in favor of the Complainant since Intermodal misappropriated the shipping charges and failed to appear at all in these proceedings. However, given the fact that other court proceedings are pending and the complicity of CEC's actions with those of Intermodal, we do not believe reparations awarded under section 22 is the proper vehicle for settling accounts between two wrongdoers. Therefore, we will not enter a default judgment against the Respondent Intermodal.[12]

It is hereby Ordered that this case be dismissed.

(S) JOSEPH N. INGOLIA
Administrative Law Judge

[12] Complainant's Motion to Reopen the record to admit the testimony of its principal witness was made and granted after this Initial Decision was written. Initially, it was thought that the Decision would be rewritten and the additional testimony added and discussed where necessary. On reflection, this was not done because, while the testimony supports and buttresses what had already been written in the Decision, it is not necessary to it. The testimony speaks for itself and is as follows:

STATE OF NEW YORK)
COUNTY OF NASSAU) ss:
PAUL G. MUNSCH, being duly sworn, deposes and says:

1. In the above mentioned proceeding I gave testimony regarding the amount of commission which CARGO EXPORT CORPORATION (hereinafter "CEC") received as a result of the truck shipment. The testimony given by me in that regard, both in depositions before trial and at the trial, was incorrect, such that by this affidavit I wish to correct said testimony. In my testimony before the Commission, at page 304, line 5, I was asked the following question:

Continued

Q Now, you have testified, I believe, that you placed two phone calls . . . strike that. It is one area I wanted to touch but neglected to.

Mr. Munsch, you testified that you awarded the shipping contract to Intermodal and you did not award it to Bangladesh Shipping.

Did Cargo Export Corporation receive any fee as a result of the awarding of the contract to Intermodal?

A Yes, we did.

Q What did you receive?

A 10%.

Q Of what?

A Of the freight.

Q Is it 10% of the cargo or 10% of the freight bill?

A 10% of the amount of the money that we paid to Intermodal.

Q I don't understand your answer sir.

A In other words, I paid Intermodal $216,000 and I received a 10% brokerage or commission from Intermodal.

Q Did you in fact collect that 10% commission?

A Yes, we did.

Q When did you receive it?

A I believe we received it the same day as we paid them.

Q And how did you receive it?

A In the form of a check.

Q An Intermodal check?

A I believe it was. I mean I don't recall the check.

Further in my examination before trial, at page 105, line 22, I was asked the following questions:

Q Return for a moment to the Intermodal, Cargo Export Corporation agreement. Did CEC receive a brokerage fee of any kind?

A Yes, it did.

Q How much was the fee?

A 10%.

Q Of what?

A Of the freight. . . .

Q Did the 10% brokerage fee affect your selection of Intermodal as the carrier. . .?

A It was not the prime consideration.

Q Was it one of the considerations?

A Yes, it was.

Q Did CEC receive any other fee or income as a result of its agreement with Intermodal apart from the 10% fee you just referred to on this shipment?

A No, it did not.

Q No remuneration of any kind other than the 10% fee?

A On this shipment?

Q Yes.

A No it did not.

2. Prior to giving the shipment to Intermodal, I was in touch by telephone with Dennis McCabe. (I cannot recall whether he called me or I called him, but I do recall that he had called me to solicit business from CEC before, and I do recall that we had never done business with him [sic] firm before this shipment.)

3. Shortly after our initial contact, McCabe called me with his final proposition for the freight. He indicated to me that he could pay a commission of approximately $35,000.00, and that the commission would be paid in the form of a check for 10% drawn to the order of CEC, with the balance in a separate check. He indicated that the maximum allowed on his tariff was 10% and that is why the amount of the check to the company would reflect that amount.

4. After the freight had been shipped and after we had received the freight charges from our principal, both myself and Eugene Pagano, President of CEC, met with McCabe and his associate, Gunther Perl, at our office. We exchanged checks as follows:

(a) $216,045.00 was paid to CEC by Intermodal;

(b) $21,604.50 was paid in the form of a check from Intermodal to CEC; and

(c) $15,123.15 in an additional check was drawn to my order.

I accepted the additional check and deposited it in the CEC account.

Continued

5. During my negotiations with Mr. McCabe, before agreeing to give him the freight, he disclosed to me the approximate amount that he was supposed to be paying the steamship line. He represented that amount to be approximately $100 per ton. He further represented that our commission would be approximately $35,000.00. He said that sum would be computed by subtracting the $100 per ton from the amount I was going to charge the shipper-in-fact. He further represented that after deducting $3,000.00 or $4,000.00 for "other expenses" which he had incurred, the difference would be halved, thus generating the $35,000.00 commission.

6. Although the actual amount paid to CEC as reflected by the two checks amounts to exactly 17% of the freight charges which I submitted to the shipper-in-fact, at no time did we ever agree on this fixed percentage. The amount of the final dollars and cents of the "differential check" was left up to Mr. McCabe and was substantially in accordance with our agreement, such that it was accepted without question.

7. I do not offer this affidavit as an excuse for my actions. Although the custom of using an N.V.O. is well entrenched in our business, I now realize that I was wrong to entrust this shipment to Intermodal for reasons that are obvious; that I was wrong to accept a payment in excess of an amount I believed the N.V.O.'s tariff permitted; and finally, and most importantly, that I was wrong not to disclose the additional payment in my testimony before this Commission. That I received an unlawful commission does not change the thrust of the action which CEC has presented before this Commission.

For the reasons above set forth, I respectfully request that the record be amended, and that upon the record as amended, judgment be awarded on the complaint.

(S) Paul G. Munsch

FEDERAL MARITIME COMMISSION

(46 C.F.R. PART 522; DOCKET NO. 76-63)
FILING OF AGREEMENTS BY COMMON CARRIERS AND OTHER PERSONS SUBJECT TO THE SHIPPING ACT, 1916
GENERAL ORDER 24; AMENDMENT 2

October 13, 1982

ACTION: Final Rules

SUMMARY: This revises the Commission's regulations prescribing procedures for filing of agreements pursuant to section 15 of the Shipping Act, 1916. The purpose of the revision is to ensure the fair, orderly, and expeditious processing of agreements.

DATES: Effective January 1, 1983.

SUPPLEMENTARY INFORMATION:

By Notice published in the *Federal Register* of June 20, 1979 (44 F.R. 36077-36080), the Commission proposed to revise its regulations (46 C.F.R. Part 522) governing the filing of agreements by common carriers and other persons subject to section 15 of the Shipping Act, 1916 (46 U.S.C. § 814). This further proposed revision was published in response to the original Notice of Proposed Rulemaking which appeared in the *Federal Register* of November 23, 1976 (41 F.R. 51622). Comments on the proposal were submitted by conferences of carriers, individual carriers, shipowners associations, port authorities, a shipper, and the United States Department of Justice. A list of commentators is set forth in Appendix A hereto.

Although many of the commentators welcome the concept of the proposed procedures, certain general objections are raised which are discussed below.

1. *Delay in Processing Agreements.*

A number of commentators object to the perceived premise for the proposal, *i.e.*, that those filing agreements were responsible for the delay in processing. Commentators assert that much of the delay rests with the Commission and that internal deadlines should be established for processing and incorporated into the rules.

The purpose of the proposed revision was to provide for standardized, expeditious processing of agreements; there was no intention to assign blame for delay to anyone. Internal deadlines and procedures have been established and are now in the process of being further updated. However, these matters are inappropriate for inclusion in a

Commission General Order and are more properly the subject of an internal Commission directive.

2. *Filing of Supporting Statements.*

Of great concern is the requirement for the filing of a supporting statement along with the agreement. Many arguments are asserted which need not be dealt with in light of the final rule promulgated here. The final rule makes the filing of statements supporting the approval of agreements optional with the filing parties.[1] However, the Commission will require that a letter of transmittal accompany the agreement which summarizes its contents and expressly requests approval pursuant to section 15. This will facilitate preparation of the *Federal Register* notice of filing.

3. *Scope of the Rules.*

Several port authorities believe that the rules should not apply to terminal agreements. Much of their argument goes to the originally proposed requirement for submission of supporting statements. The elimination of that requirement should serve to obviate the port authorities' concerns. In any event, we see no reason to make an exception for this or any other type of agreement.

4. *Rejection of Agreements.*

Objection is made to the provision that empowered the Commission staff to reject agreements for failure to comport with the requirements of the proposed agreement processing rules. Again, the basis of these arguments is the requirement for submission of supporting statements which has been eliminated. Rejection now will be made only for failure to comply with procedural requirements.

5. *Miscellaneous Comments.*

a. In proposed section 522.2, comment is made that the definition of "modification" to an agreement would require the submission of a supporting statement for cancellation of an agreement. In light of the elimination of the supporting statement requirement, no further consideration of this comment is necessary. In addition, we have simplified the definition of "modification."

b. In proposed section 522.3, objection is made to the filing of 15 copies of an agreement. The Commission has carefully considered its internal requirements and concludes that 15 copies are necessary.

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[1] This does not, however, eliminate the need for supporting statements where they are otherwise legally required. It is established that proponents of an agreement which is anticompetitive by its nature have a burden to demonstrate that it is required by a serious transportation need, is necessary to secure important public benefits or is in furtherance of a valid regulatory purpose of the Shipping Act. *Federal Maritime Commission v. Aktiebolaget Svenska Amerika Linien*, 390 U.S. 238 (1968); *United States Lines, Inc. v. FMC*, 584 F.2d 519 (D.C. Cir., 1978).

c. Objection is made to the elimination of current section 522.6 which prescribes suggested language for agreements. The existence of this section, although providing some uniformity, conveys a false impression of automatic approvability. It is the economic consequences of an agreement which should control, not its form.

d. With respect to proposed section 522.6, certain commentators suggest a limitation on public access to information submitted in support of the filing of an agreement. A section 15 agreement is not a private contract but one impressed with the public interest. Limitation on access to information would stifle candid justification and explicit protests. Accordingly, no claims for confidentiality will be allowed.

e. A number of technical comments were submitted regarding proposed section 522.7, which governs the content of comments and protests to agreements. The Commission has considered carefully all of these and concludes that the proposed rule should be adopted in substance. Some technical changes have been made to the rule and a provision for the filing of supplemental documents upon a showing of good cause has been added.

f. One commentator suggests that proposed section 522.8, which provides that nothing in the rules should be construed as limiting the Commission's authority to require information from persons subject to its jurisdiction, is extraneous. We agree and it has been eliminated in the final rule. This action should in no way be interpreted, however, as a retreat from the proposition reflected in the section.

g. Several commentators suggest that proposed section 522.9 is unnecessary and one suggests that it await further study. We are satisfied that inclusion of the section is worthwhile. The section has undergone revision, however, mostly in the interest of simplification and clarification. Another commentator suggests an amendment to provide for interim approval. This was not contemplated by the proposed rule and cannot be dealt with in this proceeding.

Other commentators suggest certain changes as to technical details which we believe to be either satisfied by the final rule or unwarranted. Certain purely editorial changes have also been made in the text of the final rule. All comments not specifically discussed herein have been carefully considered and either incorporated in the final rule or rejected.

List of subjects in 46 C.F.R.: Administrative Practice and Procedure.

Therefore, pursuant to 5 U.S.C. § 553 and sections 15, 21, 22 and 43 of the Shipping Act, 1916 (46 U.S.C. §§ 814, 820, 821 and 841a), Part 522 of Title 46, Code of Federal Regulations, is amended as follows.

1. Part 522 is amended by deleting the title of Part 522, "FILING OF AGREEMENTS BETWEEN COMMON CARRIERS OF FREIGHT BY WATER IN THE FOREIGN COMMERCE OF THE

UNITED STATES," and substituting therefor the following: "FILING OF AGREEMENTS BY COMMON CARRIERS AND OTHER PERSONS SUBJECT TO THE SHIPPING ACT, 1916."

2. Section 522.1 is revised to read as follows:

§ 522.1 *Purpose*

This part establishes procedures for: (a) filing agreement approval requests pursuant to section 15, Shipping Act, 1916 (46 U.S.C. § 814), including statements in support thereof; (b) filing comments and protests to such agreements, and responsive pleadings thereto; and (c) the disposition of agreement approval requests. The purpose of this part is to ensure the fair, orderly and expeditious processing of agreement approval requests.

3. Section 522.2 is amended to read as follows: [2]

§ 522.2 *Definitions*

For the purposes of the provisions in this part, the following definitions of terms used therein shall apply.

(a) *Agreement*. As used in this part, an agreement is a written document which reflects an understanding, arrangement, or undertaking, between two or more common carriers by water or other persons subject to the Shipping Act, 1916, which is required by section 15 of the Act to be filed with the Commission. The term "agreement" includes, but is not limited to, the following types:

* * *

(b) *Modification*. An amendment to an approved agreement.

(c) *Proponents*. The parties to an agreement for which section 15 approval has been requested pursuant to this part.

4. Section 522.3 is revised to read as follows:

§ 522.3 *Filing of agreements*

Agreement approval requests shall be submitted to the Secretary, Federal Maritime Commission, Washington, D.C. 20573. Such requests shall consist of a true copy and 15 additional copies of the agreement and all supporting information. Requests shall also be accompanied by a letter of transmittal which summarizes the agreement's contents, and expressly requests Commission approval pursuant to section 15. The true copy shall be signed by each of the proponents personally or by an authorized representative, and shall show immediately below each signature the name, position, and authority of the signer. Requests for

[2] Only those portions of section 522.2 which were the subject of the Commission's rulemaking proceeding in Docket No. 76-63 are included here. The definitions of various types of agreements contained in subparagraphs (a)(1) through (a)(7) of existing section 522.2 were not part of the rulemaking and, while not republished here, remain unchanged.

approval which do not meet the requirements of this section shall be rejected within 30 days of receipt.

5. Section 522.4 is revised to read as follows:
§ 522.4 *Modifications*

(a) A request for approval of an agreement modification shall be filed in accordance with the provisions of section 522.3 and shall identify the page and paragraph to be amended and restate each such paragraph. The language to be excised should be struck through, but not obliterated, and the substituted language, if any, should be inserted directly following that which is to be excised. The new language should be underscored. If the modification does not completely replace approved provisions, the page or pages on which the proposed amendments will appear should be restated with the proposed amendments underscored and placed in proper sequence on the page.

(b) Whenever an approved agreement shall have been modified three times in the manner stated in paragraph (a), the next succeeding modification shall be accomplished by restating the entire agreement, incorporating all previous modifications, and showing the latest change in the manner required by paragraph (a).

6. Section 522.5 is revised to read as follows:
§ 522.5 *Supporting statements*

Agreements submitted for approval may be accompanied by a supporting statement, signed by an authorized representative of the proponents, indicating the reasons which caused the making of the agreement and the results intended to flow from its implementation, or other facts or arguments which support approval. Affidavits or other evidence may be attached to such statements. Supporting statements are public records. No claims of confidentiality will be allowed.

7. Section 522.6 is deleted and new section 522.6 is added as follows:
§ 522.6 *Federal Register Notice*

Requests for approval which are not rejected pursuant to section 522.3 shall be noticed in the *Federal Register*. The notice shall include:

(a) a short title for the agreement;

(b) the identity of the proponents;

(c) the Federal Maritime Commission agreement number;

(d) a concise summary of the agreement's contents;

(e) a statement that the agreement and any supporting statement are available for inspection at the Commission's offices;

(f) the final date for filing protests or comments regarding the agreement; and

(g) the name and address of the filing agent.

8. Section 522.7 is deleted and new section 522.7 is added as follows:

§ 522.7 *Comments and protests*

(a) A comment is a written statement regarding the approvability of an agreement. Comments have no prescribed form or content and are not limited in any way, except by the time limits provided in the *Federal Register* notice. A written communication regarding the approvability of an agreement, not conforming to the requirements of paragraph (b) of this section, shall be considered a comment. Filing a comment shall not necessarily entitle a person to: (1) any discussion of the comment in a Commission order disposing of the agreement; (2) the institution of any further Commission proceeding; or (3) participation in any further proceeding which may be instituted.

(b) A protest is a written opposition to the approval of an agreement which complies with the requirements of this paragraph. A protest also constitutes an undertaking by the protestant to actively participate as a party in any further proceeding concerning the agreement, and protestants shall be so named in any Commission hearing order which may be issued. Protests shall:

(1) identify, with particularity, the reasons why the agreement, or any constituent part, should be disapproved;

(2) address the accuracy of any statements and conclusions submitted by the proponents pursuant to section 522.5 of this part;

(3) allege facts which support the arguments made in subparagraphs (1) and (2) of this paragraph; and

(4) specify the source or derivation of the facts alleged pursuant to subparagraph (3).

(c) A copy of all comments and protests filed with the Commission shall be served upon the filing agent identified in section 522.6(g) on the same date they are filed with the Commission. A certificate of service attesting that this requirement has been met shall be attached to the comment or protest.

(d) Within 15 days from the date that comments or protests are due (as specified by the *Federal Register* notice or as subsequently extended by the Commission), the proponents or their authorized representative may file a response to each such comment or protest with service to all persons which have filed comments or protests.

(e) Except as provided in this section and section 522.5, or unless specifically requested in writing by the Commission, with copies to the proponents and persons which have filed protests or comments, no other written or oral communication concerning a pending agreement shall be permitted. Amendments or supplements to documents submitted pursuant to section 522.5 and this section shall be permitted in the discretion of the Commission upon a showing of good cause; *provided that*, in no case shall such permission be granted where the agreement has been scheduled and noticed for an agency meeting pursuant to 46 C.F.R. 503.82. A change in material fact or in applicable law occurring after the submission of the initial statement, comment or protest will normally constitute good cause. Inquiries as to the status of agreements shall be made to the Secretary of the Federal Maritime Commission.

9. Section 522.8 is deleted and new section 522.8 is added as follows:
§ 522.8 *Disposition of agreement approval requests*

(a) The Commission shall, by conditional or unconditional orders, approve, disapprove or institute further proceedings regarding agreements filed with it.

(b) Further proceedings regarding an agreement will be instituted when:

(1) the Commission, in its discretion, considers further inquiry advisable;

(2) a protest alleges material facts which, if true and reasonably subject to proof on the basis of their source and derivation, and arguments advanced, would preclude approval of the agreement; *provided, however*, that no further proceeding will be instituted if the disputed factual issues are resolved by the proponents' acceptance of conditions imposed by a conditional order in accordance with paragraph (c) of this section;

(3) the proponents of an agreement which seemingly contravenes the standards of section 15 properly exercise their right to request a further hearing pursuant to paragraph (d)(2) of this section.

(c) The Commission may issue a conditional order prescribing modifications in the agreement necessary to obtain approval when the agreement: (1) does or appears to contravene the standards of section 15; and (2) if so modified, would be approvable without further proceedings. If conditions imposed by the Commission are met within the time specified by a conditional order, the revised version will stand approved from the date of receipt. Notice of such date shall be given to proponents or their representative by the Commission.

(d) Failure to meet conditions imposed by the Commission will result in either: (1) the automatic disapproval of the agreement; or (2) the institution of further proceedings by the Commission on its own initiative or, where the conditional order found that the agreement was unapprovable, pursuant to a request from proponents. Any such request shall include a detailed recital of the facts that they intend to prove at that hearing, a description of evidence intended to be used to prove those facts, and an explanation as to why the facts sought to be proven support the approval of the agreement. If a finding of unapprovability was made, the conditional order will expressly state the date upon which disapproval would take place.

(e) It is unlawful to carry out the provisions of a conditionally approved or disapproved agreement prior to approval by the Commission in this section.

By the Commission.

(S) JOSEPH C. POLKING
Assistant Secretary

APPENDIX A

I. Conferences

A. Conference Group A

Agreement No. 10140; Australia - Eastern USA Shipping Conference; Continental North Atlantic Westbound Freight Conference; Continental/US Gulf Freight Association; The "8900" Lines; Greece/United States Atlantic Rate Agreement; Gulf-European Freight Association; Gulf-United Kingdom Conference; Iberian/US North Atlantic Westbound Freight Conference; Marseilles/North Atlantic USA Freight Conference; North Atlantic Baltic Freight Conference; North Atlantic Continental Freight Conference; North Atlantic French Atlantic Freight Conference; North Atlantic Mediterranean Freight Conference; North Atlantic United Kingdom Freight Conference; North Atlantic Westbound Freight Association; Scandinavia Baltic/US North Atlantic Westbound Freight Conference; South Atlantic - North Europe Rate Agreement; UK/USA Gulf Westbound Rate Agreement; US Atlantic and Gulf/Australia - New Zealand Conference; US North Atlantic Spain Rate Agreement; US/South Atlantic/Spanish, Portuguese, Moroccan, and Mediterranean Rate Agreement; The West Coast of Italy, Sicilian, and Adriatic Ports North Atlantic Range Conference.

B. Conference Group B

Associated Latin American Freight Conference; Atlantic & Gulf/Panama Canal Zone & Panama City Conference; Atlantic and Gulf/West Coast of Central America and Mexico Conference; Atlantic and Gulf/West Coast of South America Conference; East Coast Colombia Conference; Leeward and Windward Islands and Guianas Conference; United States Atlantic and Gulf-Haiti Conference; United States Atlantic and Gulf-Jamaica Conference; United States Atlantic and Gulf-Santo Domingo Conference; US Atlantic and Gulf-Venezuela and Netherlands Antilles Conference; and West Coast South America Northbound Conference.

C. Conference Group C

Inter-American Freight Conference; The Far East Conference; The Atlantic and Gulf/Indonesia Conference; and the Atlantic and Gulf/Singapore, Malaya, and Thailand Conference.

D. Conference Group D

Japan/Korea-Atlantic and Gulf Freight Conference; Japan-Puerto Rico and Virgin Islands Freight Conference; New York Freight Bureau; Philippines North America Conference; Straits/New York Conference; TransPacific Freight Conference (Hong Kong); TransPacific Freight Conference of Japan/Korea; Agreement No. 10107; Agreement No. 10108; and their member lines.

E. Conference Group E

Latin America/Pacific Coast Steamship Conference; North Europe-US Pacific Coast Freight Conference; Pacific Coast - Australasian Tariff Bureau; Pacific Coast European Conference; Pacific Coast River Plate Brazil Conference.

F. Conference Group F

Pacific Westbound Conference; Pacific-Straits Conference; Pacific Indonesia Conference.

II. Carriers

A. Seatrain International, S.A.

Seatrain Pacific Services, S.A.

B. Moore-McCormack Lines, Inc.

C. Sea-Land Service, Inc.

III. Shipowners Associations - CENSA

European and Japanese National Shipowners Association, Council of - (CENSA) - National Shipowners' Associations of Belgium, Denmark, Finland, France, the Federal Republic of Germany, Greece, Italy, Japan, the Netherlands, Norway, Sweden, and the United Kingdom, plus individual liner operators/container consortia from most of these countries.

IV. Port Authorities

A. California Association of Port Authorities

Northwest Marine Terminal Association, Inc.

California Association of Port Authorities (Port of Long Beach, Port of Los Angeles, Port of Oakland, Oxnard Harbor District, Port of Hueneme, Port of Redwood City, Port of Richmond, Port of Sacramento, Port of San Diego, Port of San Francisco, Port of Stockton) and the Northwest Marine Terminal Association (Port of Anacortes, Port of Astoria, Port of Bellingham, Port of Everett, Port of Grays Harbor, Port of Longview, Port of Olympia, Port of Port Angeles, Port of Portland, Port of Seattle, Port of Tacoma, Port of Vancouver, SeaTerm Services, Inc.)

B. Port of Houston Authority

C. Maryland Port Administration

D. Port of New Orleans

E. Port Authority of New York and New Jersey

F. Virginia Port Authority

V. Shippers - Outboard Marine Corporation

VI. U.S. Government - Department of Justice

FEDERAL MARITIME COMMISSION

DOCKET NO. 82-12

AGREEMENT NO. 7680-39

NOTICE

October 20, 1982

Notice is given that no appeal has been taken to the September 15, 1982 Order of Discontinuance in this proceeding and that the time within which the Commission could determine to review has expired. No such determination has been made and accordingly the dismissal has become administratively final.

(S) FRANCIS C. HURNEY
Secretary

FEDERAL MARITIME COMMISSION

DOCKET NO. 82-12

AGREEMENT NO. 7680-39

DISCONTINUANCE OF PROCEEDING

Finalized October 20, 1982

The proponents of the subject agreement move "that the Commission's Order of Investigation served February 23, 1982 be terminated and that this proceeding be dismissed." This proceeding concerns an amendment to a basic conference agreement, which amendment would grant intermodal rate-making authority to the American West African Freight Conference.

In reply to the motion, Hearing Counsel state that the investigation should be terminated and the proceeding discontinued.

By letter dated September 10, 1982, addressed to the Commission's Secretary, the American West African Freight Conference has withdrawn the subject agreement.

Good cause appearing, the subject proceeding hereby is discontinued.

(S) CHARLES E. MORGAN
Administrative Law Judge

FEDERAL MARITIME COMMISSION

DOCKET NO. 82-19

COCOON HOLLAND, B.V.

v.

HAPAG-LLOYD AKTIENGESELLSCHAFT

NOTICE

October 26, 1982

Notice is given that no appeal has been taken to the September 21, 1982 Order of Discontinuance in this proceeding and that the time within which the Commission could determine to review has expired. No such determination has been made and accordingly, the order has become administratively final.

(S) FRANCIS C. HURNEY
Secretary

FEDERAL MARITIME COMMISSION

DOCKET NO. 82-19

COCOON HOLLAND, B.V.

v.

HAPAG-LLOYD AKTIENGESELLSCHAFT

Leon Dembo of Jubanyik, Varbalow, Tedesco & Shaw for the Complainant.

Dorothy Nichols of Billig, Sher & Jones for the Respondent.

APPROVAL BY WILLIAM BEASLEY HARRIS, ADMINISTRATIVE LAW JUDGE, OF AGREEMENT OF SETTLEMENT

Finalized October 26, 1982

The complaint in this proceeding was served March 22, 1982; subsequently permission was granted to amend the complaint. The amended complaint was served June 4, 1982.

The parties entered into the following Agreement of Settlement:

AGREEMENT OF SETTLEMENT

WHEREAS, complainant, Cocoon Holland, B.V. ("CH"), has filed an Amended Complaint alleging that respondent, Hapag-Lloyd, AG ("H-L"), overcharged it on several shipments of coating solution, shipped under Bills of Lading Nos. 19615117, 19637110, 19649192; and

WHEREAS, CH has fully investigated its claims and after investigation has concluded that it is in its interest to settle this matter in order to avoid the expense and interruptions to its business which continued litigation would cause and that the settlement as hereinafter set forth is a fair and reasonable compromise of the dispute between the parties; and

WHEREAS, H-L, without admitting liability or conceding any defenses, has nevertheless agreed to enter into this Agreement of Settlement ("Agreement") to avoid further expense, inconvenience and distraction of burdensome and protracted litigation;

NOW, THEREFORE, it is agreed by and between the undersigned parties that the claims of CH as embodied in the Amended Complaint in Docket No. 82-19 should be fully settled and compromised as hereinafter expressly set forth, upon approval by the Federal Maritime Commission ("FMC"):

1. H-L shall pay to CH the sum of $19,500 in full and complete settlement of CH's claims asserted in the Amended Complaint in Docket No. 82-19. Payment shall be made within ten days after date of service of the FMC's notice rendering approval of this Agreement administratively final.

2. Upon approval of this Agreement by the Administrative Law Judge, a final order and judgment shall be entered providing that all claims of CH against H-L arising under sections 22 and 18(b)(3) of the Shipping Act, 1916, as amended (46 U.S.C. §§ 821, 817(b)(3)), which have been now or could have been asserted in the Amended Complaint shall be dismissed with prejudice.

3. In consideration of said payment as provided in paragraph 1 above, CH hereby releases H-L from all claims arising under sections 22 and 18(b)(3) of the Shipping Act, 1916, as amended (46 U.S.C. §§ 821, 817(b)(3)), which have been now or could have been asserted in the Amended Complaint. CH shall, in addition, refrain from pursuing its claims in this or any future proceedings.

4. In the event that the FMC fails to approve this Agreement or any material part thereof, this Agreement shall become null and void unless the parties hereto promptly agree to proceed with the Agreement as and if modified by the FMC.

5. The provisions of this Agreement shall be binding upon and inure to the benefit of the parties hereto and their respective successors and assigns.

6. This Agreement shall become effective upon its execution by undersigned counsel for the respective parties.

On behalf of complainant, Cocoon Holland, B.V.

Dated: Aug. 26, 1982

(S) LEON D. DEMBO
JUBANYIK, VARBALOW, TEDESCO & SHAW
900 HADDON AVENUE
COLLINGSWOOD, N.J. 08108
Attorney for Cocoon-Holland, B.V.

On behalf of respondent, Hapag-Lloyd, AG

Dated: Aug. 31, 1982

(S) DOROTHY L. NICHOLS
BILLIG, SHER & JONES, P.C.
2033 K STREET, N.W.
WASHINGTON, D.C. 20006
Attorney for Hapag-Lloyd, AG

The parties filed on September 16, 1982, the following Joint Affidavit in Support of the Agreement of Settlement:

JOINT AFFIDAVIT IN SUPPORT OF THE AGREEMENT OF SETTLEMENT

We, the undersigned, on behalf of complainant Cocoon Holland, B.V. ("CH") and respondent Hapag-Lloyd, AG ("H-L"), and being each first severally sworn, depose and say for and on behalf of our respective parties:

1. The claims involved in Docket No. 82-19 arise under Sections 22 and 18(b)(3) of the Shipping Act, 1916, as amended (46 U.S.C. § 821, § 817), and present a genuine dispute, the facts critical to the resolution of which are not readily ascertainable.

2. The parties to Docket No. 82-19 have entered into the accompanying Agreement of Settlement ("Agreement") which, upon approval by the Federal Maritime Commission ("FMC") will conclusively resolve their dispute.

3. The accompanying Agreement was entered into after full and thorough investigation and consideration of all the material circumstances involved herein including, among other things, the estimated cost of further litigating the issues herein, the inconvenience and distraction of continued litigation, the possibility for each party of an unfavorable decision on the merits after continued litigation, and the desirability of maintaining amicable relations between the parties.

4. The accompanying Agreement is a fair and reasonable commercial settlement of the dispute in this case which will avoid the need for further extensive, costly, burdensome and economically unjustified litigation.

5. The accompanying Agreement is a *bona fide* attempt by the parties to terminate this controversy in a commercially reasonable manner, and is not a device to obtain transportation at other than the lawfully applicable rates and charges or otherwise circumvent the requirements of the Shipping Act, 1916, the Intercoastal Shipping Act, 1933, or any other applicable law.

WHEREFORE, for all the foregoing reasons, the parties respectfully request FMC approval of their settlement, and dismissal of the proceeding herein, in accordance with the terms of the accompanying Agreement.

COCOON HOLLAND, B.V.

BY: (S) BOB BOYD
Title: Agent

Subscribed and sworn to before me
this 26th day of August 1982.

(S) Eileen W. Grossmick
Notary Public
My Commission Expires June 11, 1983

HAPAG-LLOYD, AG

BY: (S) VINCENT S. BROOKS
Title: Pricing Manager
UNITED STATES NAVIGATION INC.
AGENTS

Subscribed and sworn to before me
this 10th day of September, 1982.

(S) Norma Frevola
Notary Public
My Commission Expires March 30, 1983

The parties submitted the following Joint Memorandum in Support of the Agreement of Settlement:

JOINT MEMORANDUM IN SUPPORT OF THE AGREEMENT OF SETTLEMENT

The undersigned, complainant Cocoon Holland, B.V. and respondent Hapag-Lloyd, AG, hereby respectfully submit this memorandum in support of the Agreement of Settlement, attached hereto as Exhibit A. The parties are requesting that the proposed settlement be approved as fair and reasonable and that an appropriate judgment be entered directing the parties to carry out the terms of the settlement and dismissing the Amended Complaint on the merits in accordance with the provisions of the Agreement of Settlement.

I

BACKGROUND

1. This proceeding arises out of a reparations complaint filed on March 19, 1982 by Cocoon Holland, B.V. pursuant to § 22 and § 18(b)(3) of the 1916 Shipping Act (46 U.S.C. § 821, 817). Essentially, complainant alleged that respondent overcharged it on a shipment of coating solution due to an error it made in classification.

2. On May 11, 1982, Hapag-Lloyd, AG answered the complaint denying the substantive allegations raised by complainant and objecting to handling this proceeding under the shortened procedure.

3. On May 25, 1982, a prehearing conference was held before Judge William Beasley Harris. At this conference, complainant agreed to certain discovery requests made by respondent and was granted permission to amend its original complaint.

4. On June 8, 1982, complainant filed its Amended Complaint, adding two more shipments on which it alleged an overcharge. Under the Amended Complaint, complainant seeks to recover alleged overcharges of $21,054.41. Were complainant to succeed and interest awarded on these claims, recovery could be as much as $27,590.

5. In due course, it became apparent that litigation of the issues would likely be complex and costly, particularly in view of the significant differences between the litigants on various questions of law and fact. Accordingly, in an effort to resolve their differences in a commercially reasonable manner and without the burden, expense and uncertainty of further litigation, the parties have, after arms-length negotiations, reached—and request approval of—the settlement agreement more fully described below and in the accompanying documents.

II

THE SETTLEMENT

6. The main issue in this action involves a determination of the applicable rates for three shipments of coating solution shipped pursuant to Bills of Lading Nos. 1915117, 19637110, 19649192. This involves the proper identification of commodities which were shipped over two years ago, a determination of the proper tariff rates, and proof as to whether the alleged overcharges were paid by Cocoon Holland, B.V. within two

years of the date on which the complaints were filed. Resolution of these questions, if fully litigated, could require each of the parties to produce expert witnesses and incur substantial legal expenses. Moreover, continued litigation of this controversy would undoubtedly inconvenience employees of both parties and distract from their every day corporate duties.

7. There is, accordingly, little likelihood that this action could be resolved by litigation without burdening the parties and incurring substantial expenses. Accordingly, in light of all of the circumstances of this case and the Federal Maritime Commission's (the "Commission") policy of promoting settlements wherever possible, the parties, after several offers and counteroffers, have agreed to a negotiated arms-length settlement of their dispute and request approval thereof.

8. It is well established that both law and Commission policy "encourage settlements and engage in every presumption which favors a finding that they are fair, correct, and valid." *Ellenville Handle Works, Inc. v. Far Eastern Shipping Co.*, 23 F.M.C. 707, 709 (1981); *Old Ben Company v. Sea-Land Service, Inc.*, 21 F.M.C. 505 (1978); *accord* 46 C.F.R. § 502.91, § 502.94 and 5 U.S.C. § 554(c)(1). Settlements are particularly warranted where, as here, the parties are "faced with the uncertainty and expense of further litigation." *Celanese Corp. v. Prudential Steamship Co.*, 23 F.M.C. 1, 5 (1980). Moreover, as demonstrated in various Commission cases, proceedings may now be terminated by mutual settlement for amounts less than those originally sought in the complaint and without admissions of statutory violations. *Del Monte Corp. v. Matson Navigation Company*, 22 F.M.C. 364, 368-369 (1979) citing cases; *Ellenville*, 23 F.M.C. at 711.

9. This is equally true with respect to the settlement of § 18(b)(3) complaints where, as here, certain conditions have been satisfied. As the Commission has held, it would be "unnecessarily restrictive" to bar the settlement of such claims unless and until a statutory violation has been admitted or conclusively established on the record. Rather, such settlements are to be presumed valid, provided the parties thereto: (a) submit a signed agreement to the Commission and apprise the Commission of the reasons for settlement; (b) attest that the settlement is a *bona fide* attempt to terminate the controversy and not a device to circumvent the requirements of law; and (c) show that the complaint on its face presents a genuine dispute, and that the facts critical to the resolution of the dispute are not reasonable ascertainable. *Organic Chemicals v. Atlanttrafik Express Service*, 18 S.R.R. 1536a, 1539-40 (FMC 1979); *Organic Chemicals v. American Export Lines, Inc.*, 19 S.R.R. 240 (Settlement Officer 1979) (administratively final June 4, 1979); *Celanese Corp. v. Prudential Steamship Company, supra*, 23 F.M.C. 1. It is also well established that the

parties to a settlement agreement may decline the award of interest. *Interest in Reparation Proceedings*, 24 F.M.C. 145, 149 (1981) ("Because interest is not part of the freight rate, it is appropriate that its treatment in settlement agreements be left to the parties").[1]

10. In the instant case all these conditions have been fully satisfied and the accompanying Agreement of Settlement should therefore be approved. The Commission has been fully apprised, both herein and in the attached supporting affidavit (*see* Exhibit B), of the various reasons for the parties' desire to settle this case without further expense and litigation. The precise terms of the settlement are contained in the accompanying signed Agreement Of Settlement and the principals have duly attested, in the accompanying sworn affidavit, that the settlement is a *bona fide* attempt to terminate the controversy in a commercially reasonable manner and is not a device to circumvent any requirements of law.[2]

11. Further, as previously discussed, the complaint on its face presents a genuine dispute and the facts critical to its resolution are not reasonably ascertainable without further litigation which, in turn, would entail the wasteful expenditure of additional funds. Accordingly, the parties submit that—in view of the respective merits of the case, the costs of further litigating the issues, and the parties' desire to reach a commercially sound and mutually acceptable compromise—the settlement negotiated by the parties herein is just and reasonable and should be approved.

III

CONCLUSION

WHEREFORE, for all the foregoing reasons, the parties respectfully request that the attached Agreement of Settlement be approved and that this proceeding be dismissed with prejudice.

[1] Here the parties were aware of the potential for recovery under Rule 253 (46 C.F.R. § 502.253) of the Commission's Rules of Practice and Procedure and took this factor into consideration in their negotiations.

[2] The settlement agreement and supporting affidavit have, moreover, been generally modeled after the form approved in *Organic Chemicals, supra*, 19 S.R.R. 240 and *Celanese, supra*, 23 F.M.C. 1.

RESPECTIVELY SUBMITTED,

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DISCUSSION

The Presiding Administrative Law Judge has been advised by counsel for the parties of the Agreement of Settlement, setting forth the terms and conditions upon which the parties propose to settle the claims pending in this proceeding. Upon review of the Joint Affidavit In Support Of Settlement Agreement, explaining the parties' reasons for the settlement, and the cases and argument set forth in the Joint Memorandum In Support Of The Agreement Of Settlement, the Presiding Administrative Law Judge is satisfied that the settlement is fair and reasonable, and should be approved.

Therefore, it is ORDERED, subject to review by the Commission as provided in the Commission's Rules of Practice and Procedure, that:

1. The Agreement of Settlement, as proposed by the parties, is approved.

2. The claims asserted in The Amended Complaint are dismissed with prejudice, and Hapag-Lloyd, AG is discharged from all liability to Cocoon Holland, B.V. in respect to any claims arising under sections 22 and 18(b)(3) of the Shipping Act, 1916, as amended (46 U.S.C. §§ 821, 817(b)(3)), which have been now or could have been asserted in the Amended Complaint.

3. Hapag-Lloyd, AG shall pay $19,500 to Cocoon Holland, B.V. in accordance with the terms of the Agreement of Settlement and notify the Commission of how and when this was done.

4. The provisions of this Order and Judgment shall inure to the benefit of and be binding upon each of the parties in this proceeding and each of their respective successors and assigns.

5. This proceeding is discontinued.

(S) WILLIAM BEASLEY HARRIS
Administrative Law Judge

FEDERAL MARITIME COMMISSION

(46 C.F.R. PARTS 521 & 522; DOCKET NO. 76-63)
FILING OF AGREEMENTS BY COMMON CARRIERS AND OTHER PERSONS SUBJECT TO THE SHIPPING ACT, 1916
GENERAL ORDER 17; AMENDMENT 3
GENERAL ORDER 24; AMENDMENT 2

October 28, 1982

ACTION: Supplement to Final Rules

SUMMARY: This supplements final rules in this proceeding by adding matters unintentionally omitted from previous publication.

DATES: Effective January 1, 1983, pending OMB review of revision to reporting requirements.

SUPPLEMENTARY INFORMATION:

The Commission published its final rules in this proceeding on October 18, 1982 (47 F.R. 46284) revising procedures for filing and processing of agreements under section 15 of the Shipping Act, 1916. The following matters were unintentionally not included in that final rule.

Section 522.1 *Purpose,* of Title 46 C.F.R. was revised in its entirety. However certain material recently adopted by the Commission (December 28, 1981; 46 F.R. 62652) was inadvertently omitted from the revision of this section. This supplement corrects that omission.

Section 522.6 *Federal Register Notice,* of Title 46 C.F.R. contains new provisions regarding notice and comment on section 15 agreements and is largely duplicative of existing provisions in 46 C.F.R. 521.10. § 521.10 was intended to be deleted and that deletion is accomplished by this supplement.

Finally, the final rule failed to give notice that OMB approval of reporting requirements is pending. That notice is included immediately below.

OMB CONTROL NUMBER: Approval by OMB is pending. In accordance with the Paperwork Reduction Act of 1980 (P.L. 96-511), the revisions to the reporting requirements that are included in this regulation have been or will be submitted to the Office of Management and Budget. They are not effective until OMB action has been completed. A *Federal Register* notice will be published when the revision has been approved by OMB.

Accordingly, pursuant to 5 U.S.C. 553 and sections 15, 21, 22 and 43 of the Shipping Act, 1916 (46 U.S.C. 814, 820, 821 and 841a) the

Commission's final rule in this proceeding is supplemented to amend Title 46 C.F.R. in the following respects:

1. The title of Part 521 is revised to read "TIME FOR FILING CERTAIN AGREEMENTS."

2. *Section 521.10 Notice of filing of agreements and modifications under section 15 of the Act and application under section 14(b) of the Act* is removed.

3. Section 522.1 is revised to read as follows:

§ 522.1 *Purpose*

(a) This part establishes procedures for: (1) filing agreement approval requests pursuant to section 15, Shipping Act, 1916 (46 U.S.C. § 814), including statements in support thereof; (2) filing comments and protests to such agreements, and responsive pleadings thereto; and (3) the disposition of agreement approval requests. The purpose of this part is to ensure the fair, orderly and expeditious processing of agreement approval requests.

(b) Adherence with the statute and rules of the Commission is mandatory, and persons operating under agreements without prior Commission approval may be liable to penalties and damages for violations of the anti-trust laws of the United States and may be subject to civil penalties of up to $1,000 for each day of such default (46 U.S.C. 814) and/or disapproval of agreements.

By the Commission.

(S) FRANCIS C. HURNEY
Secretary

FEDERAL MARITIME COMMISSION

DOCKET NO. 82-24

AGREEMENT NO. 9925-3

ORDER OF CONDITIONAL APPROVAL

November 2, 1982

This proceeding was initiated to investigate several issues which had been raised by Agreement No. 9925-3, a proposed extension of the Pacific America Container Express (PACE) cooperative working arrangement [1] which had been filed for approval pursuant to section 15 of the Shipping Act, 1916 (46 U.S.C. § 814). During the course of this proceeding the parties - Proponents, Protestant Farrell Lines, Inc., Intervenor Trader Navigation Co., Ltd., and the Commission's Bureau of Hearings and Field Operations - reached a settlement concerning the issues raised by the Order and consequently submitted a proposed Order of Conditional Approval to Administrative Law Judge Norman D. Kline.

In an Initial Decision served September 16, 1982, the Presiding Officer concluded that the proffered settlement should be accepted and approval granted upon receipt of an amended Agreement containing the conditions set forth in a "Proposed Second Order of Conditional Approval" which was attached as an appendix to the Initial Decision.

Proponents filed "Exceptions" to the Initial Decision pointing out that the proposed Order attached to the Initial Decision was never actually *issued* by the Presiding Officer and contending that the Commission should therefore issue an Order of Conditional Approval in the form proposed so that the settlement which was accepted by the Presiding Officer could be effectuated. Farrell concurred, but requested that any order issued by the Commission be served no later than October 16, 1982.

The Commission has reviewed Proponents' Motion for Order of Dismissal, Clarification and Order of Conditional Approval, the Replies thereto, the Initial Decision of the Presiding Officer, the Exceptions thereto and Replies to Exceptions, and concludes that Agreement No. 9925-3 should be approved subject to the conditions set forth in the Presiding Officer's proposed second order of conditional approval.

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[1] Proponents of Agreement No. 9925-3 are Associated Container Transportation (Australia) Ltd., a Commission-approved joint containership service among Blue Star Line, Ltd., Port Line, Ltd., and Ellerman Lines, Ltd. (Agreement No. 9767) and the Australian Shipping Commission, trading as Australian National Line (ANL).

THEREFORE, IT IS ORDERED, That Agreement No. 9925-3 is approved pursuant to section 15 of the Shipping Act, 1916, on the condition that the Commission receives within 60 days of the date of the letter transmitting this Order a complete and accurate copy of amended Agreement No. 9925, signed by both parties thereto, modified as follows:

I. Article 1 be amended to read:

> 1. When participating in any conference or rate agreement in connection with their services under this Agreement, the parties shall do so jointly as a single member for all purposes, including without limitation voting and the apportionment of expenses under such conference or agreement.

II. Article 4 be amended to read:

> 4. The parties may operate both containerized and conventional vessels under this Agreement, provided that no more than six such vessels may be operated at any one time and no more than 19,000 loaded TEUs may be carried northbound or southbound under this Agreement during any calendar year. For purposes of this Article, one loaded TEU of breakbulk cargo shall be deemed to consist of 16 weight tons (of 2,240 lbs.) in the case of reefer cargo and 10 such weight tons in the case of all other breakbulk cargo.

III. Article 5 be amended to read:

> 5. The parties shall provide equipment such as containers and related equipment by such means and in such proportions as they may determine.

IV. Article 13 be either deleted or amended to substitute the phrase "different vessels" for "additional vessels."

V. The last sentence of Article 14 be amended to read:

> The parties shall also submit to the Commission a semi-annual report setting forth the name, refrigerated cargo capacity, general cargo capacity, and ownership of each vessel employed under this Agreement, and the carryings under this Agreement per voyage (northbound and southbound, separately) of each such vessel in loaded TEUs [2] and revenue tons for both refrigerated and general cargo. Reports shall be submitted to the Commission within 45 days following the end of each semi-annual reporting period.

VI. Articles 8 and 9 be amended to read:

> 8. ACTA, through its agents, shall be responsible for the collection of all revenues. The respective parties shall be re-

[2] The Commission assumes that this will include breakbulk cargo converted to loaded TEUs in the manner set forth in Article 4 of the Agreement.

sponsible for the operation and provision of their own vessel or vessels.

9. Revenues and all other expenses, such as cargo and container handling costs, agency commissions and administrative expenses, shall be shared between the parties on such basis as they shall determine (the parties hereby agreeing promptly to notify the Commission of such basis and any changes therein). On an annual basis, ACTA, through its agents, shall settle accounts and shall distribute to the parties their respective shares of such revenues after deduction of all such expenses (or, in the event of a loss, shall collect from the parties their respective shares of the excess of such expenses over revenues). Pending final accounting advances of such shares of revenues less expenses shall be made periodically during the year.

VII. Article 21 be amended to read:

21. This Agreement shall be governed by and construed in all respects in accordance with the law of England and the United States statutes administered by the Federal Maritime Commission.

VIII. Article 22 be amended to change "March 31, 1991" to "October 30, 1985.";

IT IS FURTHER ORDERED, That, within 10 days after the date of this Order, the parties to Agreement No. 9925-3 shall apply to each of Agreements Nos. 6200 and 10268 for merger of their separate membership into a single membership, provided that such merger shall not require the payment of a new admission fee, and shall submit evidence of such applications to the Commission;

IT IS FURTHER ORDERED, That, if any information (including reports) submitted to the Commission under Agreement No. 9925-3 and marked "confidential—submitted under Agreement No. 9925-3 and subject to the Federal Maritime Commission's final order in Docket No. 82-24," shall be requested under the Freedom of Information Act, the Commission shall, at least 10 days prior to the release of any such information, give notice to the submitter, identifying the information to be released and the name and address of the requester; and

IT IS FURTHER ORDERED, That the approval contained herein shall be effective on the date upon which the Commission receives a copy of Agreement No. 9925 which meets the above conditions, at which time this proceeding will stand discontinued.

By the Commission.

(S) FRANCIS C. HURNEY
Secretary

FEDERAL MARITIME COMMISSION

DOCKET NO. 81-43

INDEPENDENT FREIGHT FORWARDER LICENSE NO. 1483

TOKYO EXPRESS CO., INC. AND KOZO AND KATHLEEN KIMURA

D/B/A COSMOS TRADING COMPANY

ORDER OF DISCONTINUANCE

November 8, 1982

The Commission's Order Adopting Initial Decision in this proceeding served September 17, 1982 approved the Settlement Agreement proffered by the parties on the condition that the amount of penalty be increased from $15,000 to $20,000 by the addition of two installments of $2,500 and that an executed copy of the modified Settlement Agreement and promissory note be submitted within 45 days. Upon receipt of such submission this proceeding would be discontinued.

The parties now have submitted the modified Settlement Agreement and promissory note to comply with the earlier order. Accordingly, proceedings in this matter are discontinued.

By the Commission.

(S) FRANCIS C. HURNEY
Secretary

FEDERAL MARITIME COMMISSION

DOCKET NO. 81-39

AGREEMENT NOS. 10333, 10333-1 AND 10333-2

CALCUTTA/BANGLADESH/USA POOL AGREEMENT

NOTICE

November 12, 1982

Notice is given that no appeal has been taken to the October 7, 1982 Order of Discontinuance in this proceeding and that the time within which the Commission could determine to review has expired. No such determination has been made and accordingly, that order has become administratively final.

(S) FRANCIS C. HURNEY
Secretary

FEDERAL MARITIME COMMISSION

DOCKET NO. 81-39

AGREEMENT NOS. 10333, 10333-1 AND 10333-2

CALCUTTA/BANGLADESH/U.S.A. POOL AGREEMENT

INVESTIGATION DISCONTINUED WITH PREJUDICE AGAINST A RENEWAL OF INFORMAL OR FORMAL PROCEEDINGS CONCERNING THE QUESTION OF PRE-APPROVAL IMPLEMENTATION OF AGREEMENT NO. 10333-2

Finalized November 12, 1982

Proponents seek dismissal of this proceeding with prejudice against renewal by way of an informal staff investigation into allegations of pre-approval implementation of Agreement No. 10333-2.[1] Reversing their initial opposition to this "with prejudice" feature of Proponents' motion for dismissal, Hearing Counsel now joins in support of the motion.

In my judgment, the motion to terminate the proceeding with prejudice should be granted.

PROCEDURAL BACKGROUND

The proceeding was initiated by Order of Investigation and Hearing (Order), served June 17, 1981, to determine the approvability of Agreement No. 10333-2 (Amendment No. 2) and the continued approvability of Agreement Nos. 10333 (Agreement) and 10333-1 (Amendment No. 1)[2] under section 15 of the Shipping Act, 1916, 46 U.S.C. 814. With respect to the general issues of approvability, the Order directed the parties to address eleven particular questions which were specified by number. Only one of those questions—No. 11—is presently relevant. It asks, "Have the terms of Agreement No. 10333-2 been implemented in any way prior to approval of that Agreement by the Commission?"[3]

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[1] As used by Hearing Counsel, the term "informal staff investigation" subsumes informal or formal civil penalty proceedings. See, e.g., transcript (Tr.) of prehearing conference, held April 13, 1982, at Tr. 31-32.

[2] Hereafter, the Agreement and Amendment No. 1 will sometimes be referred to, together, as the Amended Agreement.

[3] Hearing Counsel posited that Questions No. 9 and No. 10 might be linked, subordinately, to Question No. 11. Question No. 9 reads, "Has Waterman been prevented by its membership in Agreement No. 10333 from offering service to shippers who have otherwise been unable to obtain adequate service?" Question No. 10 reads, "has Waterman been limited to carriage of a specific amount of cargo prior to the approval of individual carrier shares by the Commission?"

The Order named Bangladesh Shipping Corporation (B.S.C.), Cunard-Brocklebank, Ltd. (Cunard), Farrell Lines, Inc. (Farrell), Hellenic Lines, Ltd. (Hellenic), Scindia Steam Navigation Co., Ltd. (Scindia), Shipping Corporation of India Limited (S.C.I.), and Waterman Isthmian Line, Division of Waterman Steamship Corporation (Waterman) as Proponents in the proceeding. The Bureau of Investigation and Enforcement (Hearing Counsel) was named a party to the proceeding. Inasmuch as the Order did not contemplate an assessment proceeding [4] under section 32(e) of the Shipping Act, 1916, 46 U.S.C. 831(e), none of the Proponents was named a respondent.

The Agreement and Amendment No. 1 were approved January 30, 1980. The Amended Agreement established a framework for a cargo revenue pool in the inbound trade from Calcutta,[5] India, and from ports in Bangladesh to ports on the Atlantic and Gulf Coasts of the United States. However, the Amended Agreement did not assign individual revenue shares to members of the pool. Had it been approved, Amendment No. 2 would have established such shares for active members of the pool and would have reserved such shares for Hellenic and Cunard, who are signatories to the Agreement but not to either Amendment.

In November 1981, Proponents moved for termination, stay or modification of the Order. Administrative Law Judge Paul J. Fitzpatrick, to whom the case was then assigned, certified the motion to the Commission for decision. The motion was premised upon changed circumstances, including Farrell's resignation from the Agreement and from the conference in the trade,[6] Proponents' withdrawal of Amendment No. 2 from consideration for approval, and Proponents' representation that negotiations were in progress which might result in a new agreement to supersede the Amended Agreement.

Hearing Counsel opposed that motion, noting, among other things, that the investigation concerned present operating conditions under the still effective Amended Agreement and pre-approval implementation of Amendment No. 2.

By Order On Motion To Terminate And Stay (Second Order), served February 25, 1982, the Commission denied Proponents' motion to terminate, basing its decision on essentially the same grounds relied upon by Hearing Counsel in opposing the motion. However, the Commission did grant a limited stay of the proceeding [7] to allow Proponents time to complete their negotiations and file a proposed superseding agreement. In this connection, the Second Order contained the

[4] An assessment proceeding is a formal civil penalty proceeding. Cf. n. 1, *supra*.
[5] Under Article 2 of the Agreement, Calcutta is defined to include the port of Haldia.
[6] Agreement No. 8650, Calcutta, East Coast of India and Bangladesh/ USA Conference.
[7] The stay was for a period of 30 days from the date of service of the Second Order.

suggestion that Proponents should consider canceling the Amended Agreement, because it simply could not be operated effectively without individual revenue shares, without prejudice to the filing of the superseding agreement.[8]

When the stay expired without the filing of a superseding agreement, I noticed a prehearing conference for April 13, 1982.

On April 7, 1982, Proponents notified the Secretary of the Commission that the Amended Agreement had been terminated and, on April 9, 1982, they filed a new motion to dismiss the proceeding, without prejudice to the filing of a superseding agreement, as the Commission's Second Order had suggested, although not within the exact time frame contemplated by the Commission.

At the prehearing conference, Hearing Counsel tendered their reply to Proponents' motion in which they advised that they "support Proponents' motion and urge [me] to discontinue the proceeding."

But Hearing Counsel added another condition to their support of the motion. Hearing Counsel wished to continue to pursue their inquiry into pre-approval implementation of Amendment No. 2 after discontinuance of the proceeding. Thus, they urged that the dismissal be without prejudice to an informal staff investigation and appropriate action.[9]

I was not favorably disposed to do what Hearing Counsel proposed. It seemed to me that Hearing Counsel should have opposed the motion to dismiss if they had a prima facie case of pre-approval implementation or if they had reason to believe that a prima facie case could be made following prehearing discovery. On the other hand, if Hearing Counsel did not believe it could make out a prima facie case at a hearing, they should not have sought the condition they wanted imposed.

In general, I was concerned about the obvious due process and vexatious prosecution problems stemming from Hearing Counsel's pro-

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[8] The Second Order dismissed Hellenic and Cunard from the proceeding. Farrell was not dismissed on Hearing Counsel's representation that Farrell might have been involved in pre-approval implementation.

[9] Hearing Counsel's reply contained the following remarks:

> In that the withdrawal of Agreement No. 10333 and 10333-1 has effectively eliminated the subject matter of the instant proceeding, Hearing Counsel agree with Proponents that no valid regulatory purpose would be served by continuing this investigation. Although the issue of Proponents' possible preapproval implementation of Agreement No. 10333-2 survives the cancellation of the basic pool agreement, it is Hearing Counsel's belief that this matter can be adequately addressed through informal investigation.* Use of informal methods would make possible a more efficient utilization of Commission resources while maintaining maximum flexibility in the pursuit of this issue.
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> ---
>
> * Upon dismissal of the present investigation, the question of Proponents' possible preapproval implementation of Agreement No. 10333-2 will be referred to the appropriate staff office for further inquiry and appropriate action.

posal. In particular, I was concerned about dismissing an issue specified by the Commission upon the casual showing made by Hearing Counsel [10] because the Commission stressed the importance of the issue in denying Proponents' earlier motion to terminate this proceeding and because of the implied suggestion that the serious issue of a possible violation of section 15 of the Shipping Act was merely an "add on" and not intrinsically worthy of survival in a formal proceeding.[11]

Therefore, I reserved decision on the motion to dismiss and authorized the parties to perfect their positions in subsequent briefs. The briefing schedule called for Hearing Counsel to open by May 13, 1982, and Proponents to reply by June 1, 1982. Hearing Counsel was given the option of filing or not filing an answering brief.

The opening and reply briefs were timely filed, but, because Hearing Counsel did not adequately address the issues which I stressed as being of most concern, I issued a Further Order on Motion to Dismiss [12] in which I directed Hearing Counsel to file an answering brief containing the following numbered items:

> (1) A statement, in the form of an offer of proof, showing all the material Hearing Counsel has at hand and which it would seek to introduce in evidence in order to prove preapproval implementation of Agreement No. 10333-2 (Question Nos. 9, 10 and 11 of the Order of Investigation and Hearing, served June 17, 1981).
>
> (2) A detailed explanation showing the difference between the informal methods of investigation to be pursued and the methods of investigation Hearing Counsel would use in this formal proceeding. The explanation shall contain a time and cost study showing whether the informal staff investigation would, at this stage of events, be a more efficient allocation of Commission resources, as alleged by Hearing Counsel. [Marginal note omitted.]

In their answering brief of July 16, 1982, Hearing Counsel modified their position. They urged that I defer ruling on Proponents' motion to dismiss with prejudice (a course contained in Proponents' reply brief) for a period of 90 days during which Hearing Counsel would try to develop their case which they outlined in response to item (1) [13] of the Further Order on Motion to Dismiss. Hearing Counsel did not respond

[10] See n. 8, *supra*.

[11] See Tr., *passim*, and Order on Motion to Dismiss, served April 15, 1982.

[12] Served June 15, 1982.

[13] Hearing Counsel attached two sets of exhibits to their answering brief. One set was labeled confidential. Hearing Counsel asked that the confidential set be covered by a protective order. I issued a temporary protective order on August 2, 1982, and later extended the temporary order. In the light of the disposition of this proceeding, the order which follows will direct the Secretary of the Commission to return the confidential exhibit to Hearing Counsel.

to item (2) because they believed that their new approach made that item moot.

Hearing Counsel's response to item (1) served the useful purpose of informing Proponents of the nature and details of the allegations concerning pre-approval implementation. To meet those allegations, Proponents asked for and obtained leave to file a reply brief. On August 19, 1982, Proponents' reply brief was filed, together with exhibits consisting of affidavits of Charles F. Fischer, who was the Chairman of the Amended Agreement. Among other things, the reply brief contained proposed findings of fact, meeting the allegations head-on. Proponents concluded by renewing their request for dismissal with prejudice.

Proponents' reply brief evoked a motion from Hearing Counsel for leave to file a response. Their response was included as part of the motion. For the purpose of the motion, Hearing Counsel does not dispute the proposed findings of fact, based primarily upon Mr. Fischer's affidavits, as a correct statement of what the record would show if evidence had been introduced in the case by Proponents. Based upon that showing, Hearing Counsel now joins with Proponents in support of their motion to dismiss with prejudice.

FACTS [14]

1. The Agreement and Amendment No. 1 were approved by the Commission on January 30, 1980. The Amended Agreement provided for revenue pooling and service rationalization in the trades between the United States and the East Coast of India and Bangladesh. The Pool was divided into Indian and Bangladesh Sections (also called "Calcutta" and "Chittagong" Sections), each with a "General Committee." The General Committees were to be overseen by a New York Governing Committee. Although there were no approved individual carrier pool shares, the Amended Agreement did include "Flag Group" Basic Entitlements for United States, Indian and Bangladesh flag carriers.

2. In the Indian Section the approved Basic Entitlements were 45% for U.S. flag carriers (Waterman and Farrell), 45% for Indian flag lines (Scindia and SCI), and 10% for B.S.C. In the Bangladesh Section, the approved Basic Entitlements were 40% for the U.S. flag group, 40% for Bangladesh Shipping and 20% for the Indian lines.

[14] N.b. The findings of fact are intended solely for the purpose of deciding the motion to dismiss with prejudice. Because so many of them are designed to place the matter of allegations of pre-approval implementation in perspective, they should not be construed as binding by way of *res judicata* or collateral estoppel in any future proceeding, including a proceeding, should there be one, to determine the approvability of a superseding pool agreement. Of course, the foregoing limitation does not apply to the question of pre-approval implementation.

3. The functions of the Pool Committees in implementing rationalization measures are summarized in the Commission's Order of Approval of January 30, 1980, at p. 2:

> The activities of each of the two sections (which are both domiciled in the Bay of Bengal area and are responsible to the New York Governing Committee) are monitored by a General Committee. The primary function of the General Committee is to make continuing assessments of trade conditions in order to determine whether the service offered by the participating lines is adequate, excessive or insufficient for the trade's needs, and to ensure that each line is meeting its obligations arising from its participation in the Pool. In appropriate circumstances, the Committees are authorized to "request" of the individual lines that they adjust their service offerings, schedules and/or itineraries to accommodate the trade or to insure that their cargo liftings approximate their basic entitlements.

It was the intention of the parties that each flag group would provide sufficient space to carry its portion of the Basic Entitlement.

4. This Pool Agreement was formed primarily to preserve the ability of the member carriers to serve this trade, with its difficult service characteristics and low-rated commodities. The trade has lost several carriers in recent years (including, most recently, Cunard and Farrell), and the idea of the pool was to rationalize services so as to reduce costs, maintain rate stability and maintain an optimal level of service for shippers.

5. Among the difficulties in serving the trade which gave rise to the need for rationalization and pooling are the difficult port conditions, climate conditions and business practices of the trade. In the Indian portion of the trade, the primary ports are Calcutta and Haldia. Calcutta is located 126 miles up the Hooghly River and accordingly is subject to silting and draft limitations, while Haldia is about 76 miles up the Hooghly River. Two natural phenomena, monsoons and bore tides, make the ports unusually difficult to serve during the monsoon season. From June until September, congestion invariably occurs. The bore tides are not always a problem but several times a year make loading of cargo extremely difficult and sometimes impossible. The river is serviced by a series of lock gates through which most lighters and vessels must pass from time to time. Substantial sections of the port become non-operative when difficulties occur with the gates. The port areas are heavily labor-intensive and, due to economic and societal circumstances, the introduction of mechanized cargo-handling equipment is kept to a bare minimum. The vessels used in the trade are generally break-bulk or lighter-aboard-ship (LASH) type vessels. The great majority of all cargoes flowing to the port are jute products which are transported mainly from upriver mills in lighters that are brought to ship side in the stream. Loading is, therefore, relatively slow and

laborious. Strikes are frequent occurrences. Although there had been rumors of rebating in the trade prior to implementation of the pool, those rumors appeared to Respondents to subside during the period of the Pool's operations.

6. Major items moving in the trade are jute and jute products, which are relatively low-rated and not highly profitable to transport. Jute products are sold under very ancient contracts between the mills and the exporters and the buyers. Under the contracts there are two kinds of shipments, one being "end-month" and the other "mid-month." Most of the goods move on the end-month vessels which under the terms of the contract must basically qualify for carriage of jute products by arriving in port before the end of the month. The procedure has resulted for many years in the bunching of vessels to pick up end-month cargoes. The consequences of this antiquated contractual machinery have been, therefore, to cause the expenditure of additional time in port. Further difficulties encountered in Calcutta include frequent strikes, slowdowns by supervisory and clerical staff of the Calcutta dock labor board, severe bore tides, power shortages, general strikes, berthing delays, insufficient dock labor, monsoon rains, etc.

7. Port conditions in Bangladesh also are difficult. The principal loading port for jute carpet backing is Chalna, a river anchorage. All of the cargoes delivered to Chalna arrive by barge. Barges are always in short supply and are usually in bad condition. Loading from barges is a much slower process than loading from a shoreside facility. There is also a bar problem at Chalna. The other major Bangladesh port is Chittagong which is a river port but not a lighterage port. There is also a bar condition which restricts the draft of arriving vessels. Berths are scarce. When grain imports are heavy, the port becomes congested to the point where berthing delays are common, and these delays are aggravated by the monsoon season and, in October, delays are further aggravated by cyclones, one of which completely devastated the port several years ago.

8. The Pool Agreement was envisioned as a means by which the parties could achieve economies and improve service, despite the difficult conditions discussed above. The basic notion was that lines would cooperate, under the guidance of Pool Committees for the Bangladesh and Calcutta Sections, in scheduling sailings and port calls and thereby reducing the number of sailings, as well as port time and costs necessary for each sailing. In addition, national flag and individual line entitlement percentages were included so that each line and national group could be assured of maintaining a significant and reasonable portion of the trade revenues. The lines thereby anticipated that their resources would be put to their optimum uses, that port service could be improved through better vessel utilization, that fuel savings would result, that rate pressures would diminish, and that the ability of the

members to serve this trade with its low-rated commodities would be preserved.

9. When the Pool Agreement was approved by the Commission in January of 1980, no individual shares were in effect. Although the lines had not yet agreed to individual pool shares, there was an agreement as to national flag "Basic Entitlements," which were approved by the Commission as part of Amendment No. 1. After approval by the Commission, the lines began, in June of 1980, to implement the pool so as to permit rationalization pursuant to the guidelines approved by the Commission.

10. When the Pool commenced, it developed that only Waterman sailed from both Calcutta and Bangladesh in June of 1980. Waterman lifted the available cargo and thereby carried the entire first month's cargo under the pool. Thus Waterman's carryings were far above the U.S. flag Basic Entitlements. In an effort to implement rationalization and to bring the lines' carryings into closer balance with the Basic Entitlements, Waterman restricted the U.S. discharge port itinerary on their July vessel with the understanding that other carriers would schedule calls for those ports. The Trade in the U.S. reacted with complaints. One problem was that a significant amount of the cargo shipped in June and July of 1980 consisted of goods as to which the letter of credit, issued prior to commencement of the Pool, had committed Waterman as the carrier. Thus, the shippers were not satisfied by vessels of the other pool members.

11. Waterman related the situation to the other pool members suggesting that the Pool be suspended so that the problems could be discussed at the scheduled September owners' meeting. Not all members were agreeable, and Waterman submitted its resignation on August 14, 1980. Waterman advised the Commission of its resignation and stated in a letter of August 27, 1980, that the reason for the resignation was its "forced overcarrier" status. The Commission's Office of Agreements advised the member lines in a letter of September 25, 1980, of their concern that the Pool "had been operating to force [Waterman] to become an overcarrier." At the owners' meeting in London, in September of 1980, the situation was discussed, and Waterman agreed to withdraw its resignation, after satisfying itself that the pool members understood its apprehensions as to its overcarriage and were willing to take necessary steps to improve the operations of the pool, so that Waterman could reduce its overcarriage.

12. Accordingly, Waterman withdrew its resignation on September 24, 1980. Nevertheless, it continued to prove difficult to rationalize service inasmuch as Waterman continued to carry a portion of trade cargo far above the approved United States flag share of 45%, in the Calcutta section of the Pool. Indeed, Waterman's carryings rose from a level of 60% of pool tonnage in August 1980, to 76% at the end of

December 1980. Conversely, the share of the Indian lines in the Calcutta section declined far below their approved 45% joint entitlement, to an aggregate total of only 12% of revenues and tonnages. Letter of credit nominations continued to be a problem, as the Indian carriers reported that their vessels were several times withdrawn because of lack of cargo. A dock labor strike in November and December of 1980 created further loading difficulties.

13. In a further owners' meeting, held on January 27, 1981, in Dacca, Bangladesh, the members discussed the difficulties encountered in balancing carryings with entitlements in the Pool. The Indian Flag carriers expressed grave concern at Waterman's 76% carrying in the Calcutta section. Waterman responded that its overcarrier position was involuntary and a matter of great concern to it as well. The lines therefore agreed, among other things, that the Calcutta General Committee would assist Waterman and the other lines in rationalizing the services offered by the lines by scheduling U.S. discharge ports of call so as to reduce Waterman's percentage of pool carryings to a target of 60% of total revenues and tonnage by May of 1981. This 60% figure was of course far above the approved United States Flag share of 45%, which applied to Farrell as well as Waterman, in the Calcutta Section.

14. At the same meeting there was a discussion concerning the status of B.S.C. as an overcarrier in the Chittagong section. It was agreed that B.S.C. would attempt to stay within the limits of its entitlement in the Chittagong section. Of course, since B.S.C. was the only Bangladesh Flag carrier in the Pool, it was entitled to the entire Bangladesh Flag share of 40% which had Commission approval under Agreement 10333-1.

15. After the January 1981 owners' meeting, efforts were made through the Calcutta Pool Committee to rationalize ports of call in the Eastern United States. The Committee requested Waterman to load cargo only for a limited range of U.S. ports, while other member lines sought to provide appropriate coverage for the trade. Still, problems remained because of shipper nominations, and also, because, due to high interest rates, many shippers anticipated financial benefits from Waterman's faster transit time. The Indian lines were often unable to obtain sufficient cargo amounts and complained of having to withdraw their vessels.

16. In March of 1981, a complaint was received from the Burlap and Jute Association that the service to certain ports, Wilmington, Del., Norfolk and Newport News, Va., and Wilmington, N.C., was inadequate. Other complaints were also received, for the same reasons, including a call from a Commission staff member who stated that a complaint had been received concerning inadequate service to Norfolk. Efforts were made to resolve the complaints, by ensuring that all relevant U.S. discharge ports were adequately covered by the Pool

members. The Chairman of the New York Governing Committee was aware of no cargo which went uncarried because of the rationalization efforts. For the first year of Pool operations, ending May 31, 1981, Waterman's carryings in the Calcutta section did not drop below 60% of pool revenues. Although proposals were made to exclude certain ports from the Pool (so that Waterman could lift cargo to those ports without increasing its overcarriage), the member lines were unable to reach agreement on such proposals.

17. The pool revenues were never liquidated on any basis. Under Articles 5 and 6 of the Amended Agreement, the only sanctions for "deliberate" under or overcarriage would have involved adjustments to Basic Entitlements or denial of carrying allowances, at the time of settlement, upon a determination by the New York Governing Committee that deliberate under or overcarriage had occurred. As no pool settlement ever took place, no sanctions were ever considered for any under or overcarrier. In no case was any member line restricted to the pool share contained in Amendment No. 2 in any respect. The described actions taken by the Pool members were all considered to be consistent with the authority approved by the FMC in its order of approval concerning the Amended Agreement.

DISCUSSION AND CONCLUSION

While it lasted, the Amended Agreement provided a framework for a pool which established basic carrying entitlements for flag groups rather than for individual carrier participants. General Committees, one for each of the two geographic sections into which the Amended Agreement was divided, monitored the activities. These committees were empowered to request that participants undertake certain rationalization functions in order to carry out their responsibilities under the Amended Agreement. In order to meet those obligations, the participants were authorized to "adjust their offerings, schedules and/or itineraries to accommodate the trade or to insure that their cargo liftings approximate their basic entitlements."

The obvious defect in the Amended Agreement was that it was merely a skeleton. As the Commission commented in its Second Order, it could not be operated effectively until it was fleshed out with individual revenue shares. Amendment No. 2 might have remedied that defect had it not been withdrawn and had it been approved.

Hearing Counsel's concern about pre-approval implementation of Amendment No. 2 apparently arose from fragments of information imparted by shippers (consignees at bypassed United States Ports) and by Waterman, itself. Those bits and pieces of complaints and conversations led Hearing Counsel to believe that individual pool shares were being distributed in advance of approval of Amendment No. 2 or that some forms of impermissible sanctions were being imposed upon Waterman by the pool's committees.

However, it is clear that the measures undertaken by the committees and by Waterman were authorized rationalization procedures under the Amended Agreement. There were no sanctions and there were no settlements of individual revenue shares.

Accordingly, I find that the answer to Question No. 11 is no,[15] there was no pre-approval implementation of Amendment No. 2.

ORDER

The investigation instituted under the terms of the Order of Investigation and Hearing, as modified by the Order On Motion To Terminate And Stay, is discontinued, with prejudice against its renewal, by way of informal or formal investigation, into allegations of pre-approval implementation of Agreement No. 10333-2.

The confidential exhibits attached to Hearing Counsel's answering brief of July 16, 1982, shall remain confidential and shall be returned to Hearing Counsel by the Secretary of the Commission upon this order becoming the final order of the Commission.

(S) SEYMOUR GLANZER
Administrative Law Judge

[15] The answers to the subordinate Questions, Nos. *9* and *10*, are also in the negative.

FEDERAL MARITIME COMMISSION

DOCKET NO. 82-37

UNION CARBIDE CORPORATION

v.

DELTA LINES

NOTICE

November 12, 1982

Notice is given that no exceptions have been filed to the October 6, 1982 initial decision in this proceeding and the time within which the Commission could determine to review that decision has expired. No such determination has been made and accordingly, that decision has become administratively final.

(S) FRANCIS C. HURNEY
Secretary

FEDERAL MARITIME COMMISSION

DOCKET NO. 82-37

UNION CARBIDE CORPORATION

v.

DELTA LINES

Respondent carrier found to have overcharged complainant shipper in the amount of $8,801.02 in connection with a shipment consisting of twelve 20-foot containers loaded with insecticides. Respondent is ordered to pay reparation in that amount plus interest as required by the Commission's regulations.

Respondent erred in rating the shipment by failing to include 432 loose cartons when calculating freight charges. Had respondent included these cartons, it would have seen that the shipment satisfied the minimum size requirement published in the tariff and that it should therefore have used actual weight of the shipment, not a higher minimum weight, when beginning its freight calculations.

Peter Nelson for complainant.

Sean G. Burke for respondent.

INITIAL DECISION [1] OF NORMAN D. KLINE, ADMINISTRATIVE LAW JUDGE

Finalized November 12, 1982

This case began with the filing and service of a complaint on August 17, 1982, in which complainant Union Carbide Corporation alleges that respondent Delta Steamship Lines, Inc., had violated section 18(b)(3) of the Shipping Act, 1916, by overcharging Union Carbide on a shipment of insecticides which Union Carbide had shipped via Delta from Charleston, South Carolina, to Guayaquil, Ecuador, under Delta's bill of lading dated March 30, 1981. Union Carbide alleges that it was overcharged in the amount of $8,801.02 because Delta failed to include certain portions of the shipment consisting of 432 loose cartons when rating the shipment with the result that Delta mistakenly believed that the shipment fell below the minimum size required for the twelve 20-foot containers which held the shipment. Because of that mistaken assumption, Delta allegedly raised the actual weight of the shipment to a required minimum weight of 85 percent of the weight capacity of the containers under the pertinent tariff rule, applied the tariff rate of $161 per 2,000 lbs. to such minimum weight to derive ocean freight, and

[1] This decision will become the decision of the Commission in the absence of review thereof by the Commission (Rule 227, Rules of Practice and Procedure, 46 C.F.R. 502.227).

similarly applied incidental container usage, bunker surcharge, and port congestion surcharges to the minimum weight rather than actual weight of the shipment, in accordance with other tariff rules. Had Delta correctly included the 432 loose cartons in rating the shipment, complainant alleges that Delta would not have had to raise actual weights to 85 percent of the containers' weight capacities before applying the rate of $161 per 2,000 lbs. and similarly could have utilized actual weights when determining the three incidental charges. If Delta had used actual weight, furthermore, complainant alleges that Delta would have seen that actual weight times the rate of $161 would have fallen below a minimum-revenue rule in the tariff, and Delta would merely have applied that minimum revenue ($2,318 per 20-foot container) to the 12 containers in the shipment (the incidental charges remaining at actual weight times each charge). Under this latter method of rating, complainant alleges that total freight would have been $8,801.02 below what Delta actually charged. Complainant therefore seeks reparation in this amount together with interest.

In support of its claims, Union Carbide furnished the relevant tariff pages, bill of lading, packing list, and a letter from Delta Line acknowledging the claim but declining to honor it because of its tariff rule which barred such claims if submitted more than six months after shipment. Complainant asks that this case be decided under the Commission's shortened procedure (Subpart K of the Commission's Rules of Practice and Procedure, 46 C.F.R. 502.181 through 502.187).

Although the complaint had been served on August 17, 1982, as noted above, and Delta was supposed to have filed an answer either within 20 days if it declined to consent to the shortened procedure or within 25 days if it consented to such procedure, Delta initially failed to respond. Rather than issue some type of default judgment without affording Delta an opportunity to explain its failure to respond to the complaint, I provided Delta with such opportunity under less technical administrative procedures and to assure myself that Delta had been given a full opportunity to present its defense. (See Order to Show Cause Why Initial Decision Should Not Issue Under the Shortened Procedure, September 20, 1982.) [2] Shortly thereafter I was contacted by Delta's general counsel, Mr. Sean G. Burke, who advised that the

[2] In the Order to Show Cause cited, I relied upon a number of court and agency decisions which hold that administrative agencies like the Commission are not courts, are not bound by hard and fast technical rules applicable to courts, and ought not to use their rules of procedure to defeat the ends of justice. See *Oakland Motor Car Co. v. Great Lakes Transit Corp.*, 1 U.S.S.B.B. 308, 311 (1934); *Utd.-Buckingham Frt. Lines v. United States*, 288 F.Supp. 883, 886 (D. Neb. 1968); *N.L.R.B. v. Monsanto Chemical Co.*, 205 F.2d 763, 764 (8th Cir. 1953). However, agencies, while relaxing rules of pleadings and procedure, must ensure that every party has had an opportunity to make its case or defense. *City of Portland v. Pacific Westbound Conference*, 5 F.M.B. 118, 129 (1956); *Pacific Coast European Conf.—Limitation on Membership*, 5 F.M.B. 39, 43 (1956).

complaint, which had been served on Delta's New York office, had apparently become mislaid and had not been transmitted to Delta's home office in New Orleans. Mr. Burke further advised that he would submit a response to the complaint and did so by letter of September 24, 1982. In that letter, he stated that Delta does not dispute the merits of Union Carbide's claim but denied the claim initially only because of the tariff's so-called six-months' rule. He further advised that Delta does not wish to defend the validity of that rule in consideration of previous decisions by the Commission and that "Delta respectfully requests that the appropriate order be issued for the refund." [3]

DISCUSSION AND CONCLUSIONS

The basic principle of law which governs overcharge cases is essentially the principle enunciated in *Western Publishing Company v. Hapag-Lloyd A.G.*, 13 S.R.R. 16 (1972), and its progeny. Very simply, complainants in these types of cases are permitted to show what actually moved in a shipment notwithstanding bill of lading descriptions. However, they are required to show the validity of their claims on the basis of a preponderance of the evidence and "must set forth sufficient facts to indicate with reasonable certainty and definiteness the validity of the claim." *Merck Sharp & Dohme v. Atlantic Lines*, 17 F.M.C. 244, 245 (1973). See discussion and case citations in *Sanrio Co., Ltd. v. Maersk Line*, 23 F.M.C. 150, 159-164 (1980).[4]

The instant case does not present the problem usually encountered in overcharge cases in which shippers claim that the carriers charged higher rates than those specified in the tariffs because the cargo was misdescribed on the bill of lading on which the carrier relied when rating the shipments. The problem here is not that the cargo was misdescribed on the bill of lading as to the nature of the commodity shipped but that the measurement of the shipment was erroneously understated with the result that Delta invoked a minimum-size rule so as to increase freight charges. The facts necessary to establish the validity of the claim and to support the foregoing conclusion are

[3] Also following issuance of the Order to Show Cause, Mr. E. T. Woods, Area Manager, Liner Services, for Union Carbide, called me to inquire as to the status of the case. I advised him that in view of Delta's response to the complaint and Order to Show Cause, as shown in the letter of September 24, 1982, complainant need not file anything further in the case and that my Initial Decision would issue promptly.

[4] As Delta has correctly noted, furthermore, tariff rules which bar the filing of claims with carriers beyond six months after shipment or cause of action accrues cannot be used as defenses to complaints alleging overcharges in violation of section 18(b)(3) of the Act. Furthermore, the Commission has recently issued a rule which will require the elimination of such rules in the tariffs themselves so that in the future carriers will be able to honor such claims as the one in the present case without forcing shippers to file them with the Commission. See *Sun Co. v. Lykes Bros.*, 20 F.M.C. 67, 69 (1977); *Kraft Foods v. F.M.C.*, 538 F.2d 445 (D.C. Cir. 1976) (tariff rules shortening time to submit claims to carriers are not defenses to formal complaints filed with Commission); Docket No. 81-51, *Time Limit for Filing of Overcharge Claims*, 25 F.M.C. 185 (1982).

clearly shown in the shipping documents, particularly the packing list and the bill of lading, and are not disputed by Delta. These documents show that the shipment of insecticides which was carried in twelve 20-foot containers weighed a total of 278,136 lbs. and measured 11,346 cubic feet. However, the bill of lading on which Delta relied when rating the shipment, shows 278,136 lbs. but only 10,488 cubic feet. The reason why the bill of lading shows fewer cubic feet than actually shipped is that someone failed to carry over to the bill of lading the measurement figures for 432 loose cartons shown on the packing list. These loose cartons measured 858 cubic feet. Had Delta added these 858 cubic feet to the 10,488 cubic feet comprising the rest of the shipment, its bill of lading would have shown the correct total measurement of 11,346 cubic feet (10,488 plus 858). This figure more than equals 85 percent of the cubic capacity of the twelve 20-foot containers. Therefore, according to Delta's tariff, the shipment can be rated at actual weight, not at the higher minimum weight also set at 85 percent of weight capacity of the containers.[5] By using actual weight, basic ocean freight amounts to $22,389.95 (278,136 lbs. times $161 per 2,000 lbs.). However, because this amount is below the required minimum revenue for 12 containers, rated at $2,318 per 20-foot container under the tariff,[6] base freight is raised to $27,816 (12 containers times $2,318). The three incidental charges (container usage, bunker surcharge, and port congestion) are figured at actual weight times each charge. The total freight then comes to $32,683.38, the correct amount which Union Carbide should have paid. Since Union Carbide actually paid $41,484, based upon the erroneous raising of actual weight of the shipment to a minimum weight of 85 percent of the containers' aggregate weight capacity, Union Carbide seeks return of the additional amount, some $8,801.02, plus interest. The following table illustrates the foregoing calculations:

[5] Delta's tariff has a rule (Rule 43(N)(3)) which provides that if cargo rated by weight tons does not fill a container to 85 percent of the recorded weight capacity, the carrier will raise the actual weight to a figure which represents 85 percent of the weight capacity of the container when rating the shipment. Eighty-five percent of the weight capacity of the twelve 20-foot containers used by Delta amounts to 423,300 lbs., and Delta rated the shipment by using that amount rather than the actual weight of the shipment, which was 278,136 lbs. However, Delta's tariff also has a rule (Rule 43(N)(4)) which makes the preceding 85-percent rule inapplicable if the cargo fills the container to 85 percent of the recorded cubic capacity of the container. Another tariff rule (43(N)(1)) defines 85 percent of the cubic capacity of a 20-foot container to be 935 cubic feet (85 percent of 1,100 cubic feet). Because the aggregate cargo filling the 12 containers in the subject shipment occupied more than 935 cubic feet per container (11,346 cu. ft. total measurement divided by 12 equals 945 cubic feet) the shipment should have been rated at the actual weight, 278,136 lbs., rather than the minimum weight of 423,300 lbs.

[6] Delta's tariff Rule 43(N)(8) requires a minimum revenue of $2,318 per 20-foot container.

Correct Freight Calculation

12 containers, 278,136 lbs. x $161 per 2,000 lbs.	=	$22,389.95
Minimum revenue required under Rule 43(N)8 ($2,318 per container x 12)	=	27,816.00
Additional Charges:		
Container usage (278,136 lbs. x $10/2000 lbs.)	=	1,390.68
Bunker surcharge (278,136 lbs. x $22/2000 lbs.)	=	3,059.50
Port congestion surcharge (278,136 x $3/2000 lbs.)	=	417.20
Total	=	$32,683.38

Delta's Freight Calculation

423,300 lbs. x $161 per 2,000 lbs.	=	$34,075.65
Additional Charges:		
Container usage (423,300 lbs. x $10/2000 lbs.)	=	2,116.50
Bunker surcharge (423,300 lbs. x $22/2000 lbs.)	=	4,656.30
Port congestion surcharge (423,300 lbs. x $3/2000 lbs.)	=	634.95
Total	=	$41,484.40 [7]

Total freight paid:	$41,484.40
Correct Freight:	32,683.38
Overcharge:	$8,801.02

I conclude that respondent Delta Steamship Lines, Inc., has overcharged Union Carbide in the amount of $8,801.02 because of Delta's failure to account for the measurement of 432 loose cartons in the shipment, which, when added to the measurement figures relating to the other portions of the shipment, satisfied the minimum-size requirements of Delta's tariff and required Delta to rate the shipment on the basis of actual, not the higher minimum weight. On such actual weight basis, base ocean freight falls below another minimum-revenue-per-container rule but even after applying that rule, total freight amounts to $8,801.02 less than the amount Union Carbide actually paid. Reparation is therefore awarded in that amount. In accordance with the Commission's governing regulation concerning interest, Delta shall pay Union Carbide such amount plus interest computed under the formula provid-

[7] Correct total is $41,483.40. Delta's addition was in error.

ed by that regulation. See Rule 253, 46 C.F.R. 502.253, 24 F.M.C. 145 (1981).[8]

(S) NORMAN D. KLINE
Administrative Law Judge

[8] The regulation cited provides that simple interest will accrue from "date of payment of freight charges to the date reparations are paid." It also provides that "[t]he rate of interest will be calculated by averaging the monthly rates on six-month U.S. Treasury bills commencing with the rate for the month that freight charges were paid and concluding with the latest available monthly Treasury bill rate at the time reparations are awarded." The Commission however, also stated that when the facts are not reasonably ascertainable, parties could settle overcharge cases, in which case the amount of interest could be left to the parties. See 24 F.M.C. at 149.

FEDERAL MARITIME COMMISSION

DOCKET NO. 82-26

RASCATOR MARITIME S.A.

v.

CARGILL INCORPORATED

ORDER

November 15, 1982

This proceeding is before the Commission upon review of Administrative Law Judge Charles E. Morgan's Order Approving Settlement Agreement and Discontinuing Proceeding, served September 2, 1982. In that Order, the Presiding Officer approved the settlement negotiated by the parties, but further held that the Commission did not have jurisdiction over the complaint because it was time-barred.

The two-year limitation in section 22 of the Shipping Act, 1916 (46 U.S.C. § 821) applies only to requests for reparations. The complaint in this proceeding alleged violations of section 17 of the Act (46 U.S.C. § 816) and asked for a cease and desist order as well as reparations. Thus, the Commission retains jurisdiction over the complaint even though the actions which form its gravamen took place more than two years ago. The Commission therefore rejects the Presiding Officer's statements concerning its lack of jurisdiction over the matter at issue. However, we agree that the parties' settlement agreement does not appear to violate the Act and should be approved.

THEREFORE, IT IS ORDERED, That except to the extent modified above, the September 2, 1982 Order Approving Settlement Agreement and Discontinuing Proceeding is adopted by the Commission; and

IT IS FURTHER ORDERED, That this proceeding is discontinued.

By the Commission.

(S) FRANCIS C. HURNEY
Secretary

FEDERAL MARITIME COMMISSION

DOCKET NO. 82-26

RASCATOR MARITIME S.A.

v.

CARGILL INCORPORATED

RULING ON MOTION FOR AN ORDER APPROVING SETTLEMENT AGREEMENT AND DISCONTINUING PROCEEDING

Partially Adopted November 15, 1982

By complaint filed April 29, 1982, and served May 5, 1982, the complainant, Rascator Maritime S.A. (Rascator), alleged that respondent, Cargill Incorporated (Cargill), operated a grain elevator at Channelview, Texas, known as the "Cargill Houston Elevator"; that Cargill as operator of a marine terminal filed a tariff with the Federal Maritime Commission, namely its Houston Tariff No. 2; that Rascator chartered the *M/V BRABANTIA*, and on or about September 20, 1978, subchartered this motor vessel to the Embassy of Pakistan for the carriage of wheat in bulk from the U.S. Gulf Coast to Karachi, Pakistan; that an application was made to berth this vessel at the Cargill Houston Elevator and that on September 27, 1978, this vessel docked at the Cargill Houston Elevator berth and commenced loading; that only one vessel could be loaded at a time at this terminal facility; that loading of this vessel reasonably could take about two days; that for its own reasons Cargill did not complete promptly the loading of the *BRABANTIA*; that Cargill received other vessels for loading out of turn; and that loading of the *BRABANTIA* was not completed until October 10, 1978, and this motor vessel sailed from Houston for Karachi on October 11, 1978.

The complainant further alleged that Cargill on or about October 18, 1978, submitted an invoice for $21,357.26 for dockage for the September 27 to October 10, 1978, period; that Rascator through its agent protested the invoice on October 25, 1978; that Rascator on September 25, 1981, filed suit against Cargill in the United States District Court for the Southern District of New York based upon the above circumstances, *Rascator Maritime S.A. v. Cargill Incorporated*, S.D.N.Y. No. 81 Civ. 5956-CLB; and that Rascator sought to recover damages of $409,088.77.

Cargill's answer to the complaint in the Federal Court included a defense that the allegations of the complaint fell within the exclusive primary jurisdiction of the Federal Maritime Commission.

Cargill in Federal Court further argued that its actions were justified and permitted by an item in its tariff which provided:

> Cargill, in its sole discretion, may change the turn of vessels whether berthed or not or assign a berth to vessels passed in specific compartments when confronted by an urgent need to receive or ship a particular grade or kind of grain or when, in its judgment, conditions at the dock or in the elevator will be facilitated thereby.

Cargill moved for summary judgment in the Federal Court, and United States District Court Judge Brieant decided the motion on January 29, 1982, stating in part that even if the Federal Maritime Commission found that its jurisdiction over compensatory damages were time barred, that the Commission still might grant prospective relief to the complainant, if the Commission were to sustain Rascator's criticism of the tariff, 46 U.S.C. section 816, with regard to the Commission's power to make findings regarding "just and reasonable regulations and practices related to or connected with the receiving, handling, storing or delivery of property" under section 17 of the Shipping Act, 1916 (the Act).

Therefore, Judge Brieant concluded that the Court should abstain in favor of the exercise by the Federal Maritime Commission of its primary statutory jurisdiction, and Rascator was directed to file an appropriate complaint with the Commission, and proceedings in the Federal Court were stayed pending action by the Commission.

Further, it appears that Judge Brieant reserved the right to rule on the matter of compensatory damages to Rascator if such damages were unobtainable before the Commission because time barred. The above matters have been recited in some detail because of their bearing on the Commission's jurisdiction.

Now, the matter for current consideration and ruling is the "Joint Motion For an Order Approving Settlement Agreement and Discontinuing Proceeding," filed by Rascator and Cargill on August 25, 1982.

The parties submit that their settlement agreement is fair to both in view of the complex legal issues, the difficulties of making full discovery, and the estimated cost and complexity of continued litigation. Their settlement agreement provides, in part, after the discontinuance of both of the proceedings (the one before the Commission and the one pending in the U.S. District Court), that Cargill pay $25,000 to Rascator without any admission of liability, that Cargill will not receive and Rascator will not be required to pay any sums with respect to Cargill's counterclaim in either proceeding.

It is concluded and found that based upon the pleadings and facts presented, there is no reason shown why the Federal Maritime Commission should disapprove the settlement agreement of the parties. The settlement agreement does not appear to contravene any law or public policy.

The question remains as to the jurisdiction of the Federal Maritime Commission. The Commission may award reparation or compensatory damages if a complaint is filed within two years after the cause of action accrued. Insofar as Rascator's complaint seeks damages in connection with events occurring more than two years prior to the filing of its complaint, the complaint appears time barred.

The settlement agreement on its face does not appear to be concerned with the present or future tariff provisions of Cargill applicable at its Houston elevator. In fact, the settlement agreement does not mention anything about the present or future terms of the tariff of Cargill applicable at its Houston elevator, and the parties are deemed to have abandoned their contentions under section 17 of the Act.

Under all the circumstances, it is concluded that were the Federal Maritime Commission shown to have jurisdiction, it should approve the settlement agreement. But, it is concluded that insufficient facts have been presented to show that the Commission has jurisdiction over the settlement agreement of the parties.

The complaint in this proceeding is dismissed for lack of jurisdiction, and the proceeding hereby is discontinued.

(S) CHARLES E. MORGAN
Administrative Law Judge

FEDERAL MARITIME COMMISSION

DOCKET NO. 73-17

SEA-LAND SERVICE, INC. AND GULF PUERTO RICO LINES, INC. - PROPOSED RULES ON CONTAINERS

DOCKET NO. 74-40

PUERTO RICO MARITIME SHIPPING AUTHORITY - PROPOSED ILA RULES ON CONTAINERS

ORDER

November 18, 1982

On July 2, 1982 the United States Court of Appeals for the District of Columbia Circuit issued a Supplemental Opinion Following Remand in *Council of North Atlantic Shipping Associations and New York Shipping Association, Inc. v. F.M.C. and U.S.A.*, D.C. Cir. No. 78-1776, in which it vacated that part of the Commission's May 19, 1982 Report and Order on Remand discontinuing these proceedings. On September 23, 1982, the Court denied the Commission's request for rehearing with respect to the Supplemental Order. The Court has directed that the Commission "defer further action in its Dockets Nos. 73-17 and 74-40 until it has reached its final decision in its Docket No. 81-11 and until the Supreme Court has concluded its action [on a petition for writ of certiorari with respect to the Court of Appeals March 2, 1982 decision in No. 78-1776.]* . . . The Commission should then reconsider its conclusions in Dockets Nos. 73-17 and 74-40."

THEREFORE, IT IS ORDERED, That these proceedings are reopened and all action in them is stayed pending further order of the Commission.

By the Commission.

(S) FRANCIS C. HURNEY
Secretary

* On October 4, 1982, the Supreme Court denied the petition.

FEDERAL MARITIME COMMISSION

DOCKET NO. 81-74

AGREEMENT NO. 9718-8

CALIFORNIA JAPAN/KOREA SPACE CHARTER AGREEMENT

ORDER DISCONTINUING PROCEEDING

November 19, 1982

On January 16, 1981, the Commission conditionally approved Agreement No. 9718 (the Agreement) [1] through August 22, 1983. 20 S.R.R. 776. One of the conditions required the parties to limit the total container capacity operated pursuant to the Agreement to 8,512 TEU's.[2] *See* 20 S.R.R. at 785.

The Commission's order of approval was appealed to the U.S. Court of Appeals for the District of Columbia Circuit by certain carriers who had protested the Agreement. In the meantime, on June 23, 1981, the parties filed Agreement No. 9718-8 (Amendment No. 8) which proposed to raise the capacity ceiling to 9,126 TEU's by October 21, 1981 and to 10,011 TEU's by March 30, 1982. Protests were filed by Sea-Land Service, Inc., United States Lines, Inc., American President Lines, Ltd. and Lykes Bros. Steamship Co., Inc. By an Order of Investigation served December 14, 1981, this proceeding was instituted to determine whether Amendment No. 8 should be approved, disapproved or modified pursuant to section 15 of the Shipping Act, 1916, 46 U.S.C. § 814.

The Order of Investigation set five issues down for investigation: (1) the relevant market for purposes of determining the market share of the parties to the Agreement; (2) the market share of the parties to the Agreement; (3) whether the trade to which the Agreement applies is overtonnaged and, if so, to what extent; (4) whether there is adequate forty-foot container and reefer capacity in the trade; and (5) whether there has been or will be enough cargo growth in the trade to justify increasing the tonnage in it to the extent proposed by Amendment No. 8. The proceeding was initially limited to simultaneous filing of opening

[1] Agreement No. 9718 applies to the trade between ports in California and ports in Japan and Korea, and permits the parties to, *inter alia,* charter space aboard each other's vessels, interchange equipment and jointly schedule sailings. The parties to the Agreement are Japan Line, Ltd., (Japan Line); Kawasaki Kisen Kaisha, Ltd. (K Line); Mitsui O.S.K. Lines, Ltd. (Mitsui); and Yamashita-Shinnihon Steamship Co., Ltd. (Y-S Line).

[2] Twenty foot equivalent unit.

and reply affidavits of fact and memoranda of law before the Commission.

All of the parties' written submissions have been filed. However, pursuant to the decision on July 13, 1982 by the Court of Appeals in *Sea-Land Service, Inc. v. United States*, 683 F.2d 491 (D.C. Cir. 1982), the Commission is by separate order served this date in Docket No. 82-54, *Agreements Nos. 9718-7, et al. - Space Charter and Cargo Revenue Pooling Agreements in the United States/Japan Trades*, initiating further hearings on remand into the approvability of the underlying Agreement. There is extensive congruence between the issues which, pursuant to the Court's decision, require further investigation before the question of the approval of the Agreement can be resolved, and the issues included within the investigation of Amendment No. 8. In addition, the issues of overtonnaging, market share and projected cargo growth should be resolved on the most recent probative data available.

For these reasons, the Commission hereby discontinues Docket No. 81-74. The matters put at issue and the record in Docket No. 81-74 will be included in Docket No. 82-54.

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

By the Commission.

(S) FRANCIS C. HURNEY
Secretary

FEDERAL MARITIME COMMISSION

DOCKET NO. 82-35

IN THE MATTER OF AGREEMENT NO. 10423, BETWEEN PHILIPPINES, MICRONESIA & ORIENT NAVIGATION COMPANY AND MATSON NAVIGATION COMPANY

ORDER DENYING PETITION FOR DECLARATORY JUDGMENT OF THE PHILIPPINES, MICRONESIA AND ORIENT NAVIGATION COMPANY

November 24, 1982

The Philippines, Micronesia and Orient Navigation Company (PM&O) has petitioned the Commission for a declaratory order interpreting the Commission's Order of December 17, 1981 approving Agreement No. 10423 between PM&O and Matson Navigation Company (Matson).[1] PM&O asks the Commission to find that the Order of Approval was limited to the westbound activities contemplated under the agreement and was not an exercise of Commission jurisdiction under section 15 of the Shipping Act, 1916 (46 U.S.C. § 814) over the eastbound contract carriage provided for in the Agreement. The Commission has section 15 jurisdiction over the entire Agreement and exercised that jurisdiction in approving the Agreement. The Petition for Declaratory Order is therefore denied.

BACKGROUND

Agreement No. 10423 covers the trade between the U.S. West Coast and ports in Micronesia. PM&O operates 2 vessels between Portland, Los Angeles, Oakland, and Honolulu on the one hand, and the Micronesian Islands of Majuro, Ebeye, Tarawa, Kosrae, Ponape, Truk, Saipan, Yap and Koror on the other. PM&O has a tariff on file for the westbound service from the U.S. West Coast to Micronesia, but carries only contract cargo, mostly pineapple, in the eastbound trade. Matson is the predominant carrier in the U.S. West Coast/Hawaii trade. Matson also offers service between the U.S. West Coast and the Micronesian islands of Majuro and Ebeye, via tug and barge between Hawaii and Majuro/Ebeye.

Under Agreement No. 10423, Matson agrees to transship cargo for PM&O between Honolulu and U.S. West Coast ports at rates set forth in a schedule of charges attached to the Agreement. The transshipment

[1] Notice of the filing of the Petition was published in the *Federal Register* on July 13, 1982, 47 Fed. Reg. 30646 (1982). No comments to the Petition were received.

arrangement applies to both east and westbound trades, and no distinction is made in the Agreement between the trades or between PM&O's contract cargo and its common carrier cargo. The purpose of the Agreement is to permit PM&O to avoid some sailings to and from the U.S. West Coast without disrupting its 25-30 day service frequency, and to provide time for annual drydocking of PM&O's vessels.

POSITION OF PETITIONER

PM&O urges the Commission to clarify its approval of Agreement No. 10423 by limiting that approval to the activities involved in the westbound trade in which PM&O operates as a common carrier. PM&O maintains that, as a contract carrier in the eastbound trade, it is neither a common carrier nor an "other person subject to the Act" for section 15 purposes, and thus its agreement with Matson is not subject to section 15 insofar as it concerns eastbound voyages. PM&O notes that it is lawful for a single carrier to perform both common and contract carriage. *Fall River Line Pier, Inc. v. International Trading Corp.*, 399 F.2d 413 (1st Cir. 1968). PM&O argues that "it is the attempted use of contract carriage to violate the Act" or evade regulation that brings such carriage under the Commission's jurisdiction, citing *Grace Line, Inc. v. FMB*, 280 F.2d 790 (2nd Cir. 1960), *cert denied* 364 U.S. 933 (1960); *Flota Mercante Grancolombiana v. FMC*, 302 F.2d 887 (D.C.Cir. 1962); *Gulf Mediterranean Ports Conference Agreement No. 134-21*, 8 F.M.C. 459 (1965); *New Orleans Steamship Association v. Bunge*, 8 F.M.C. 687 (1965); *Puerto Rican Rates*, 2 U.S.M.C. 117 (1939); and *Puerto Rican Forwarding Co. Inc. Possible Violations*, 16 S.R.R. 1433 (ID 1976).

PM&O further argues that the Commission has in the past limited its approval to those portions of agreements dealing with activities which were subject to its jurisdiction, citing cases dealing with agreements under which some activities are subject to the Interstate Commerce Commission's (ICC) jurisdiction and some are subject to FMC jurisdiction,[2] and in which the Commission has approved agreements which include parties not subject to the Act.[3]

DISCUSSION

The opening phrase of section 15 establishes the Commission's Jurisdiction over persons, including common carriers by water, without regard to their activities.[4] Neither section 15 nor section 1 of the Act

[2] *Freight Forwarder Agreement 71-7*, 17 F.M.C. 302 (1974), *Investigation of Wharfage Charges on Bulk Grain at Pacific Coast Ports*, 8 F.M.C. 653 (1965), *Atlantic Gulf/West Coast of South America Conference*, 13 F.M.C. 121 (1969).

[3] *New York Shipping Association - NYSA - ILA Man Hour Tonnage Method Assessment*, 16 F.M.C. 381 (1973) *aff'd New York Shipping Association, v. FMC*, 495 F.2d 1215 (2nd Cir. 1974).

[4] Specifically, it provides that:

Continued

(46 U.S.C. $ 801), in defining the term "common carrier by water," limits the Commission's personal jurisdiction over such carriers to their activities "while acting as such." *Grace Line, Inc. v. FMC*, 280 F.2d at 792.

Section 15's subject matter jurisdiction extends to any agreement

> . . . 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 or 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.
>
> "If a contract is of that nature, it is within the reach of Section 15 and subject to the Commission's jurisdiction. . . ." *FMC v. Pacific Maritime Association*, 435 U.S. 40, 53 (1978).

PM&O states in its Petition that it is a common carrier by water in the U.S. foreign commerce. Its agreement with Matson, another such common carrier, provides for the "giving or receiving [of] special rates, accommodations, or other special privileges or advantages" and establishes a "cooperative working arrangement." PM&O argues that its contract carriage eastbound makes its westbound common carriage possible. In facilitating that eastbound service, as well as the westbound service, the Agreement affects competition among these common carriers and falls within the ambit of section 15.

None of the cases relied upon by PM&O requires the Commission to limit its jurisdiction under section 15 as requested. In *Agreement No. 134-21 Gulf/Mediterranean Ports Conference, supra*, the Commission investigated an amendment to a conference agreement exempting from conference jurisdiction full shiploads of one commodity by one shipper under charter conditions. The conference argued that the amendment was outside the Commission's jurisdiction because it related to tramp or contract operations exempted by section 1 of the Act. The Commission ruled that the agreement was among carriers subject to the Act and would be disapproved if the contract operations would result in discrimination against common carrier patrons in violation of section 16 of the Act (46 U.S.C. § 815) *Id.* 8 F.M.C. at 707 (I.D., adopted at 8 F.M.C. 460). The Commission thus asserted section 15 jurisdiction over the agreement; the question of discrimination violative of section 16

"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. . . ."

related to the agreement's approvability, not the Commission's jurisdiction under section 15.

In *Fall River Line Pier, Inc. v. International Trading Corp., supra,* the court ruled that a terminal's services in connection with common carriers did not bring its alleged discrimination against a contract carrier within the Commission's jurisdiction either under section 16 or section 17 of the Act (46 U.S.C. § 816).[5] *Fall River* did not deal with the Commission's jurisdiction under section 15. The issue raised by PM&O's Petition is not whether the Commission has jurisdiction over its operations as a contract carrier under sections 16 and 17, but over its relationships with other common carriers under section 15.[6]

The Commission's section 15 jurisdiction is not limited by the subject matter jurisdiction granted in other sections of the Act. The cases interpreting the subject matter jurisdictional reach of section 15 have noted the "expansive" nature of that jurisdiction, *Volkswagenwerk Aktiengesellschaft v. FMC,* 390 U.S. 261, 273 (1967), in keeping with the provision's purpose to "regulate[ ] competition in the shipping industry." *FMC v. Pacific Maritime Association,* 435 U.S. at 54. The Commission has appropriately asserted subject matter jurisdiction over agreements which include some parties not subject to its personal jurisdiction, *N.Y. Shipping Association v. FMC, supra,* as well as agreements among persons subject to its jurisdiction which provide for activities not subject to jurisdiction under other sections of the Act but which affect competition among the parties.

In *Freight Forwarder Agreement No. 71-7,* 17 F.M.C. 302 (1974), the Commission asserted jurisdiction over an agreement among parties subject to its personal jurisdiction, where the activities contemplated under the agreement (acquisition of ICC Part IV freight forwarder rights) were not subject to FMC substantive regulation, but the agreement was one to affect competition among the parties. Contrary to PM&O's interpretation, in that case the Commission did not eschew section 15 jurisdiction despite its recognition that some of the ultimate activities contemplated would not be subject to its continuing substantive regulation under other sections of the Act.

Similarly, in *Transpacific Freight Conference of Japan v. FMC,* 314 F. 2d 928 (9th Cir. 1963) the Commission's section 15 jurisdiction to interpret a previously approved agreement was upheld despite the fact

[5] This case is inconsistent with the earlier *Grace Line, supra,* and *Flota Grancolombiana, supra,* cases which it criticized. The latter cases are better reasoned and have been consistently followed by this Commission and the courts.

[6] Although the Commission indicated some reluctance to assert section 15 jurisdiction over the segregated activities of a terminal operator which served contract carriers at one facility and common carriers at another, (*see New Orleans Steamship Assoc. v. Bunge, supra*), that case can not be read so broadly. The case did not discuss section 15 jurisdiction, or distinguish between personal and subject matter jurisdiction under section 15.

that the incident giving rise to the need for the interpretation involved foreign-to-foreign carriage, under an agreement covering both the U.S. and Canadian trades with Japan.[7] The court's "fundamental reason" for affirming the Commission's jurisdiction was that the decision of the conference members to file a unitary agreement covering both trades subjected the entire agreement to FMC jurisdiction under section 15 since it was among "common carriers in foreign commerce," as defined in the Act. *Id.*, 314 F.2d at 933. The court agreed with the Commission's refusal to treat the agreement as two agreements, only one of which would be subject to its jurisdiction. *Id.*, 314 F.2d at 934, footnote 6. The court there further noted the agreement's provisions relating to submission of the agreement for FMC approval and effective date (after Commission approval). *Id.*

Agreement No. 10423 similarly provides unitary treatment of the PM&0 arrangement with Matson, without regard to whether it is in the eastbound or westbound trade, and provides for an effective date following Commission approval. We believe the parties created a unitary agreement which was duly submitted to the Commission for approval pursuant to section 15. The Commission exercised its jurisdiction under section 15 in approving Agreement No. 10423 in its entirety.

THEREFORE, IT IS ORDERED That the Petition for Declaratory Order is denied.

By the Commission*

(S) FRANCIS C. HURNEY
Secretary

[7] The court, however, noted that the fines imposed on complainant by the neutral body and set aside by the Commission were not based upon the foreign-to-foreign transaction but upon complainant's refusal to permit inspection of its records by a neutral body which it maintained was ineligible for appointment as such under the terms of the conference agreement. Thus, it was a provision of the agreement universally applicable to both trades which the Commission was interpreting and not its direct applicability to a transaction in a non-U.S. trade.

* Vice Chairman Moakley's concurring opinion is attached.

Vice Chairman Moakley, concurring

The majority opinion has addressed the rather narrow question presented by the subject petition and has concluded correctly, in my opinion, that, as a unitary, interrelated package, the entire agreement between Matson and PM&O is subject to our jurisdiction under section 15 of the Shipping Act. However, the rationale used by the majority contains an implication that an agreement between these two parties dealing solely with the eastbound, contract carriage of PM&O would also be subject to section 15 because of its affect on competition between the common carrier operations of the parties.[1]

I believe that this is too broad a reading of our jurisdiction under section 15. There are many agreements among common carriers by water which affect competition among such carriers but which are not subject to FMC jurisdiction. Conferences serving Canadian or Mexican ports whose members also serve U.S. ports are prime examples of such arrangements. The competitive impact of such conferences on U.S. common carrier service is obvious, but has never been (and hopefully never will be) used as a basis for jurisdiction under section 15.

In order for section 15 to apply to an agreement, there must be both personal jurisdiction and subject matter jurisdiction. If PM&O is purely a contract carrier eastbound and if it should enter into an agreement with Matson dealing solely with that contract carriage, it would be arguable whether either personal jurisdiction or subject matter jurisdiction attached. I therefore disassociate myself from any implication to the contrary.

[1] The majority order states, at p. 5: "PM&O argues that its contract carriage eastbound makes its westbound common carriage possible. *In facilitating that eastbound service, as well as the westbound service, the Agreement affects competition among these common carriers and falls within the ambit of section 15.*"

FEDERAL MARITIME COMMISSION

DOCKET NO. 82-8

COMPLIANCE WITH GENERAL ORDER 7, REVISED, SELF-POLICING

ORDER

November 26, 1982

By Order served January 22, 1982, the Commission directed the member lines of five rate agreements (Respondents) [1] to show cause why those agreements should not be disapproved for failure to comply with the requirements of General Order No. 7, (G.O. 7) 46 C.F.R. Part 528.[2] In response, Agreement Nos. 8470, 8480, and 8490 (Household Goods Agreements) filed a joint "Motion to Dismiss and Petition for Exemption." The remaining two agreements, Agreement Nos. 8760 and 9247 (Pacific/India Agreements), filed amendments to their underlying agreements in an attempt to comply with G.O. 7 and, simultaneously, filed identical "Motions to Dismiss." The Commission's Bureau of Hearings and Field Operations submitted a memorandum in reply.

POSITIONS OF THE PARTIES

The Petition filed by the Household Goods Agreements seeks an exemption from the G.O. 7 neutral body requirement to permit an employee to act as the head of their policing authority pursuant to 46 C.F.R. § 528.3(b)(3). They argue that their trades are relatively free of malpractices because they are limited to commercial movements of only one commodity, used household goods. Further, they contend that because of the nature of this traffic, there is no incentive for carrier rebating. It is also alleged that the agreements are so limited in scope that the retention of an outside, independent self-policing body would impose an unrealistic financial burden on their members. In this regard,

[1] Respondents are: International Household Goods Rate Agreement (Agreement No. 8470), U.S. Hawaii/Puerto Rico/Guam Household Goods Rate Agreement (Agreement No. 8480), U.S. Alaska Household Goods Rate Agreement (Agreement No. 8490), Pacific/India Rate Agreement (Agreement No. 8760), and Pacific/India Rate Agreement (Agreement No. 9247).

[2] G.O. 7 was amended on September 2, 1978 (43 F.R. 42760) to establish minimum standards for judging the adequacy of self-policing activities, assist ocean carriers to obtain expeditious approval of their section 15 agreements concerning self-policing, provide the Commission with reliable information concerning the nature and performance of self-policing systems, and curtail rebating and other malpractices by ocean carriers (46 C.F.R. § 528.0(a)). Agreements subject to the rule were given until January 1, 1979 to file conforming amendments. These rules were subsequently upheld by the U.S. Court of Appeals for the D.C. Circuit. *Trans-Pacific Freight Conference of Japan/Korea v. F.M.C.*, 650 F.2d 1235 (D.C. Cir. 1980), *cert. denied* 451 U.S. 984 (1981).

the Household Goods Agreements point out that their total membership is 79 carriers; that in 1980, only 20 shipments were made under the agreements, for gross revenues of $180,464.20; and the estimated cost of an independent policing body would be $197,500.00. These Respondents suggest that the president of the Household Goods Carriers' Bureau, Inc. is well qualified to conduct self-policing activities and would be able to do so without conflicting with his other obligations. In the alternative, they request that the retired, former president of the Household Goods Carriers Bureau be permitted to act as their independent policing authority. If their Petition is not granted, these Respondents contend that they will accept disapproval of their agreements. The alleged result of this action would be the proliferation of independent tariffs and the possibility that some carriers would leave the trades.

The Pacific/India Agreements amended their underlying agreements in an attempt to comply with the requirements of G.O. 7. Because they have allegedly taken all action available to them, they contend that they should be dismissed from this proceeding and be treated in the same manner as other agreements which presently have self-policing amendments pending before the Commission. An affidavit attached to their motions argues that these self-policing amendments could not have been filed sooner. The Agreements' Secretary states that they began drafting conforming amendments in February 1981, but that it was not until September 1981, when their petitions for exemption were denied, that they knew for a certainty that they would need to adopt a self-policing system. They advise that it then took them until March 1982 to get their final draft approved by the membership.

DISCUSSION

The amendments to Agreement Nos. 8760 and 9247 which were filed to comply with G.O. 7 (Agreement Nos. 8760-12 and 9247-9, respectively), were conditionally approved by the Commission on June 16, 1982. The conditions were subsequently met and these agreements therefore stand approved as of August 12, 1982. Because the Pacific/India Agreements are now in full compliance with G.O. 7, no further purpose would be served by continuing this proceeding as to them and they will therefore be dismissed.

A review of the Household Goods Agreements' Petition for Exemption and the affidavit attached thereto indicate that they have met the requirements of 46 C.F.R. §§ 528.3(b)(3)(i)-(iii). Accordingly, they will be granted an exemption from the independent self-policing authority requirement so that one of their officers or employees may act as the head of their policing authority. As a result, these Agreements will likewise be dismissed from this proceeding.

THEREFORE, IT IS ORDERED, That Pacific/India Rate Agreement No. 8760 and Pacific/India Rate Agreement No. 9242 are dismissed from this proceeding; and

IT IS FURTHER ORDERED, That the "Motion to Dismiss and Petition for Exemption" filed on behalf of the International Household Goods Rate Agreement (Agreement No. 8470), the U.S. Hawaii/Puerto Rico/Guam Household Goods Rate Agreement (Agreement No. 8480), and the U.S. Alaska Household Goods Rate Agreement (Agreement No. 8490) is granted to the extent discussed above and these agreements are also dismissed from this proceeding; and

IT IS FURTHER ORDERED, That this proceeding is discontinued.

By the Commission.

(S) FRANCIS C. HURNEY
Secretary

FEDERAL MARITIME COMMISSION

DOCKET NO. 80-54

TIME/VOLUME RATE CONTRACTS - TARIFF FILING REGULATIONS APPLICABLE TO CARRIERS AND CONFERENCES IN THE FOREIGN COMMERCE OF THE UNITED STATES

ORDER

December 8, 1982

On July 8, 1982, the Commission issued a final rule in the above-referenced proceeding which sets forth uniform procedures concerning the use of time/volume rates (47 *Fed. Reg.* 29671). The rule permits the offering of time/volume rates by common carriers by water in the United States foreign commerce, or conferences of such carriers, subject, however, to several conditions, including the requirements that time/volume rates and related contracts be published in tariffs on file with the Commission and that time/volume contracts contain certain minimum provisions.

Sea-Land Service, Inc. has filed a Petition seeking clarification of certain aspects of the rule. Sea-Land contends that the rule should be clarified to expressly provide that time/volume rates may not be implemented without an executed contract between the parties, which contract must be retained by the designated recordkeeper. In addition, Sea-Land seeks clarification from the Commission that the filing of a specimen time/volume contract complies with the tariff filing requirement contained in the rule (46 C.F.R. § 536.7(a)).

The Commission believes that the rule as it presently stands is sufficiently clear on the point that a time/volume rate cannot be implemented without an executed time/volume contract. The definition of a time/volume rate clearly indicates that such a rate can only be implemented "pursuant to the terms of a time/volume contract" 46 C.F.R. § 536.2(p). That contract must be one executed between the offeror of the time/volume rate and the individual shipper or consignee accepting the rate and shipping its goods pursuant to it.

The rule does not, however, require that the designated recordkeeper for "time/volume shipment records" also maintain a copy of the executed time/volume contract. While such a requirement has a certain appeal, the Commission believes that this is a matter better left to the parties' discretion. They are, of course, free to stipulate in their contract that the recordkeeper will maintain a copy of it.

The Commission further believes that the fact that the filing of a specimen time/volume contract does comply with the requirement that time/volume contracts be published in tariffs on file with the Commission is reasonably apparent from a reading of the rule. Section 536.7(a) states that "[t]ime/volume rates and related contracts shall be published in tariffs on file with the Commission and made available to all shippers or consignees under the same terms and conditions 46 C.F.R. § 536.7(a). The contract to be published in the tariff and made available to all shippers could only be a specimen contract, and not an executed contract between the offeror and one shipper or consignee. There is no need, therefore, to amend the rule to make this fact clearer.

THEREFORE, IT IS ORDERED, That the Petition for Clarification filed by Sea-Land Service, Inc. is granted to the extent discussed above and is denied in all other respects.

By the Commission.

(S) FRANCIS C. HURNEY
Secretary

FEDERAL MARITIME COMMISSION

DOCKET NO. 81-62

WESTINGHOUSE ELECTRIC CORPORATION

v.

DELTA STEAMSHIP LINES, INC.

ORDER

December 8, 1982

This proceeding came before the Commission on a proposed settlement submitted for approval by Complainant Westinghouse Electric Corporation and Respondent Delta Steamship Lines, Inc., which would terminate their controversy over the proper classification of oil circuit breakers carried by Delta on behalf of Westinghouse.

The parties reached a settlement after the issuance of an Initial Decision by Administrative Law Judge Charles E. Morgan, and the filing of Exceptions by Delta.

BACKGROUND

The dispute which gave rise to the settlement in question involves three shipments of oil circuit breakers tendered by Westinghouse to Delta for carriage from Baltimore, Maryland, to Rio Haina, Dominican Republic. Each of the circuit breakers measured in excess of 1700 cubic feet, weighed 13,000 pounds and was mounted on its own skid.

At the time of the first shipment in December 1980, the tariff of the United States Atlantic and Gulf-Santo Domingo Conference, of which Delta is a member, contained a commodity rate of $64.50 M for "ELECTRICAL DEVICES, Equipment and Materials in minimum lots of 1600 cft" and a Class 55 rate of $167.00 M or $247.00 W for "ELECTRICAL APPARATUS N.O.S." Prior to the second shipment in February 1981, the Conference revised the description of "ELECTRICAL DEVICES . . ." to read "ELECTRICAL WIRING DEVICES . . .," which description also was in effect at the time of the third shipment in July 1981.[1]

Delta assessed ocean freight charges on the three shipments at $167.00 M applicable to "ELECTRICAL APPARATUS, N.O.S." and

[1] 6th Rev. page 103, effective 11/5/80, and 7th rev. page 103, effective 1/17/81. Effective August 17, 1981, the tariff description was further revised to read "ELECTRICAL WIRING DEVICES . . . per carrier's container" and by adding under Class 55 a new item, "CIRCUIT BREAKERS, Industrial electrical, not household."

refused to accept Westinghouse's offers of payment based on the $64.50 rate applicable to "ELECTRICAL DEVICES. . . ."

The Presiding Officer found that "at the time of shipment" the descriptions electrical devices, electrical wiring devices, or electrical apparatus were equally specific. Applying Rule 32 of the Tariff pursuant to which commodity rates take precedence over class rates,[2] the Presiding Officer determined that the circuit breakers were subject to the $64.50 commodity rate provided for electrical devices or wiring devices.

Delta filed Exceptions to the Presiding Officer's classification of the February and July shipments as "ELECTRICAL WIRING DEVICES", and to the conclusion that the December 27, 1980 shipment could reasonably be classified as "ELECTRICAL DEVICES". Delta also requests the correction of some minor technical errors in the Initial Decision.

THE PROPOSED SETTLEMENT [3]

Under the proposed settlement, the parties agree that the December 27, 1980, shipment was subject to the $64.50 M rate, applicable to "ELECTRICAL DEVICES," whereas, in view of the January 17, 1981 change in the tariff,[4] the parties agree that the shipments which moved in February and July, 1981, were subject to the rate of $167.00 M applicable to "ELECTRICAL APPARATUS N.O.S.," both rates reduced by the applicable project rate discount.[5]

DISCUSSION

Section 18(b)(3) of the Shipping Act, 1916 (46 U.S.C. § 817(b)(3)) forbids ocean carriers subject to that Act from charging or collecting "a greater or less or different compensation for the transportation of property" than the rates and charges specified in their tariffs. In light of this prohibition, while it has generally followed a policy of encouraging the settlement of controversies,[6] the Commission has set certain conditions for approval of settlements of claims arising under section 18(b)(3), that is: the parties must show that the settlement is a bona fide attempt to settle their controversy, not a device for obtaining transportation at other than the applicable rates and charges; the complaint on

[2] As mentioned, the Tariff provided a commodity rate for "ELECTRICAL DEVICES" and a class 55 rate for "ELECTRICAL APPARATUS, N.O.S."

[3] The full text of the settlement is attached to this Order as Appendix I.

[4] As mentioned, the tariff was revised to read "ELECTRICAL WIRING DEVICES."

[5] The circuit breakers were proprietary cargo entitled to project rate discounts which reduced the $64.50 to $60.50 and the $167.00 to $160.50.

[6] *Merck, Sharp and Dohme v. Atlantic Lines*, 17 F.M.C. 244 (1973); *Old Ben Coal Co. v. Sea-Land Service, Inc.*, 21 F.M.C. 505 (1978); *Del Monte Corporation v. Matson Navigation Company*, 22 F.M.C. 364 (1979) and cases there cited. See also Rule 91 of the Commission's Rules of Practice and Procedure, 46 C.F.R. 502.91, and section 5(b)(1) of the Administrative Procedure Act, 5 U.S.C. 554(c)(1).

its face presents a genuine dispute; and the facts critical to the resolution of the controversy are not reasonably ascertainable.[7] In this instance, no relevant facts are in dispute - the sole issue being the proper classification of the cargo under the applicable tariff. Approval, therefore, must rest on the merits to insure that the settlement is consistent with the requirements of section 18(b)(3) of the Act and of the carrier's tariff.[8]

As stated in the Initial Decision, "the intrinsic nature of the item shipped controls the tariff rate to be applied." [9] This means that while tariff words generally are to be given their ordinary meaning, matters outside the express language of the tariff may have to be considered in order to establish the import of those words in a particular context, especially where (1) the language of the tariff is itself vague; *Aleutian Homes Inc. v. Coastwise Line*, 5 F.M.B. 602 (1959); *Thomas C. Crowe v. Southern S.S. Co.*, 1 U.S.S.B. 145 (1929); or (2) there exists a custom or usage of a trade or a course of dealing of the parties which, although not specified in the tariff, is such that it should be applied; *Sacramento-Yolo Port District v. Fred F. Noonan Co., Inc.*, 9 F.M.C. 551 (1966); *C.S.C. International v. Lykes Bros.*, 20 F.M.C. 552 (1978).

The tariff description at issue here is arguably vague and there is conflicting evidence of record as to whether the circuit breakers of the size shipped are generally considered in the industry as "apparatus" or "devices." However, whatever the intent of the carrier may have been, the tariff item itself specified no size or other limitation for the term "ELECTRICAL DEVICES," except for the proviso that the shipments be in minimum lots of 1600 cft." (Each of the circuit breakers exceeded 1700 cubic feet.) Therefore, because the words "devices" and "apparatus" are generic terms referring to a class or group of unspecified items, the classification of the December 27, 1980 shipment of circuit breakers as "ELECTRICAL DEVICES," does not appear unreasonable or arbitrary.

There remains the question of whether the revision to the tariff adding the word "WIRING" to the phrase "ELECTRICAL DEVICES" so restricted the meaning of the term "device" as to render it inapplicable to the last two shipments. Both Delta's pricing manager and its expert witness attested that the phrase "ELECTRICAL WIRING DEVICES" is a commonly accepted term in the trade which "would not encompass large oil circuit breakers." In addition, the "Westinghouse Quick Selector" Catalog 25-000, 7th Edition, 1977, in-

[7] *Organic Chemicals (Glidden-Durkee) Division of SMC Corp. v. Atlanttrafik Express Service*, 18 S.R.R. 1536, 1539-1540 (1979).

[8] *In re Hugoton-Anardarko Area Rate Case*, 466 F.2d 974 (9th Cir. 1972).

[9] *European Trade Specialists, Inc. v. Prudential Grace Lines, Inc.*, 21 F.M.C. 888, 890 (1979); *Sunmark, Inc.*, 22 F.M.C. 714, 717 (1980).

troduced in evidence by Delta, lists under "Wiring Devices" various types of switches, receptacles, locking devices, wall plates and plugs, none of which approaches in size or description the oil circuit breakers shipped by Westinghouse. Westinghouse's expert witness did not refute these statements or present any evidence to the contrary. The preponderance of the evidence, therefore, leads to the conclusion that the oil circuit breakers at issue here cannot be classified as "ELECTRICAL WIRING DEVICES."

Consequently, the proposed settlement whereby the circuit breakers which moved in December 1980 is to be classified as "ELECTRICAL DEVICES," subject to the rate of $64.50 M or, as reduced by the project rate discount, to $60.50, and the shipments which moved in February and July, 1981, after the amendment to the tariff, would come under the tariff description "ELECTRICAL APPARATUS N.O.S.," subject to the rate of $167.00 M, or $160.50 after the project rate reduction, appears to be in compliance with the requirements of section 18(b)(3) of the Shipping Act, 1916, and of Delta's tariff.

THEREFORE, IT IS ORDERED, That the settlement reached by Complainant Westinghouse Electric Corporation and Respondent Delta Steamship Lines, Inc., which terminates their controversy over the proper classification of three shipments of oil circuit breakers, which Delta Steamship Company, Inc., carried in December 1980, February 1981, and July 1981, is approved.

IT IS FURTHER ORDERED, That the Initial Decision issued in this proceeding is vacated; [10] and

IT IS FINALLY ORDERED, That this proceeding is discontinued.

By the Commission.

(S) FRANCIS C. HURNEY
Secretary

[10] Approval of the settlement renders moot the Initial Decision.

APPENDIX I

October 14, 1982

Honorable Francis C. Hurney
Secretary
Federal Maritime Commission
1100 L Street, N.W.
Washington, D.C. 20573

Re: Westinghouse Electric Corporation v. Delta Steamship Lines, Inc., FMC Docket No. 81-62

Dear Mr. Hurney:

Subsequent to service of the Administrative Law Judge's Initial Decision in the above-referenced proceeding and the filing of Exceptions thereto by Respondent Delta Steamship Lines, Inc. ("Delta"), Delta and Complainant Westinghouse Electric Corporation ("Westinghouse") have entered into further discussions regarding the appropriate rates to be applied to the three shipments in question based on the evidence of record. As further discussed below, the parties have now agreed to a settlement of the subject dispute, in accordance with the rates which they jointly accept as being properly applicable to each of the subject shipments.

As set forth in the Initial Decision, this case involves three separate shipments of electrical circuit breakers by Westinghouse aboard Delta vessels from Baltimore to Rio Haina, Dominican Republic on December 27, 1980, February 5, and July 16, 1981, respectively. At the time of the first shipment, the applicable United States Atlantic and Gulf-Santo Domingo Conference Tariff, FMC Tariff No. 5, contained entries for (1) "ELECTRICAL DEVICES, Equipment and Materials in minimum lots of 1600 cft: $64.50," and (2) "ELECTRICAL APPARATUS, N.O.S.," which was subject to a "Class 55" rate, equalling $167.00 per measurement ton or $247.00 per weight ton, whichever produced the greater charge. Subsequent to the first shipment, but prior to the second and third shipments, the first of these tariff entries was revised to read "ELECTRICAL *WIRING* DEVICES, Equipment and Materials in minimum lots of 1600 cft: $64.50." All of the rates were subject to an applicable project discount.

The Initial Decision concluded that the circuit breakers reasonably could be considered to be either electrical devices or electrical wiring devices, and recommended that all three shipments be invoiced at the rate applicable to those tariff entries. Delta filed Exceptions (1) challenging the conclusion that the circuit breakers could reasonably be considered electrical wiring devices based on the evidence of record, and maintaining that the last two shipments should have been rated in accordance with the electrical apparatus tariff item, (2) challenging the determination that the circuit breakers could be reasonably considered electrical devices as to the first shipment, and (3) requesting certain minor corrections to the Initial Decision. But for Delta's belief that the Initial Decision was clearly erroneous as to Exceptions (1) and (3), Delta would not have filed its Exception (2).

Following receipt of Delta's Exceptions, Westinghouse requested its technical staff to re-evaluate the pertinent evidence of record. In regard to Delta's Exception (1), Westinghouse's review indicates that there is merit to Delta's position and Westinghouse therefore agrees the Initial Decision should be amended accordingly. Westinghouse further agrees that the minor errors noted in Delta's Exception (3) should be corrected by the Commission.

Following careful reconsideration of the record, and in view of Westinghouse's concurrence in Delta's Exceptions (1) and (3), Delta agrees to accept the Administrative Law Judge's findings and conclusions in regard to the first shipment of circuit breakers, which moved prior to the tariff change discussed above, and agrees that such findings and conclusions are adequately supported by the evidence of record. Delta therefore withdraws its Exception (2).

In accordance with the foregoing and the evidence of record in this proceeding, Westinghouse's December 27, 1980 shipment of circuit breakers should be subject to the tariff rate for "ELECTRICAL DEVICES, Equipment and Materials," while the February 5 and July 16, 1981 shipments should be subject to the tariff rate for "ELECTRICAL APPARATUS, N.O.S." The parties therefore request the Commission to approve settlement of this proceeding on such grounds, and either to amend the Initial Decision in accordance therewith, or to direct withdrawal of the Initial Decision in view of the settlement.

The parties submit that such settlement is in the public interest, and fully consistent with Section 18(b)(3) and the Commission's responsibilities thereunder, in that the settlement is based upon application of filed tariff rates that the parties now agree are applicable to the respective shipments, and further that application of such rates is supported by the evidence of record in this proceeding.

For all the foregoing reasons, Westinghouse and Delta respectfully request the Commission to approve settlement of this proceeding on the foregoing basis and to issue an appropriate Order in accordance therewith.*

Respectfully submitted,

(S)________________
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(S)________________
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Attorney for Respondent,
Delta Steamship Lines, Inc.

JWP/mh
cc: Honorable Charles E. Morgan

* If for any reason the Commission declines to approve the foregoing settlement of this proceeding, the parties have agreed to, and hereby request the Commission to approve, an extension of time of twelve days after receipt of notice of such adverse action for Westinghouse to file a Reply to Delta's Exceptions. The parties further agree that under such circumstances the matters set forth herein will not prejudice the position of either party.

FEDERAL MARITIME COMMISSION

DOCKET NO. 81-48

INTERCORP FORWARDERS, LTD. - INDEPENDENT OCEAN FREIGHT FORWARDERS LICENSE APPLICATION AND POSSIBLE VIOLATIONS OF SECTION 44, SHIPPING ACT, 1916

ORDER ADOPTING INITIAL DECISION

December 16, 1982

This proceeding was instituted by Order of Investigation and Hearing served August 21, 1981, to determine whether:

(1) Intercorp violated section 44(a), Shipping Act, 1916, 46 U.S.C. § 841(b) by engaging in unlicensed forwarding activities;

(2) Civil penalties should be assessed against Intercorp pursuant to section 32 of the 1916 Act, 46 U.S.C. § 831, for violations of that Act, and, if so, the amount of any such penalty which should be imposed; and

(3) In light of the evidence adduced pursuant to the first issue, together with any other evidence adduced, Intercorp possesses the requisite fitness within the meaning of section 44 to be licensed as an independent ocean freight forwarder.

On August 9, 1982, Administrative Law Judge Norman D. Kline served an Initial Decision in this proceeding, which found that: (1) Intercorp had operated as a forwarder without a license on 27 shipments, albeit under mitigating circumstances, and had used incorrect insurance invoices and improperly marked up the cost of accessorial services; (2) Intercorp was otherwise fit to be licensed as an independent ocean freight forwarder; and (3) Intercorp should be assessed a civil penalty of $3,000 to be paid in $500.00 installments at six-month intervals with 12% interest on the unpaid balance.[1] The Commission's Bureau of Hearings and Field Operations (Hearing Counsel) filed Exceptions to the Presiding Officer's "fitness finding" to which Respondent, Intercorp, replied.

Hearing Counsel believes that the circumstances surrounding Intercorp's violations require a finding that Intercorp is not fit to be licensed as an independent ocean freight forwarder. It contends that a finding

[1] The first installment is due 30 days from the date of this Order.

would be consistent with the Commission's precedent. Hearing Counsel maintains that Intercorp's violations are not only devious but also indicative of its disregard for the Commission's regulations.

Intercorp urges the Commission to affirm the Presiding Officer's Initial Decision. It notes that it has promised to adhere to the Commission's freight forwarder regulations and agreed to periodic audits of its activities. Finally, Intercorp advises that its related business has been adversely affected by this proceeding and its refusal to perform forwarding services pending the outcome of this proceeding.

The Commission finds, upon review of the record in this proceeding, the parties' pleadings, and precedent, that the Initial Decision is well-reasoned and supportable, both in law and fact. The Presiding Officer's fitness and civil penalty findings are supported by Commission precedent.[2] Accordingly, the Commission will adopt the Presiding Officer's Initial Decision in this proceeding. Intercorp's freight forwarder license, which will allow it to commence business, will be issued when it satisfies the bonding requirements of section 44 of the Act.

THEREFORE, IT IS ORDERED, That Hearing Counsel's Exceptions in this proceeding are denied.

IT IS FURTHER ORDERED, That the Presiding Officer's Initial Decision in this proceeding is adopted.

IT IS FURTHER ORDERED, That Intercorp shall submit the civil penalty installments and the interest payments to the Commission's Office of Budget and Financial Management at its offices in Washington, D.C.

FINALLY, IT IS ORDERED, That this proceeding is discontinued.

By the Commission.[3]

(S) FRANCIS C. HURNEY
Secretary

[2] The Commission does not endorse Hearing Counsel's suggestion that applicant respondents have a heavier burden of proof, with regard to mitigation, than do licensed respondents.

[3] Vice Chairman Moakley dissents on the fitness issue.

FEDERAL MARITIME COMMISSION

DOCKET NO. 81-48

INTERCORP FORWARDERS, LTD. - INDEPENDENT OCEAN FREIGHT FORWARDERS LICENSE APPLICATION AND POSSIBLE VIOLATIONS OF SECTION 44, SHIPPING ACT, 1916

This is an investigation begun to determine whether applicant Intercorp Forwarders Ltd., which to all intents and purposes is Mr. Robert Stettner, the sole salaried employee and President, deserves to obtain a freight forwarder's license in view of the fact that allegedly Intercorp operated as a forwarder without a license for a period of time in the past, in violation of section 44 of the Shipping Act, 1916, and carried on certain billing practices which concealed his mark-ups from shippers and used incorrect insurance invoices when billing shippers on some shipments. Additionally the investigation is to determine whether Intercorp should pay a civil penalty for the past violations. The Commission's Bureau of Hearings and Field Operations urges a finding that Intercorp is unfit to obtain a license and should pay a civil penalty of $5,000 for the violations. On the basis of the evidence developed and governing Commission precedent, it is found that:

(1) Intercorp, which filed its application in October 1980, deserves an opportunity to operate its forwarding business notwithstanding past violations of law but should pay a civil penalty of $3,000 and be subjected to periodic auditing.

(2) The Bureau's hard-nosed position marks an abrupt change from Commission precedent which has developed the principle that past violations of law do not automatically bar a person from obtaining a forwarder's license if there are mitigating circumstances and if the record does not show that the applicant's conduct has been so flagrant and reprehensible that he can never be trusted or redeemed. In such cases the Commission has permitted persons to carry on their forwarding businesses after paying civil penalties and undergoing periodic auditing and surveillance.

(3) Applicant did carry on forwarding without a license but had believed that it had a valid arrangement with a licensed forwarder as a sales representative which it terminated in early 1981 during the course of this proceeding. Applicant also forwarded three shipments later in 1981 in order to retain the business of two of its valued customers in its customs house brokerage business. Applicant's billing practices included mark-ups for its services but without so indicating and in five instances utilized artificial supporting insurance invoices. These practices, while unacceptable, are no worse than those of at least three recent forwarders who did these things and more but were permitted to continue operating their businesses by the Commission after paying fines and agreeing to certain types of surveillance. Harsher treatment of this applicant than that accorded to the three forwarders and others similarly situated would be arbitrary and unfair.

Robert Stettner and *David Stettner* for applicant/respondent Intercorp Forwarders, Ltd.

John Robert Ewers, Joseph B. Slunt, Charles C. Hunter, and *Stuart James* for the Bureau of Hearings and Field Operations, Office of Hearing Counsel.

INITIAL DECISION [1] OF NORMAN D. KLINE, ADMINISTRATIVE LAW JUDGE

Adopted December 16, 1982

This is an investigation begun by the Commission's order served on August 21, 1981, to determine, after hearing, whether an applicant for a freight forwarder's license, a corporation known as Intercorp Forwarders, Ltd., which to all intents and purposes, consists of Mr. Robert Stettner, its President, deserves to obtain such license or whether because of alleged past violation of section 44 of the Shipping Act, 1916, namely, carrying on the business of forwarding without a license, plus certain other alleged activities relating to Intercorp's billing practices, applicant should be denied a license and furthermore should be assessed a civil penalty. The case had its origins in the filing of an application by Mr. Stettner for Intercorp on October 6, 1980, a letter of intent to deny the application following a staff investigation because of alleged past violations of law on April 27, 1981, and Mr. Stettner's request for a hearing on the matter, submitted by letter dated May 8, 1981.

In response to his request for a hearing, the Commission instituted the present proceeding and framed three issues relating to Intercorp's alleged operation without a license and to the alleged billing practices and questioned Intercorp's fitness to obtain a license. Because of these allegations of operations and practices, furthermore, the Commission questioned not only whether Intercorp should be denied a license but whether Intercorp ought to be assessed civil penalties. Specifically the allegations concerned Intercorp's purportedly having forwarded at least 24 ocean freight shipments and sharing compensation from carriers for its services presumably with a licensed freight forwarder. In addition applicant allegedly "inflated" charges for ancillary services including inland freight and insurance charges on its invoices to shipper clients and for some of the shipments furnished shippers with false insurance invoices in order to support its own invoices. The Commission's Order of Investigation and Hearing therefore stated that "[t]he alleged violations described above could, if proven, reflect adversely upon Intercorp's fitness" and set down the following three issues for determination (Order of Investigation and Hearing, pp. 2, 3):

1. Whether Intercorp violated section 44(a) of the Shipping Act, 1916, by engaging in unlicensed forwarding activities;
2. Whether civil penalties should be assessed against Intercorp, pursuant to section 32 of the Shipping Act, 1916 and Part 505.3 of the Commission's regulations (46 CFR 505.3) for

[1] This decision will become the decision of the Commission in the absence of review thereof by the Commission (Rule 227, Rules of Practice and Procedure, 46 CFR 502.227).

violations of the Shipping Act, 1916, and, if so, the amount of any such penalty which should be imposed; and

3. Whether in light of the evidence adduced pursuant to the first issue, together with any other evidence adduced, Intercorp possesses the requisite fitness, within the meaning of section 44(b), Shipping Act, 1916, to be licensed as an independent ocean freight forwarder.

DEVELOPMENT OF THE EVIDENTIARY RECORD

The record in this proceeding was developed under procedures designed to avoid unnecessary costs and formalities. Two informal conferences were held in my office attended by Hearing Counsel and Mr. Stettner and a series of status reports were submitted by the Office of Hearing Counsel on behalf of the Commission's Bureau of Hearings and Field Operations (the Bureau). Because Mr. Stettner was not represented by an attorney, special efforts were made to advise him of customary procedures and his procedural rights. Although, early in the proceeding, it appeared from the Bureau's initial status report that the issues involved close legal questions as to whether Intercorp's practices had risen to the level of "carrying on the business of forwarding" and the possibility of settlement had been mentioned, the Bureau indicated in their second status report that more recent information about Intercorp's activities changed the complexion of the case from one of interesting legal issues with possible settlement to one of violations with little likelihood of settlement. (See Order to Furnish Prehearing Statement, November 12, 1981.) Therefore, it was decided that litigation was necessary. After the furnishing of information by Intercorp in response to the Bureau's discovery requests, Hearing Counsel drafted a proposed stipulation of facts which, with minor modifications, was submitted into evidence. In addition, Hearing Counsel submitted written testimony of two Commission employees, Mr. Robert James Klapouchy of the Commission's Office of Freight Forwarders, and Mr. Peter S. Breslaw, District Investigator assigned to the Commission's Atlantic District Office in New York City. A written statement of Mr. Stettner plus recent financial statements of Intercorp were also received into evidence. These documents together with various attached documents constitute the documentary evidence of record. In addition, in order to assure Mr. Stettner a completely fair hearing, the Bureau's witnesses were presented for cross-examination at an oral hearing held on February 19, 1982, and Mr. Stettner was allowed to present his own testimony on the record subject to such questioning as Hearing Counsel deemed necessary. Again, the oral hearing was conducted with a view toward protecting Mr. Stettner, who had no legal counsel, from suffering any disadvantage because of his unfamiliarity with Commission hearing procedures. The post-hearing briefing procedure required the

Bureau to file first with their opening brief, thereby enabling Mr. Stettner and Intercorp an opportunity to ascertain and understand fully the Bureau's case against applicant and answer it accordingly. A final reply brief was permitted to the Bureau.

The evidentiary record established under the procedure described above, to a large extent with the full cooperation of applicant who willingly turned over relevant business records requested by the Bureau, essentially shows no factual disputes but rather differing legal conclusions and disputes over the terminology employed by Hearing Counsel in describing applicant's past practices. The following findings of fact are therefore drawn largely from the stipulation of facts entered into by both parties but with some modifications and amplifications drawn from other documents and evidence in the comprehensive record.

SUMMARY OF THE EVIDENCE

The Corporation

1. Respondent and applicant Intercorp Forwarders, Ltd., is a corporation organized under the laws of the State of New York with its principal place of business at 32 Broadway, New York, N.Y.

2. Robert Stettner is the President of Intercorp and holder of forty percent of the corporate stock. The remainder of the stock is held by Serena Stettner.

3. Robert Stettner is the sole salaried officer/employee of Intercorp. However, since May of 1981, Mr. Stettner's brother David became a Vice-President engaged in sales and another person named Joseph DeFronzo became associated with Intercorp as a commission sales agent. (Tr. 88).

4. Intercorp is a licensed customs house broker and also operates as an air freight forwarder and an import consolidation break bulk agent.

Robert Stettner's and Intercorp's Two Applications

5. The application which is the subject of this proceeding is actually Mr. Stettner's second application. On May 2, 1977, Mr. Stettner d/b/a Trans-World Impex Forwarding Ltd. applied as a sole proprietor for an independent ocean freight forwarder license.

6. In acknowledging receipt of Mr. Stettner's application, the Commission's Office of Freight Forwarders advised Mr. Stettner of the prohibition against carrying on the business of ocean freight forwarding without benefit of a license issued by the Commission. The letter, dated May 12, 1977, states: "If you should engage in the business of forwarding before receiving your license, you will be subject to penalties provided by law and may prejudice the issuance of your license."

7. By letter dated September 21, 1977, Mr. Stettner was advised of an intent to deny his application on the ground that he lacked the requisite training and experience to be licensed as an independent ocean freight forwarder. According to the information and references received by the Commission's staff, Mr. Stettner's experience while working for a licensed freight forwarder (Rohner Gehrig & Co.) had been limited to sales rather than documentation. However, by letter dated July 25, 1977, Mr. Stettner had indicated to the Commission's staff that, after leaving Rohner Gehrig, he had tried to obtain employment from freight forwarders but without success because, in his opinion, the forwarding companies "deem me to be too much of a threat to their interests." Mr. Stettner also indicated that he had acquired reference books on forwarding and had studied them. (Ex. C, Appendices III, IV, VI). By letter of September 8, 1977, Mr. Stettner had also written to the staff that "it's very important to me to attain this license as soon as possible because in the meantime I have not been able to make a living" and also stated that he had received offers to give him business if he could obtain a license. (Ex. C, Appendix III). As part of his application file, there was a letter from an American importer located in Waltham, Massachusetts, commending Mr. Stettner and concluding by stating: "Thank you for a job well done and it is a pleasure to be dealing with a man of your knowledge and business acumen." (Ex. C, Appendix III). However, the file also contained a letter from Mr. Stettner's supervisor at Rohner Gehrig where he had been employed, casting aspersions on Mr. Stettner's character, and referring to a "breach of confidence," which negative reference accounts for Mr.. Stettner's difficulties in finding subsequent employment with forwarders, according to Mr. Stettner. (Ex. C, Appendices III and IV).

8. By letter dated October 4, 1977, Mr. Stettner withdrew his application, stating that he wished to withdraw the application "without prejudice but wish to refile above application as soon as positive results are received by me pursuant to the U.S. Customs House Broker's License examination which I took yesterday" (Ex. C, Appendix VI).[2]

9. By letter dated May 1, 1978, Mr. Stettner advised the Commission's Office of Freight Forwarders that he had incorporated his firm and had passed the customs house broker's examination. Mr. Stettner, as President of Intercorp, therefore, asserted Intercorp's eligibility to be licensed as an ocean freight forwarder. Mr. Stettner advised that he had received a grade of 82 percent on the examination given on April 3,

[2] Later Mr. Stettner states that he also withdrew the application because of financial difficulties and because the requirement for bonding had been trebled. (Ex. D, statement of Mr. Stettner, February 19, 1982). This statement is confusing since the bonding requirement raising forwarder's surety bonds from $10,000 to $30,000 became effective at the end of 1978, long after Mr. Stettner's application had been withdrawn in 1977.

1978, in New York City and that "[i]nsofar as a licensed U.S. Customs House Broker's application for approval as FMC licensed independent ocean freight forwarder represents 'prima facie evidence' of documentation and procedure competence as required by the Federal Maritime Commission and, since this is in direct reply to the objection of the Federal Maritime Commission in your letter of September 21, 1977, it is the wish of the writer to see this matter speedily concluded so that normal business may ensue." (Ex. C, Appendix VII). In a later statement, dated February 19, 1982, Mr. Stettner states that he had been advised by Mr. Charles Clow, former Chief of the Office of Freight Forwarders, that passage of the customs house broker's examination would represent "prima facie" evidence of export documentation experience. (Ex. D, p. 3). He also stated that in the course of obtaining the broker's license he had undergone investigation by the Federal Bureau of Investigation and that customs house brokers' functions and that of ocean freight forwarders overlapped in certain respects when importers seek duty-free treatment on goods imported into the United States and their brokers must show proof of the goods' previous manufacture and exportation from the United States by using export ocean bills of lading and export declarations. (Ex. D, p. 2).

10. In response to Mr. Stettner's letter advising that he had passed the broker's examination and believed himself now eligible to obtain a forwarder's license, the Commission's Office of Freight Forwarders, by letter dated May 16, 1978, advised Mr. Stettner that he needed to file an application for a license as a corporation rather than as a sole proprietor together with certain financial information pertaining to the corporation. The Office also furnished Mr. Stettner with other materials including a form letter which is sent to all new applicants detailing the procedure for applying for a license and copies of Form FMC-18 and General Order 4 as a convenience to the applicant. (Ex. C, Appendix VIII). This package of materials again contained a warning against operating as a forwarder without benefit of a license.

11. Between May 16, 1978, and September 16, 1980, the record shows nothing to have happened between Mr. Stettner and the Commission's staff, since Mr. Stettner did not as yet file his application on behalf of Intercorp. However, on September 16, 1980, during the course of a conversation with Mr. Robert James Klapouchy, a Transportation Industry Analyst with the Office of Freight Forwarders, Mr. Stettner detailed his ocean freight forwarding experience. From this discussion Mr. Klapouchy came to believe that Mr. Stettner and Intercorp had engaged in unlicensed ocean freight forwarding activity. This is because Mr. Stettner indicated to Mr. Klapouchy that he had entered into an arrangement with a licensed ocean freight forwarder, Gateway Shipping Co., Inc. (FMC license No. 648), pursuant to which Intercorp had performed a variety of the duties normally performed by a licensee

on a number of ocean export shipments and had shared in the forwarder's compensation received from ocean common carriers on such shipments.

12. During the course of the September 16, 1980, discussion, Mr. Klapouchy advised Mr. Stettner that Intercorp appeared to be carrying on the business of ocean freight forwarding without benefit of a license issued by the Commission. According to Mr. Klapouchy, Mr. Stettner replied that under his agreement with Gateway, he was equivalent only to an employee of Gateway and that he was therefore acting legally.

13. By letter dated September 22, 1980, the Office of Freight Forwarders furnished Intercorp with another application packet. This packet also contained a warning against unlicensed ocean freight forwarding which "may prejudice the approval of your application" and also against use of another forwarder's license as well as against a licensed forwarder's permitting its license number to be used by another person. (Ex. C, Appendix IX). In addition, the packet contained copies of Form FMC-18, the application for license form, and copies of General Order 4 and sections 1 and 44 of the Shipping Act, 1916.

14. On October 6, 1980, Intercorp filed the second application by Mr. Stettner but his first on behalf of Intercorp. This is the application which ultimately triggered this formal proceeding.

15. As part of the application for Intercorp, Mr. Stettner was asked in a formal questionnaire whether he had read and understood all the provisions of the Commission's General Order 4 and the Shipping Act, 1916, as it related to the activities of an independent ocean freight forwarder. To both questions he checked the answer block marked "Yes." In addition, in a separate letter dated October 6, 1980, Mr. Stettner stated that he had read and understood the provisions of General Order 4 and the relevant provisions of the Shipping Act, 1916. (Ex. C, Appendix X).

16. By letter dated November 29, 1980, the Commission's Office of Freight Forwarders acknowledged receipt of Intercorp's application and advised Mr. Stettner once again of the prohibition against unlicensed freight forwarding activity.

17. In early February 1981, the Commission's Bureau of Certification and Licensing requested the Atlantic District Office to institute an investigation of Intercorp's possible unlicensed freight forwarding activity. This investigation was begun and Mr. Peter S. Breslaw, a District Investigator with that Office, was assigned to the investigation.

18. By letter dated February 4, 1981, the Commission's Office of Freight Forwarders notified Intercorp that an investigation of its application had been instituted.

19. Mr. Breslaw, during the course of his investigation, interviewed Mr. Stettner on February 13, 17, and 18, 1981.

Intercorp's Arrangement and Practices With Gateway Shipping

20. In March 1978, Intercorp entered into an arrangement with Gateway Shipping Company, Inc. (Gateway), holder of Independent Ocean Freight Forwarder License Number 648, pursuant to which Intercorp would handle ocean freight shipments for export in conjunction with Gateway. This arrangement terminated some time in February 1981. Mr. Stettner maintains that during this period of time he was not acting as a salaried employee of Gateway but as a "sales representative" or as a commission sales agent for Gateway. (Ex. B, para. 9; Ex. D, p. 1; Exs. 28, 29). In a letter dated May 19, 1978, which apparently summarizes the arrangement between Intercorp and Gateway which is peculiarly designated as "AMK International Corporation," a related company, Mr. Stettner outlined their understanding. (Ex. 28). Mr. Stettner stated that he agreed to become a sales representative of "AMK International" purportedly holding the freight forwarding license.[8] Mr. Stettner was to be paid 50 percent of the carrier compensation payable to the licensed forwarder as well as 50 percent of the forwarder's fees as a consequence of routing exports through the intermediary of the licensed forwarder and was to receive 66 percent of these fees and compensation apparently if the business "is obtained through the assistance of a foreign agent of Intercorp Forwarders, Ltd." (Ex. 28). The licensed forwarder was supposed to bill Intercorp for services rendered to Intercorp under the agreement while Intercorp billed Intercorp's own clients either before or after receipt of the licensed forwarder's invoices to Intercorp. The licensed forwarder's name was to appear on the ocean bills of lading, and that forwarder was not to solicit clients away from Intercorp in connection with any shipments which Intercorp had procured and in which the licensee participated. In addition to these provisions, Mr. Stettner quoted provisions of the Commission's General Order 4 forbidding licensees from sharing any of their compensation or fees with shippers, consignees, etc. (formerly 46 CFR 510.24(c)), but permitting an employee of a licensed forwarder to function without having to obtain his or her own license (formerly 46 CFR 510.4(b)). Moreover, Mr. Stettner cited a reference book on forwarding, recommending that "sales representatives" for

[8] The designation of the other party to the arrangement in Mr. Stettner's written letter (Ex. 28) as "AMK International Corporation" is somewhat confusing. It is clear from the actual shipping documents employed under the agreement that Gateway Shipping Co., Inc., the holder of FMC license No. 648, is the real ocean freight forwarder and that "AMK International Corporation" is some type of affiliated or related company with a common officer, Mr. Abe Knipper. Apparently Mr. Stettner addressed "AMK International" either out of confusion or for convenience. The Commission's records as to Gateway in the Office of Forwarders show "AMK International" as a possible affiliated company with Mr. Knipper involved, possibly as an air freight forwarder. It is clear from those records, however, that it is Gateway that holds the ocean freight forwarder's license, not "AMK International." The parties in this proceeding, however, addressed "AMK International" as a "parent" of Gateway.

licensed forwarders provide a statement to the licensee that no part of the forwarder's revenue would revert to a person included in the prohibited list of persons under the applicable regulation and law and made such statement to the licensed forwarder as part of their arrangement.

21. Twenty-four ocean shipments were forwarded under the arrangement entered into by Intercorp and Gateway beginning in mid-1978 and ending in early (mid-February) 1981.

22. The twenty-four shipments forwarded pursuant to the arrangement were handled for clients secured by or for Intercorp.

23. The bills of lading and dock receipts necessary to forward the twenty-four shipments handled pursuant to the arrangement were prepared by Gateway which also made payments of ocean freight charges to the carriers involved. Intercorp performed all other functions necessary to facilitate the export movement of the twenty-four shipments.

24. Among the services which Intercorp performed in handling the twenty-four shipments forwarded pursuant to the arrangement with Gateway were the following:

(a) preparation and processing of export declarations;
(b) preparation and processing of delivery orders;
(c) arranging for inland transportation;
(d) arranging for cartage or drayage;
(e) coordinating the movement of cargo to the pier;
(f) consular document preparation and processing;
(g) preparation and processing of certificates of origin;
(h) booking, arranging or confirming cargo space;
(i) clearing shipments through customs;
(j) arranging for insurance coverage;
(k) preparing insurance certificates;
(l) dealing with foreign banks;
(m) dealing with foreign consignees;
(n) advancing ocean freight charges; and
(o) receiving, examining and implementing shipper instructions.

25. Intercorp dealt directly with the clients for whom the twenty-four shipments forwarded pursuant to the arrangement were handled. Gateway had no direct contact with these clients. The record contains also an advertised listing of Intercorp Forwarders Ltd., 32 Broadway, Suite 1712, with telephone number, included in an alphabetical listing of various other companies in shipping or related businesses in the *Journal of Commerce "Transportation Tickler,"* with no indication of any rela-

tionship with Gateway. (Ex. 28, attached page; Ex. 29, answer to interrogatory No. 16).

26. The clients for whom the twenty-four shipments forwarded pursuant to the arrangement were not apparently advised directly of Gateway's role in the forwarding of the shipments. However, these shipper-clients were provided with copies of ocean bills of lading which contained Gateway's name on the appropriate space provided for forwarders together with Intercorp's invoices to the shipper-clients. (Ex. 29, answer to interrogatory No. 11). In several instances Intercorp itself indicated to the shipper that "AMK International" was somehow involved (Exs. 6-Q, 8-0, 9-0) or the shipper wrote to Intercorp in care of "AMK International." (Ex. 1-T).

27. Intercorp invoiced the clients for whom the twenty-four shipments were forwarded. These clients were not provided with copies of Gateway's invoices to Intercorp.

28. On ten of the twenty-four shipments forwarded under the arrangement, Intercorp deducted amounts from the sums paid to Gateway equal to fifty or sixty percent of the ocean carrier compensation received by Gateway on these shipments. The amount of $1,642.61 was so retained by Intercorp.

29. Intercorp received $1,570 in forwarding fees on the twenty-four shipments forwarded under the arrangement.

30. On February 18, 1981, Mr. Breslaw, the Commission's District Investigator in New York, interviewed Mr. Stettner and advised him to discontinue the aforesaid activities. Mr. Breslaw believed that what Mr. Stettner and Intercorp had been doing constituted unlicensed forwarding in violation of section 44 of the Shipping Act, 1916, but Mr. Breslaw, assuming that Mr. Stettner understood the applicable law, did not go into detailed enumeration of what constituted unlicensed forwarding. Nor did Mr. Breslaw cite to Mr. Stettner Commission decisions holding that the activities described above constituted unlicensed forwarding. Mr. Breslaw also does not recall that he flatly stated to Mr. Stettner that these activities constituted unlicensed forwarding. However, Mr. Breslaw did explain the nature of his investigation to Mr. Stettner and referred to the relevant portion of the Shipping Act relating to unlicensed forwarding. (Tr. 22-28; 39; Ex. B, para. 14; Ex. D).

The Three Shipments Forwarded After Intercorp's Arrangement With Gateway Had Terminated

31. Subsequent to Mr. Stettner's discussions with Mr. Breslaw in February 1981, Intercorp forwarded three additional ocean shipments for two clients on or about April, July, and August 1981. (Ex. A, para. 18-21; Ex. A, Appendices 25-27; Tr. 39, 85).

32. Intercorp prepared all documentation (except perhaps for dock receipts on two of the shipments) (Tr. 86) and performed or arranged for the performance of all services necessary to facilitate the export of these three shipments, for which Intercorp received $466 in forwarding fees.

33. These three shipments were handled by Mr. Stettner for import clients of Intercorp who had specifically requested that he do the forwarding. Mr. Stettner acceded to the clients' requests in the belief that this was necessary in order to preserve their import business which was very important to Intercorp. Mr. Stettner believed that failure to satisfy their needs would have seriously threatened the existence of his company and that their continued business was "vital to my existing livelihood." Although since approached with more and "numerous" requests, Mr. Stettner has declined them, awaiting the Commission's decision on his application. Mr. Stettner received no compensation ("brokerage") from ocean carriers involved on these three shipments. (Ex. 29, answer to interrogatory No. 1; Ex. 29, letter of November 6, 1981; Ex. D, pp. 1, 2).

Intercorp's Practice of Marking Up Its Costs When Billing Its Clients

34. On twelve of the twenty-four shipments forwarded under the arrangement with Gateway, Intercorp arranged for inland transportation, cartage or drayage.

35. When invoicing its clients for services performed in forwarding these twelve shipments, Intercorp marked up the inland transportation, cartage and drayage costs incurred on the clients' behalf. Such markups amounted to $2,785.06.

36. On thirteen of the twenty-four shipments forwarded pursuant to the arrangement with Gateway, Intercorp arranged for insurance coverage.

37. When invoicing its clients for services performed in forwarding these thirteen shipments, Intercorp marked up the insurance premiums paid on the clients' behalf. Such mark-ups amounted to $4,531.37.

38. When invoicing clients for whom the twenty-four shipments forwarded under the arrangement with Gateway were handled, Intercorp also marked up consular fees paid on behalf of those clients.

39. Intercorp's mark-ups of inland transportation, cartage, drayage, insurance and consular costs incurred on behalf of clients for whom the twenty-four shipments forwarded pursuant to the arrangement with Gateway were handled were not identified as mark-ups or designated as service or placement fees. These mark-ups were lumped together with the actual costs incurred and the total appeared as Intercorp's charges to the clients on Intercorp's invoices.

40. On five of the twenty-four shipments forwarded pursuant to the arrangement with Gateway, Intercorp instructed its insurance agent,

Loren Brokerage Co., to prepare a second "adjusted" invoice which increased the actual insurance costs shown on the first invoice. Intercorp paid the first or correct invoice. The second "adjusted" invoice was used by Intercorp to support its billing of its own clients. The shipments occurred only between August and December of 1978.

41. Mr. Stettner explained the above practice of utilizing incorrect, "adjusted" insurance invoices by stating that he used such invoices in order to secure profits "for lack of any other way known to us at the time" and that other functions were included in the service, namely responsibility for shipper collections. He stated furthermore that his clients did not object, that he was induced to do this by the insurance agent, and was young, naive, and had only $600 in the bank. (Tr. 79). In other respects on some shipments, Mr. Stettner states that he marked up inland trucking and rail freight costs when handling shipments for a British forwarder known as M & S Shipping, with whom Intercorp had business dealings, because of negative payment disputes with M & S. (Ex. D, p. 3; Tr. 43). Mr. Stettner also explained that he used markups on insurance costs to cover costs of collection of letters of credit. Consular fees were also marked up.

42. On the three shipments handled completely by Intercorp in 1981 after termination of the arrangement with Gateway, Intercorp marked up inland freight and insurance costs. The mark-up of the former amounted to $201.50; the mark-up of the latter amounted to $800.85.

Intercorp's Limited Financial Situation and Small Size

43. Intercorp is, as the Bureau acknowledge, "an extremely small operation possessed of limited financial resources." Opening Brief of Hearing Counsel, p. 33). As noted earlier, Mr. Stettner is the sole salaried officer/employee. For the twelve month period ending October 31, 1981, Intercorp generated a net profit of only $894.77 after taxes on gross income of $58,004.26. For the previous fiscal year ending on October 31, 1980, Intercorp's net profit had been $8,296.56, after taxes, out of gross income of $71,553.04. (Ex. E). For fiscal 1979, Intercorp showed only $414.84 net profit, after taxes, out of gross income of $138,156. (Ex. C, Appendix X, Financial Report). Intercorp has thus shown a steady decline from 1979 to 1981 in gross income and a sharp decline in net profits in 1981, after a significant gain in 1980, to a negligible amount.

44. Intercorp's net worth is also rather negligible. In its fiscal year 1981, its net worth (assets less liabilities) was only $14,582.25; in 1980 it was $13,687.48, and in 1979 it was $5,390.92. (Ex. E; Ex. C, Appendix X, Financial Report).

Background of Mr. Robert Stettner

45. Since Mr. Stettner is to all intents and purposes Intercorp Forwarders Ltd., any decision about the fate of Intercorp ought to show something about his background, and education. The resume which Mr. Stettner submitted to the Commission's staff with Intercorp's application for a license in October 1980 is contained in the record. (Ex. C, Appendix X). It shows that Mr. Stettner is 33 years old (born January 4, 1949). He was educated at the University of Vermont where he received a Bachelor of Business Administration degree in May of 1971 with a major in Finance and a minor in Spanish. According to this resume, he speaks, reads and writes Spanish fluently, German and Portuguese adequately, and French passably. He has also graduated from the National Credit Office in New York City, the World Trade Institute in "ocean shipping," and the World Trade Institute Language School in German. He had held a variety of jobs (sales, clerking with several non-shipping companies) until joining Rohner Gehrig & Co. where he was involved in ocean freight and air freight sales, traffic administration, and customs brokerage from February 1974 to February 1977. He has cleared shipments through U.S. customs, arranged air freight exports, filled out export declarations, and been involved in other transportation-related activities (documentations, issuing delivery orders, etc.). As noted before, he took and passed the examination for a U.S. Customs House Broker on April 3, 1978, for which he also underwent an F.B.I. investigation. Included in his application package (Ex. C, Appendix X) are several letters of recommendation or favorable responses from several companies (Rutland Maritime Management Corporation of New York City, Capitol Records, Inc.) as well as several credit references for Intercorp. (As also mentioned earlier, however, the record contains a negative report about Mr. Stettner from his previous supervisor at Rohner, Gehrig as well as a favorable report from the same person and a most favorable letter from an importer in Waltham, Mass., known as Compo Industries, Inc.) (Ex. C, Appendices III and IV).

DISCUSSION AND CONCLUSIONS

The questions to be determined are essentially three. First, did Intercorp carry on the business of forwarding without benefit of a license by performing forwarding services on 24 shipments under its arrangement with Gateway Shipping, a licensed forwarder, from 1978 to early 1981 and thereafter by forwarding three shipments on its own at the request of two clients, in violation of section 44(a) of the Shipping Act, 1916, 46 U.S.C. § 841b. Second, if Intercorp did carry on such business without a license in violation of law, should civil penalties be assessed under section 32(a) of the Act, 46 U.S.C. § 831 and, if so, in what amount. Third, does Intercorp deserve to obtain a license, in other words, should Intercorp be found to possess the requisite "fitness" within the meaning of section 44(b) of the Act, 46 U.S.C. § 841b, if it is found to have carried on the business without a license or to have conducted itself in other ways suggesting unfitness.

The Bureau's Contentions

The Bureau of Hearings and Field Operations (Office of Hearing Counsel) are emphatic in their contentions that Intercorp engaged in the business of forwarding without a license, that for that reason and others Intercorp has not been shown to be fit to obtain a license, and that it should be assessed a civil penalty in the amount of $5,000. The Bureau argue that the evidence of record shows that Intercorp's arrangement with Gateway permitted Intercorp to perform a number of forwarding services which are more than enough to constitute the carrying on of the business of forwarding. Under the arrangement with Gateway, they argue, Gateway acted merely as a subcontractor to Intercorp by performing only a few services, namely, preparing ocean bills of lading, dock receipts, and paying ocean freight to carriers plus sometimes booking cargo space. On the other hand, Intercorp did all the rest of the forwarding services, e.g., preparing and processing export declarations, delivery orders, arranging for inland transportation, cartage, drayage, other documents, booking, arranging or confirming cargo space, handling financial matters, advancing ocean freight, implementing shipper instructions, etc. Moreover, Intercorp held itself out to its shipper clients in its own name and dealt directly with these shippers, the shippers not dealing with Gateway at all nor being directly advised of Gateway's involvement. As far as the final three shipments handled solely by Intercorp are concerned, the Bureau argue that there is no doubt that Intercorp acted as sole freight forwarder performing all necessary services with no subcontracting to Gateway whatsoever.

In support of their contentions, the Bureau cite numerous authorities, section 44(e) of the Act, 46 U.S.C. § 841b, listing forwarding functions, relevant portions of the Commission's regulation, General Order 4, 46 CFR 510.2(f) and 510.2(h), defining a freight forwarder and listing forwarding functions. In addition, the Bureau cite Commission decisions further defining and explaining the functions of forwarders which, they argue, show clearly that Intercorp was indeed carrying on a forwarding business, citing such decisions as *Investigation of Practices, Operations, Actions, and Agreements of Ocean Freight Forwarders. . .*, 6 F.M.B. 327, 334 (1961); *Dynamic International Freight Forwarder, Inc., Independent Ocean Freight Forwarder License Application. . .*, 23 F.M.C. 537 (1981); *Independent Ocean Freight Forwarder Application - Air-Mar Shipping, Inc.*, 14 SRR 97, 99-100 (I.D.), adopted by the Commission, 14 SRR 1250 (1974). Legislative history to the enactment of the Freight Forwarder Law is also cited to demonstrate that Intercorp's practices constituted forwarding.

On the question of Intercorp's fitness to obtain a license, the Bureau argue vigorously that Intercorp's past actions demonstrate unfitness and unreliability and show that it would not be able to maintain a standard of professional conduct reflecting the high degree of business responsibility which forwarders should and must possess before serving the public. The Bureau do not contend that past violations automatically bar a person from thereafter obtaining a license but cite Commission decisions holding that such violations are relevant to the question of fitness and "militate against the issuance of a license." The Bureau also cite Commission decisions emphasizing the need for forwarders to maintain high standards of business conduct and to show that they will adhere to law and Commission regulations since they occupy a position of trust and responsibility.[4] They argue that the record shows Mr. Stettner to have received warnings against operating without a license on at least four occasions by the Office of Freight Forwarders and on two occasions by Commission investigators or employees. Yet, argue the Bureau, Mr. Stettner continued his arrangement with Gateway and, after terminating the arrangement, forwarded three shipments after warnings from the investigator. This suggests to the Bureau that Mr. Stettner cannot be trusted to follow applicable law and regulations although he had stated in his application forms that he understood the law and regulations. The Bureau consider Mr. Stettnar's conduct to demonstrate such disregard of law that it is not likely that he can be trusted to obey fully the mandates and requirements of law and relevant Commission regulations. They dismiss Mr. Stettner's contention that he acted out of a feeling of financial need or desperation when servicing the last three shipments or in the belief that his arrangement with Gateway was permissible as indicating a weakness of character in that, according to the Bureau, Mr. Stettner may only conform to law when it is convenient to do so. Again, past Commission decisions in which applicants are denied licenses who have blatantly disregarded law or have engaged in deliberate schemes to evade the licensing

[4] The cases cited are: *Independent Ocean Freight Forwarder License Application - Guy G. Sorrentino,* 15 F.M.C. 127, 134 (1972); *Harry Kaufman d/b/a International Shipper Co. of N.Y.,* 16 F.M.C. 256, 271 (1973); *Cargo Systems International (CSI),* 22 F.M.C. 56, 71 (1979). In *Harry Kaufman,* the Commission found respondents unfit who had either permitted use of a license by another person or transferred a license to another person without Commission approval or performed forwarding for a person whose license had been revoked. (16 F.M.C. at 264). However, even so, the Commission permitted a new corporation formed out of certain persons involved to refile its application for a license once certain defects had been cured. (16 F.M.C. at 261). In *Cargo Systems International,* applicant had devised a series of phony sales agency agreements which did not resemble an employee-employer contract at all and was found unfit. In *Guy G. Sorrentino,* applicant was actually found fit to obtain a license because of numerous mitigating circumstances although his previous forwarding company had engaged in a misclassification scheme with a shipper. (15 F.M.C. at 128, 130).

requirement are cited by the Bureau. The Bureau are vary emphatic as to Intercorp's practices of marking up invoices, which they call "inflating," and liken such practices to fraud and deception, facts which further militate against finding Intercorp to be "fit" since they call into question Mr. Stettner's honesty and integrity. Again, Commission and other decisions are cited to justify arguments against licensing Intercorp because of such activity.

On the question of penalties, the Bureau contend that ordinarily they would urge a penalty of $20,000 because of Intercorp's operations over a three-year period without a license which the Bureau argue to have been "knowing and wilful" despite numerous warnings. However, the Bureau acknowledge that because of Intercorp's "relatively precarious financial status," such a large fine or even one which would recover all of the forwarding fees received over the three year period ($12,000) "would seriously jeopardize the continued viability of Intercorp." (Opening Brief of Hearing Counsel, p. 33). The Bureau also briefly allude to Intercorp's cooperation in furnishing evidence during the course of the proceeding presumably as a minor mitigating factor. Therefore, the Bureau conclude that $5,000 would be a reasonable penalty. Such a penalty plus denial of a license, in the Bureau's view, would not leave applicant without means of support because applicant is a licensed customs house broker and has handled over $500,000 in gross revenues since Intercorp was incorporated, largely derived from other activities than forwarding.

Mr. Stettner's Arguments in Defense

Mr. Stettner suffers from the handicap of defending himself without benefit of trained legal counsel. Therefore, to some extent, he defends against contentions that were either not made against him or that are irrelevant.[5] However, he does stand up and fight for himself and his company in plain English. He states that he did not believe that his arrangement with Gateway was illegal and that he believed he was merely a sales representative or a "bona fide employee" of that licensed forwarder who, under Commission decisions, does not need his own license. He states that he never impeded his clients' market penetrations and that they never complained about him or Intercorp to the Commission when he handled the twenty-seven shipments. He contends that he

[5] For example, Mr. Stettner seems to believe that Intercorp is accused of having charged forwarding fees which were so high as to be detrimental to the commerce of the United States, contrary to section 18(b)(5) of the Act, and cites Commission decisions under that law. He also argues that he has suffered from "blacklisting" because of a former employer and unjust discrimination under section 17 of the Act, citing cases. But the issues and this decision have nothing to do with any alleged "blacklisting" or discrimination against Intercorp stemming therefrom. The Commission's Order does not refer to Mr. Stettner's or Intercorp's willingness or ability to perform forwarding services, only to the question of whether their alleged past operations as a forwarder without a license and certain billing practices render Intercorp unfit to obtain a license in the future.

acceded to the requests to perform forwarding for two clients in connection with the three shipments in 1981 handled solely by Intercorp in the belief that this was necessary to retain those clients' who used his customs house brokerage services because their business was vital to the continuation of Intercorp. Mr. Stettner states that he has cooperated with the Bureau by willingly furnishing all requested documents pertaining to his forwarding activities even though the materials furnished were damaging to his application, and he promises continued cooperation. He also states that he voluntarily discontinued all forwarding in August 1981 (even though elsewhere stating that he has had numerous requests from clients to perform forwarding which he has refused) and that he apparently first realized that he had possibly violated law only after the first informal conference in Washington with me and Hearing Counsel in September of 1981. In this regard he states that he never received a clear cease and desist order and that violations had not been found during the period of time that the Commission's staff had been advising him, that the Commission's investigator had "casually" interviewed him, and cites a Commission ruling that the Commission has no injunctive powers and can only issue cease and desist orders after hearing and upon findings of violations of law. (*Berthing of Seatrain Vessels in San Juan, Puerto Rico,* Docket No. 76-41, 9-7-76) (16 SRR 1395). Nevertheless, as noted, he states that he has ceased the questionable activity and promises to adhere to law and regulations in the future if he obtains a license for Intercorp.

Mr. Stettner contends furthermore that he has suffered "blacklisting" because of an unfriendly separation from employment with Rohner Gehrig and has had trouble finding employment with forwarders as a result. Therefore he asks that the Commission consider his past activities in the light of his financial and personal difficulties and problems during a period which he describes as one of "extreme hardship." (Respondent's Opening Memorandum of Law, p. 7). He cites a Commission decision frowning upon arbitrary or capricious exercise of the power of licensing and expressing the Commission's intent to consider "constitutional and lawful safeguards of individuals and their right to make a living." *Application for Freight Forwarder License, Carlos H. Cabezas,* 8 F.M.C. 130, 131 (1964).

Mr. Stettner cites other facts in support of his position. He states that none of the shippers whom he serviced ever complained to the Commission about Intercorp's charges, that the quality of his work justified the charges, and that the shippers used Intercorp's services and made their sales at profits to themselves, showing that his charges must have been reasonable. (Respondent's Memorandum, p. 11). Furthermore, he states that Intercorp. "went to whatever lengths were necessary to see that its clients were paid (Respondent's Memorandum, p. 19), citing

Commission decisions condemning forwarders who misuse shippers' funds entrusted to the forwarders."

As further evidence of his good character and ability, Mr. Stettner cites the fact that he has been licensed by the U.S. Department of the Treasury as a Customs House Broker for which he took and passed an examination and underwent an F.B.I. investigation. Moreover, Mr. Stettner argues that the Bureau's contentions that, if licensed, he and Intercorp may well depart from law and regulations are "unauthorized" and violative of his due process rights since, in his opinion, they represent "acrimony" and "innuendo" and are speculative. He cites a Commission decision holding that such speculation of future behavior is no ground for denial of a license but that if the licensee does violate law in the future, such conduct can be handled in an appropriate proceeding at the time. *Independent Ocean Freight Forwarder Application—Sequoia Forwarders Co.,* 19 F.M.C. 182, 189 (1976).

What is a Reasonable Disposition of the Application Under Commission Precedent?

The facts in this case are not especially complicated and there is no real dispute as to what happened. The real problem is that Intercorp has carried on the business of forwarding during the period 1978 through 1981 and has utilized "adjusted," incorrect invoices to itself to support some of its charges to its customers, thereby concealing markups on its services, as the great preponderance of evidence shows. Given those facts, the question is whether this obviously struggling young man and his Intercorp company deserve to obtain a forwarder's license and, furthermore, whether Intercorp should pay a civil penalty for having operated without a license in violation of section 44 of the Act. The problem of reaching a just and reasonable decision is made more difficult by the fact that the Commission's many decisions in this area have not always been consistent. Sometimes licenses have apparently been granted or not revoked though the forwarders seemed more culpable than Intercorp and Mr. Stettner and sometimes licenses have been denied though the applicant seemed about equally culpable with Intercorp. However, in a number of recent decisions, forwarders have been permitted to retain their licenses or obtain them after paying something in settlement of the issues of violations very similar to those involved in this case and have been found fit to retain licenses after recommendations of fitness were submitted by the Bureau. Perhaps it is well to bear in mind the statements in these cases that each case requires careful consideration of the peculiar facts so that the Commission's exercise of its discretion will be sound and so that it will avoid arbitrariness or unfair discrimination against particular applicants in cases which lie in gray areas and in which reasonable persons can differ. Thus, as the Commission stated in *Fabio A. Ruiz d/b/a Far Express Co.*, 15 F.M.C. 242, 243 (1972):

> An arbitrary denial of a freight forwarder license constitues a denial of due process of law. On the other hand, the government can require high standards of qualifications, such as good moral character or proficiency in the business before it admits an applicant. The matter of fitness or good moral character is a gray area where fair-minded men draw differing judgment from the same set of facts.[6]

As I explain below, I believe that the Bureau's tough-minded approach, while well argued and carefully researched, lacks an element of compassion or balance, hammering as it does on strict standards and extreme sanctions, although in a gray area case such as this one, reasonable persons could differ. I am also influenced by the fact that their approach departs abruptly from their own previous positions and Commission decisions in more recent cases of this type which refrain from extreme sanctions, preferring to fashion remedial orders and protective devices enabling persons to carry on forwarding businesses under periodic supervision when mitigating factors are present. I would therefore give young Mr. Stettner and his Intercorp company a chance to develop their forwarding business and extricate themselves from the financial doldrums in which they now reside under certain protective conditions which have been followed in numerous cases of this type. However, I would also follow the distinction between the remedial provisions of section 44 of the Act under which licenses can be granted and are not revoked if protective audits and supervision are maintained and the more punitive portion of law encompassed in section 32 of the Act prescribing civil penalties to deter recurrence of prohibited practices. Therefore, although I believe Intercorp should have an opportunity to serve clients under certain safeguards, it should not walk away from its past violation of law without a reasonable penalty which, however, considers its ability to pay, lest the penalty destroy the business before it has a chance to survive. I would therefore assess a penalty of $3,000 and permit payment over a three-year period of time

[6] The *Ruiz* decision bears further consideration and will be cited again. In that case Mr. Ruiz applied for a license and admitted that he had operated without a license, forwarding 23 shipments for under two months, knowing that this operation was a "lie" and was unlawful, although he did not defraud anyone, and that he was fully aware of the licensing requirements of section 44 and General Order 4 and had worked for freight forwarders and exporters for twenty years. (15 F.M.C. at 245). Yet both the presiding judge and the Commission found Mr. Ruiz to be fit, notwithstanding the knowing and wilful violations of law. Since the record in the case was submitted on paper, the presiding judge did not even observe the applicant and the Commission noted that fact. (15 F.M.C. at 243). There are striking similarities between Mr. Ruiz and Mr. Stettner, Mr. Ruiz stating that he did unlawful forwarding "in order to be able to support my family, and I did not wait for the issuance of my License, that I applied for." (15 F.M.C. at 245). I have observed Mr. Stettner in this case and find his demeanor and deportment to support his contentions that he acted under stress or misunderstanding of the law and promises to comply with the law in the future.

in view of Intercorp's precarious financial situation. Before elaborating on these conclusions, however, I must dispose of the issue of violations with adequate explanations.

Intercorp Did Carry on the Business of Forwarding Without a License and Did Utilize Incorrect Invoices But Prevailing Commission Decisions Do Not Require Denial of the Application

There is little doubt on this record that Intercorp was carrying on the business of forwarding during the period March 1978 through February 1981 under its arrangement with Gateway Shipping during which it handled 24 shipments and that thereafter it forwarded three additional shipments in April, July, and August 1981, all on its own. The Bureau's arguments and the evidence developed are persuasive. Although Mr. Stettner argues that he believed that he had only become a "sales representative" or a commission sales agent and not a forwarder in his or Intercorp's own right and that not being an attorney and not being provided with previous case law deciding what Intercorp's arrangement with Gateway Shipping really constituted, these arguments relate to mitigation of the offense, to the question of Intercorp's fitness to obtain a license, and to the amount of civil penalty. They do not provide a defense to the violation. The clear facts are, as described above, that Intercorp, without its own license, held itself out to perform forwarding services and performed virtually all of them except for preparation of ocean bills of lading, dock receipts, and initial payment of ocean freight, which services it subcontracted to Gateway Shipping under its arrangement with Gateway, and, furthermore, that Intercorp billed its own clients who were not billed by Gateway and were not directly informed of Gateway's involvement generally except through copies of the bills of lading given the clients, on which Gateway's name appeared. Under the arrangement, furthermore, Intercorp shared the compensation paid by carriers to Gateway, deducting its share from the money it remitted to Gateway for performing the limited services which Gateway performed for Intercorp. Though Mr. Stettner, in drawing up this arrangement with Gateway (actually addressing it to "AMK International Corporation," a related company) took pains to cite the Commission's General Order 4 prohibiting shippers, consignees, and other persons from receiving any portion of carrier compensation paid to licensed forwarders and referring to the portion of General Order 4 stating that employees of licensed forwarders need not be licensed themselves and stating that these prohibitions would be respected by Mr. Stettner, these facts again only illustrate Mr. Stettner's belief that he might have been acting legally but do not change the fact that, under the arrangement, he was carrying on the business of forwarding without benefit of a license and was, in effect, relying upon Gateway's license number which was placed on bills of lading so that ocean carriers would pay compensation to Gateway. As case law clearly shows, the fact that Gateway performed three or so forwarding services (preparing bills of lading, paying ocean freight, preparing dock receipts) while Intercorp performed 15 or so other forwarding services running the gamut from preparation and processing of export declarations and other shipping documents, arranging inland transportation, booking cargo space, implementing shippers' instructions, etc. (see Summary of Evidence, paragraph No. 24) in no way indicates that Intercorp did not perform forwarding services. The Commission made clear in *Dynamic International Freight Forwarder, Inc.*, cited above, 23 F.M.C. 537, that a person could be carrying on the business of forwarding without performing all of the services which forwarders may perform. The Commission held that the terms "dispatching of shipments" and "handling the formalities incident to such shipments" contained in section 1 of the Act defining the term "carrying on the business of forwarding" have been treated as a "single concept to describe a range of activities, any one of which may constitute forwarding. . ." 23 F.M.C. at 543. The Commission furthermore explained that "a freight forwarding license is required for any one who proposes to engage in any of the 'forwarding' (or 'dispatching') activities described in . . . 46 CFR 510.2(c) . . . [now 46 CFR 510.2(h)]." The Commission affirmed the presiding officer's finding that Dynamic had violated section 44 of the Act because "Dynamic engaged in one or more of these activities on numerous occasions without a license . . ." 23 F.M.C. at 544. Both the statute itself, section 44(e) of the Act, and the Commission's regulations in the portions cited in the quoted passage immediately above clearly include the type of services performed by Intercorp under its arrangement with Gateway [7] and, of course, on the final three shipments in 1981 when Intercorp performed all necessary services, there is no question that Intercorp was performing as a forwarder. Even if one could argue that the final three shipments handled by Intercorp in

[7] Thus, section 44(e) of the Act, 46 U.S.C. § 841b, sets forth the following functions performed by freight forwarders: soliciting and securing cargo, booking or otherwise arranging for cargo space, coordinating the movement of cargo to shipside, preparing and processing ocean bills of lading, preparing and processing dock receipts and delivery orders, preparing and processing consular documents and export declarations, and paying ocean freight charges. General Order 4, as revised effective October 1, 1981, 46 CFR 510.2(h), essentially recodifies the earlier 46 CFR 510.2(c) and lists such services as "ordering cargo to port; preparing and/or processing export declarations; booking, arranging for or confirming cargo space; preparing or processing delivery orders or dock receipts; preparing and/or processing ocean bills of lading; preparing or processing consular documents or arranging for their certification; arranging for warehouse storage; arranging for cargo insurance; clearing shipments in accordance with United States Government export regulations; preparing and/or sending advance notifications of shipments or other documents to banks, shippers, or consignees, as required; handling freight or other monies advanced by shippers . . .; coordinating the movement of shipments for origin to vessel; and giving expert advice to exporters concerning letters of credit, other documents, licenses or inspections, or on problems germane to the cargos (sic) dispatch." As the evidence shows, Intercorp performed many of the above services under its arrangement with Gateway and even more of them when it handled the three shipments in 1981 by itself.

April, July, and August 1981, at the specific behest of two of Intercorp's important customs house brokerage clients, were only sporadic and incontinuous and did not constitute "carrying on the business of forwarding" but only an occasional dabbling in forwarding with no holding out or solicitation of forwarding business as had occurred under Intercorp's arrangement with Gateway, the argument does not detract from the three-year period of holding out by Intercorp under its arrangement with Gateway. At best, therefore, Intercorp is shown quite persuasively on the evidence of record to have carried on a forwarding business without benefit of a license, notwithstanding its assertions that it had only believed itself to be a sales representative or agent or some other type of employee of Gateway Shipping and therefore did not itself need to obtain a license. Previous Commission decisions have held that similar type arrangements by which unlicensed persons entered into so-called "agency" or "employment" arrangements with licensed forwarders which did not constitute true employment relationships, did not exonerate the purported employee or agent from liability under section 44 of the Act. If, furthermore, the person involved deliberately conceived a phony employment arrangement to avoid the licensing requirement and to make use of a licensed forwarder's name and number to effectuate the scheme, such person has understandably been found to be unfit to obtain a license. If there has been no deliberate intent to conceive such a scheme, however, the results may be different. See, e.g., *Independent Ocean Freight Forwarder License Application, James J. Boyle & Co. . . . .*, 10 F.M.C 121 (1966) (applicant devised a phony employment relationship with a licensee's employee in order to use the licensee's name and number, the scheme being a product of "guile and deception"; applicant found unfit); *Cargo Systems International. . .*, 22 F.M.C. 56 (1979) (applicant devised phony commission sales agent agreements with a succession of licensed forwarders but ran the forwarding operation himself with no semblance of being a mere employee or sales agent of the licensees; applicant found unfit). But compare decisions in which applicants have been found fit when they mistakenly arranged to use licensed forwarder's license numbers and were found to have operated without a license in violation of law, albeit unintentionally. See, e.g., *Gemini International Co.—Possible Violations of Section 44(a)*, 24 F.M.C. 893 (1982) (licensee unintentionally permitted unlicensed person to perform forwarding services on 290 shipments as employee of the licensed forwarder in a "branch office" but discontinued this activity when discovering that the "branch office" had not been properly opened under Commission regulations; licensee found fit to retain its license but paid $2,500 in settlement); *Paulssen & Guice Ltd.—Freight Forwarder License*, 24 F.M.C. 583 (1982) (applicant forwarded 922 shipments for two years using licensed forwarder's license in mistaken belief that as a former branch office it could continue to use the license but discontinued the practice when advised it was unlawful; found fit and agreed to pay $5,000 in lieu of civil penalties). As I indicate below, I do not classify Mr. Stettner's attempt to become a sales representative for Gateway as a deliberate scheme full of "guile and deception" because there is sufficient indication on the record that he believed his arrangement could conform to law and did not possess the necessary legal skills or knowledge to realize that his arrangement crossed the line from agency or employment to independent contracting between Intercorp as a forwarder in its own name and Gateway, a licensed forwarder. Were Intercorp's operations as a forwarder without a license the only problem in determining Intercorp's fitness, this proceeding would be easier to decide since the Commission has never held that past operations without a license act as an automatic, immutable bar forever to any applicant seeking to obtain a license if there are mitigating circumstances. See, e.g., *Independent Ocean Freight Forwarder Application—Air-Mar Shipping Co.,* 14 SRR 97, 101, 125 (I.D.), adopted, 14 SRR 1250 (1974); *Dixie Forwarding Co., Inc., Application for License,* 8 F.M.C. 109, 112 (1964), license granted on reconsideration, 8 F.M.C. 167; *Cargo Systems International (CSI)—Independent Ocean Freight Forwarder Application,* 22 F.M.C. 56, 71 (1979); *Fabio A. Ruiz,* cited above, 15 F.M.C. at 246; *Paulssen & Guice, Ltd.—Freight Forwarder License,* 24 F.M.C. 583, 589-590 (1982); *Kuehne & Nagel, Inc.—Independent Ocean Freight Forwarder License No. 1162,* 24 F.M.C. 315, 337-338 (1981).

The more difficult problem arises because while Mr. Stettner and Intercorp carried on a forwarding business without a license, Intercorp engaged in certain billing practices which in some instances fell below reasonable standards of honesty even though probably caused by economic hardships and pressures. I refer to Intercorp's unfortunate habit of concealing mark-ups on its invoices furnished to its clients but, more particularly, to its use of incorrect, "adjusted" insurance invoices. As described above (Summary of Evidence, paragraphs 34-42), Intercorp marked up its fees on its invoices covering such services as inland transportation, cartage, drayage, insurance, and consular costs. There is no prohibition in law against a business marking up its costs when it performs a service in order to realize a profit. Intercorp was not in business to be a non-profit charity donating its services to shippers for nothing. However, Mr. Stettner did two things in addition to the normal, accepted practice of marking up. First, he lumped his costs and mark-up together and presented to the shippers a charge for each service as a single figure so that the shipper could not tell whether the charge represented actual cost to Intercorp or cost plus profit nor, of course, what that margin of profit was. Second, and more seriously, in order to support some of the charges for cargo insurance which Intercorp billed its shipper clients, on five of the twenty-seven shipments forwarded by Intercorp, Mr. Stettner arranged to have his insurance broker prepare a second "adjusted" insurance invoice which showed a greater premium cost than the actual cost on the first and real insurance invoice that Intercorp actually paid the insurance broker. This second, artificial invoice was used as the basis of billing the shippers. Mr. Stettner explained that he utilized these artificial insurance invoices in order to secure profits "for lack of any other way known to us at the time," and that he was misled by the insurance broker, was young, naive, and without much money. He also explained that he marked up other costs in order to cover costs of other functions included in the particular services performed, e.g., costs of letter of credit collections and because of payment disputes with a British forwarder who apparently owed Intercorp money. Such explanations might explain why any business person has to mark up his or her goods or services. However, they do not explain why this practice had to be done in such a devious way.

As to the practice of marking up each service performed, although not violative of normal profit-making business codes, as I have indicated, it does run afoul of the standards of practice prescribed by the Commission in General Order 4. Although technically, since Intercorp did not have a license when it performed the forwarding services in question and was not therefore perhaps bound by General Order 4, that regulation was designed to enunciate reasonable standards of conduct to ensure decent behavior by licensed forwarders and protect shippers against underhanded, deceitful practices. The relevant portions of General Order 4 pertaining to forwarders' billing practices are now 46 CFR 510.32(c), 510.32(d), and 510.32(h) of General Order 4, as revised, effective October 1, 1981, previously 46 CFR 510.23(d), 510.23(e), and 510.23(j). These three sections of the regulations deal with the forwarder's duty not to knowingly impart to its shipper clients false information relative to any forwarding transaction, not to withhold information from the forwarder's client, and the forwarder's duty to itemize its charges separately and to show actual costs for these charges separately. (In the revision to General Order 4, however, this last duty has been somewhat modified so that forwarders, while still required to list actual costs for each charge, may, however, provide only a general lumpsum service fee for all services. (See 46 CFR 510.32(h), the present provision, as compared to 46 CFR 510.23(j), the previous provision.) These regulations obviously, among other things, serve the purpose of enabling shipper clients of forwarders to determine whether the forwarder is marking up on its fees and services and even how much, but under the present regulation, however, only generally as to the total service fee rather than as to the mark-up on each service performed. Shippers can therefore change forwarders if they believe the mark-ups too high. (Of course, they could change forwarders even without knowing the forwarders' mark-ups if they thought their fees were too high.) The greater offense to one's sense of integrity, however, is the use of false backup insurance invoices on the five shipments which could only have been used to induce shipper clients into believing that Intercorp's fees for obtaining cargo insurance were merely its actual costs without mark-ups. Mr. Stettner explained why he felt the need to do this and stated that no shipper complained. (One wonders what the shipper would say had he known about the practice, however.) But these excuses are not really valid. The phony invoice practice was plainly dishonest and although it was not as harmful as forwarders' absconding with shippers' funds or misusing shippers' funds for the forwarder's own private purposes rather than payment to ocean carriers, leaving shippers in great debt to carriers, it is inherently dishonest and deceitful. I cannot condone it. However, following many Commission decisions, I do not believe that Intercorp needs both to be penalized by paying what, for it, amounts to a significant monetary penalty, and also needs to be stigmatized permanently and forever banished from the forwarding business. Nor, in similar cases, does the Commission. For example, compare the recent case of *Chumet Shipping Co., Inc.—Freight Forwarder License*, 24 F.M.C. 609 (1982). In *Chumet*, among other things, the forwarder inflated the amount of insurance premiums it paid to insurance companies, marking up premium payments from 10 to over 100 percent without informing its clients of the true premium costs over almost three-years' period of time, realizing insurance profits of $152,836 in 1979. (24 F.M.C. at 618-619). Moreover, Chumet engaged in other unlawful practices, e.g., misrepresenting the selling price of certain merchandise by failing to disclose a five percent discount and failing to account to its principal for receipt of a claim on insurance. Yet Chumet was found fit to retain its license because of mitigating circumstances (employee responsible no longer with the company, discontinuance of the practice, sincere intention to comply with law in the future) (24 F.M.C. at 623-624). Chumet also agreed to permit unannounced audits of its books and to pay $20,000 over four years' time in lieu of civil penalties.

In another recent case, *Independent Freight Forwarder License No. 1483, Tokyo Express Co. Inc. and Kozo and Kathleen Kimura D/B/A Cosmos Trading Company*, 25 F.M.C. 339 (1982), the forwarder, among other things, on 29 shipments over a year and one-half invoiced shippers substantial amounts for payment of ocean freight above the actual ocean freight, overcharging shippers by $14,000, overcharged shippers for drayage in the amount of $2,062 over actual costs, billed shippers for forklift charges in the amount of $550 when there were no such costs on the shipment, overcharged shippers on the 29 shipments a total amount of $16,534.08, did not maintain receipts or documents to support its charges on the 29 shipments, and declared cubic measurements which were less than actual measurements of the cargo (presumably thereby underpaying ocean carriers). (25 F.M.C. at 346). However, the forwarder, a small company serving the Japanese community in San Francisco, fully cooperated with the Commission's staff and showed an intent to comply with law in the future, discontinued its connection with a shipper, and corrected its dilatory record-keeping and other past sloppy practices. In addition, the forwarder agreed to pay $15,000 in settlement of the issues of violations (raised to $20,000 by the presiding judge) and was found fit to retain its license, revocation being found an extreme sanction. (25 F.M.C. at 347).

Finally, in an even more recent case, violations similar to and even worse than those found in this case did not result in revocation of the forwarder's license, again with the full agreement of the Bureau. In the case, *Ramon Arguelles—Freight Forwarder License*, 25 F.M.C. 39 (1982), the forwarder, among other things, had for a time operated without a license which had been revoked for lack of a surety bond, issued invoices to its clients billing them for cartage and insurance without performing any services and co-mingled various components of insurance and accessorial charges, invoiced clients for more than actual costs of the insurance, adding other expenses to the insurance charges, and even entered into a scheme with a carrier whereby the forwarder overcharged the shipper using phony bills, received refunds from the carrier, and paid the refunds to other persons. Yet the forwarder was found fit to retain its license after consideration of mitigating circumstances and after settlement of the issues of violations and agreement to pay $35,000 in lieu of civil penalties and after agreeing to be subjected to an audit over a four-year period. The record in the *Arguelles* case showed that these various violations occurred over many months' time and affected 584 shipments while the forwarder had no license and numerous shipments (over 100) in connection with the other objectionable practices. As a result of the various incorrect billings and overcharges to shippers, the record in that case indicates well over $16,000 was involved in monies which were improperly withheld from shippers or carriers or paid to third persons. As noted, included among the activities of *Arguelles* was a plan by which an ocean carrier added a phony handling charge to a bill of lading so that it could later issue a correction and remit funds to the forwarder who then sent them not to the shipper but to a third person.

All of the above activity makes Mr. Stettner look like small potatoes. Mr. Stettner handled only 27 shipments and on five occasions used artificial insurance invoices to support Intercorp's own invoices on insurance. But even then he at least performed the service for the shipper for which he thought Intercorp was entitled to a mark-up and did not extract extra money from the shipper to turn over to third persons or withhold money from his shipper clients to which money they were entitled, things done by Arguelles. However, the Bureau entered into a settlement with Arguelles and there were mitigating factors (cooperation with Commission staff, discontinuance of the activities in question, sincere commitment to obey law in the future, limited period of time during which forwarder operated without a bond and without a license, less than two months without a bond and about five months without a license, the smallness of the forwarder's business and the dependence of the forwarder on future compliance with law for his business and livelihood). (25 F.M.C. at 46).

Ironically, in view of their present position, the Bureau of Hearings and Field Operations (speaking through Hearing Counsel) in the *Arguelles* case, after considering the above-described record of transgressions and the law favoring settlement of the issues of violations, argued in favor of a finding of fitness, stating that "The law is not totally inflexible, however, in regard to such sanctions [i.e., revocation or suspension of licenses for willful failure to comply with law] . . ." The Bureau proceeded to argue in the *Arguelles* case that "the Commission recognize[s] the persons holding a license are entitled to certain considerations, that section 44 of the Act is remedial, not a punitive statute, and that any regulatory agency ought to exercise its discretionary powers in a fair and consistent manner and fashion appropriate remedies to fit particular circumstances." (Bureau's Memorandum in Docket No. 81-42, April 9, 1982, p. 11, citing *E. Allen Brown—Independent Ocean Freight Forwarder License No. 1246*, 22 F.M.C. 583, 596).

In the *Arguelles* case, furthermore, the Bureau argued that the forwarder was fit, citing more Commission decisions holding that "even where in cases where the violation is clear, evidence of mitigation will be considered in tailoring the sanctions to the facts of the specific case" because "section 44 and its regulations are based on an underlying remedial public interest purpose and the sanctions imposed must serve such a purpose and not be punitive in character." (Bureau's Memorandum in Docket No. 81-42, p. 12, citing *Independent Ocean Freight Forwarder License E. L. Mobley, Inc.*, 21 F.M.C. 845, 847 (1979).) Finally, the Bureau also argued that "[p]ast violations, although a significant factor, do not automatically indicate that a freight forwarder is not fit; the violations must be considered in light of all the circumstances surrounding them. Revocation should only be imposed if, because of those circumstances, the licensee could not be trusted to refrain from violative conduct in the future. See *G. R. Minon-Freight Forwarder License*, 12 F.M.C. 75, 82 (1968)." (Bureau's Memorandum, p. 12). The Bureau then concluded that "[r]evocation would be a draconian, punitive action that would not further the underlying remedial public interest purpose of the Shipping Act" and "urge[ed] the presiding Administrative Law Judge to approve the proposed settlement and to find MCS fit to continue to be licensed as an independent ocean freight forwarder." (Bureau's Memorandum, cited above, pp. 12-13).

Denial of the License in This Case, Which the Bureau Urge, Would Depart From the Commission's Prevailing Decisions to Apply the Freight Forwarder Law Remedially and Without Resort to Unnecessarily Extreme Sanctions

The Commission, as noted in the preceding discussion, has developed a body of law in applying section 44 of the Act and its implementing regulation, General Order 4. Under it, the Commission recognizes the remedial nature of section 44 and the need to fashion reasonable, corrective orders when mitigating circumstances are present, in recognition of the needs and frailties of human beings, avoiding drastic sanctions of revocation or denial of licenses unless nothing short of such sanctions will work. As for proven violations, the Commission has also endorsed settlements embodying payments of money in the nature of fines to act as deterrents together with protective audits, reports, or similar types of surveillance. Thus, the Commission has tempered its decisions with a degree of understanding of the pressures of commercial life, by permitting the forwarder to continue its business notwithstanding past violations of law and has limited adverse action to fines, penalties, audits, reports, etc. This does not mean that in unusual cases of blatantly reprehensible or dishonest conduct carried on without just cause or excuse over a period of time with tangible harm to the shipping public where there is no evidence that the forwarder can be trusted to comply with law in the future, the Commission has never revoked or denied a license. Such cases are extreme, however, and, as the present case and recent Commission decisions indicate, the vast bulk of forwarder cases involve forwarders' errors and misconduct but with mitigating circumstances. In short, as was stated in another recent case, *Rodhe & Liesenfeld, Inc., Independent Ocean Freight Forwarder License No. 1832,* 25 F.M.C. 9, 21 (1982):

> . . . [T]he Commission seeks to fashion reasonable remedies and does not merely issue draconian decrees of revocation or suspension when such are unnecessary to achieve regulatory purposes. Moreover, the Commission has avoided such drastic sanctions even when the record shows . . . that there have clearly been willful violations of law. The Commission seems more concerned that it has evidence that a forwarder can be trusted in its future business behavior to adhere to all requirements of law and the Commission's regulations. (Case citations omitted.)

In a similar vein in another recent decision, *Arguelles,* cited above, 25 F.M.C. at 47-48, the decision corroborated the above-stated description of present status of law, stating:

On the one hand it has been held that where violations of the Shipping Act have occurred and it is believed the licensee will continue in the violative conduct, that licensee cannot be deemed fit to be so licensed. (Case citations omitted.) On the other hand, it has been held in [*Independent Freight Forwarder's License—E.L. Mobley Inc.* 21 F.M.C. 845, 847 (1979)] that:

> Administrative sanctions should not, however, be blindly or automatically imposed and even in cases where the violation is clear, evidence of mitigation will be considered in tailoring the sanctions to the facts of the specific case (footnote omitted). Section 44 and its regulations are based on an underlying remedial public interest purpose and the sanctions imposed must serve such a purpose and not be punitive in character (footnotes omitted);

and in *E. Allen Brown—Independent Ocean Freight Forwarder License No. 1246*, FMC Docket No. 79-16, 22 F.M.C. 583, 598 (1980), that:

> . . . Thus, the courts as well as the Commission have recognized that evidence of mitigation should be considered when determining whether a license applicant should be found to be fit although implicated in violations of the Act in the past (citations omitted). Furthermore, in previous cases the Commission has expressed its belief that the Freight Forwarder Law, P.L. 87-254, was enacted as remedial statute in order to correct abuses in the forwarding industry (citations omitted).
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> The principle that the Commission should not rush to extreme sanctions without considering all factors of mitigation in an effort to fashion a just and reasonable remedy is well supported by the courts. Although agencies are not required to impose sanctions in a perfectly even manner because of the wide latitude they are given by the courts as the expert bodies most skilled in devising means to carry out specific legislative purposes, the agencies are nevertheless expected to consider less drastic alternative remedies and to base whatever remedy they select on facts and reasonable interpretations of law (footnote omitted).

In view of the prevailing view of law followed by the Commission, it is difficult to understand the Bureau's hard-nosed position, namely, a $5,000 penalty and denial of a license without even a suggestion that Mr. Stettner could apply again some day in the future or might be permitted to operate with a license provided that he agree to periodic auditing, as so many previous forwarders have agreed. It is even more difficult to understand this abrupt change in position when one considers the three recent cases cited above, *Chumet, Tokyo Express,* and *Arguelles,* in which the Bureau urged that each forwarder be found fit to retain its license and continue its business subject to auditing, after settling other issues and agreeing that the forwarder could pay money in lieu of penalties, not to mention countless other cases in recent years in which the Bureau has urged findings of fitness where forwarders had been involved in a wide variety of dishonest or otherwise unlawful practices.[8] But as to the three recent cases cited, the Bureau's inconsistent position and abrupt change are rather astounding since the forwarders in those three cases were apparently more culpable than Mr. Stettner and were much larger operations. Thus, in *Chumet*, as noted, the forwarder inflated insurance premiums, concealed mark-ups, realized handsome profits, misrepresented the selling price of merchandise, and failed to account to the shipper for receipt of an insurance claim. In *Tokyo Express*, as noted, the forwarder substantially overcharged shippers on its invoices, billed shippers for charges which did not exist, misdeclared cubic measurements, etc. In *Arguelles*, as noted, the forwarder operated without a license, billed clients for services it had not performed, invoiced clients for more than actual costs without notifying the clients, and even carried on a scheme with a carrier to list phony charges, receive refunds from the carrier, and remit the refunds not to the shippers concerned but to other persons. Of course in each case the Commission found mitigating circumstances (discontinuance of the practices, sincere promise to obey law in the future, cooperation with the Commission's staff, smallness of Chumet's and Arguelles' businesses and dependence on them, etc.). But in each case the Bureau urged a finding of fitness and consideration of the mitigating factors. Why, then, is Mr. Stettner and Intercorp now to be excluded from similar consideration? In the context of the three cases cited, Mr. Stettner's offenses seem rather small and relatively harmless. On twenty-four shipments he handled most of the forwarding services under an arrangement with a licensed forwarder, Gateway Shipping, in which Mr. Stettner believed he had been the forwarder's sales representative. In three isolated instances in 1981, he yielded to two customers in his brokerage business because he was fearful of losing their accounts, thus jeopardizing his business which the record shows to have returned virtually no profit in its fiscal year 1981. Thus he carried on the business of forwarding without a license in the mistaken belief for most of the period that he could legitimately work with Gateway without obtaining his own license. In previous cases involving similar employment arrangements, the Commission has found them not to excuse the forwarder from the licensing requirement but, unless there was deliberate "guile and deception," it has also permitted the applicant to obtain a license. (*Paulssen & Guice*, cited above, 24 F.M.C. 583; *Gemini International Co.*, cited above, 24 F.M.C. 893).

[8] For example, see *Kuehne & Nagel, Inc.*, cited above, 24 F.M.C. 315.

Mr. Stettner's and Intercorp's other transgressions involved his billing practices in which he marked up charges without so indicating to his clients and in some instances even used artificial insurance invoices to justify his own invoices. But these offenses are no worse than and even milder than similar conduct of Chumet, Tokyo Express, and Arguelles, who concealed mark-ups, inflated insurance premiums, used phony charges, withheld money from shippers, mismeasured cargo, etc., affecting far more than 27 shipments and involving greater sums of money. Mr. Stettner may have induced shippers to pay his fees without disclosing his mark-ups but at least he performed the services and did not withhold money lawfully due to his shipper clients. The worse that can be said about him is that he concealed his mark-ups and sometimes induced shipper clients to believe that his fees for obtaining cargo insurance reflected only actual costs without any mark-up. For all of this, even with his customs house brokerage, air freight forwarding, and break bulk consolidation agency, Mr. Stettner and Intercorp realized the grand profit of $894.77 in 1981, $8,296.56 in 1980, and $414.84 in 1979. Moreover, Mr. Stettner, like the forwarders in the cited cases who were allowed to continue in business, cooperated with the staff during the proceeding and promises to obey law in the future, discontinued the forwarding activities, explaining his past transgressions in terms of his belief that his arrangement with Gateway was proper and that his billing practices and the last three shipments forwarded were caused by economic pressure or hardship or fears for his business's continued livelihood. Yet the Bureau, which accepted similar defenses and excuses from Chumet, Tokyo, and Arguelles, now resolutely reject them from Mr. Stettner, and want him banned from forwarding with no apparent hope of redemption. I find no reasonable basis for such abrupt inconsistency by the Bureau either on this record or under acceptable norms and relevant principles of law.[9]

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[9] The Bureau may wish to argue that there are distinctions between Mr. Stettner and Intercorp's defenses and those of Chumet, Tokyo Express, and Arguelles if the Bureau insist on following the hardnosed approach unlike that they followed in the three cases cited. One argument they have already made is that Mr. Stettner was warned four times by the Commission's Office of Freight Forwarders and perhaps twice more by Commission employees. But a close look at the warnings shows that they were contained in general form letters and application packages instructing anyone applying as to the prohibitions of section 44. As to Mr. Breslaw, it is not clear whether he specified in his interview with Mr. Stettner that the Gateway arrangement was definitely unlawful (Tr. 27) nor did he provide detailed descriptions of unlawful forwarding. (Tr. 27; Summary of Evidence, para. 30). Mr. Klapouchy appears to have been more definite about the unlawfulness of the Gateway arrangement, however. (Summary of Evidence, para. 12). However, informal advice from staff members, even if correct, does not constitute formal findings by the Commission nor cease and desist orders. A person has the right to obtain a formal Commission finding after hearing and is not required to cease doing business he believes to be lawful but which staff members believe to be unlawful. See 46 CFR 510.16(h) (right to a hearing after letter of intent to deny license application).

Another argument by the Bureau is that Mr. Stettner signed forms and stated that he had read and understood section 44 of the Act and General Order 4. Therefore, the Bureau castigate him for

Continued

Agencies Are Supposed To Apply Their Standards Consistently and Treat Similarly Situated Persons Equally But if They Depart From Precedent, to Explain the Departure Fully

I find that Intercorp deserves the chance to operate a forwarding business with a license albeit after paying a civil penalty for past violations and being subjected to surveillance, findings which I believe to be fully consistent with Commission precedent as it has evolved. However, because the Bureau is taking such a rigid contrary view and has made such an abrupt change from its previous positions in the recent cases cited, I believe a brief explanation of the principles of law governing consistency in administrative decisions would be helpful.

Very briefly, it is recognized and expected in administrative law that agencies will develop standards, will follow them consistently, and will not depart from them unless they provide adequate explanations for such departure. Furthermore, it is expected that agencies will treat similarly situated persons equally. For example, when the Interstate Commerce Commission granted a certificate to operate to one motor carrier but denied it to another in a similar position, the court stated:

> There must be, however, a rational basis for the agency's action. (Citations omitted.) Patently inconsistent application of agency standards to similar situations lacks rationality and is arbitrary. (Citations omitted.) . . . Thus, the grounds for an agency's disparate treatment of similarly situated applicants must be reasonably discernible from its report and order. (Citation omitted.) The commission's decision does not meet these requirements. Under substantially similar circumstances, Contractors and Russell received markedly different treatment. The commission stated no basis for its uneven disposition of the two applicants. . . . If the commission does not alter its decision, it should explicitly state its reasons for the apparently inconsistent treatment. . . . *Contractors Transport Corp. v. United States*, 537 F. 2d 1160, 1162 (4th Cir. 1976).

In another decision concerning an agency's inconsistent decisions, Judge Brown of the Fifth Circuit stated in *Mary Carter Paint Co. v. F.T.C.*, 333 F.2d 654, 660 (5th Cir. 1964), rev'd on other grounds, 382 U.S. 46 (1965):

> Our complex society now demands administrative agencies. The variety of problems dealt with make absolute consistency,

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violating section 44 and the standards of G.O. 4. But such statements are routine on applications so that every time any forwarder fouls up on G.O. 4, he can be accused of a separate offense or violation of the statements made in the original forwarder application. I have not seen any previous Commission decisions punishing forwarders on such grounds in addition to the violations of the regulations and law themselves. Some provisions of law and regulations are, moreover, sufficiently complicated so that reasonable persons can differ on their interpretations. Should the erroneous interpreter be punished not only because he followed the wrong interpretation but because he had once stated that he had understood the law or regulation?

> perfect symmetry, impossible. And the law reflects its good sense by not exacting it. *But law does not permit an agency to grant to one person the right to do that which it denies to another similarly situated. There may not be a rule for Monday, another for Tuesday, a rule for general application, but denied outright in a specific case.* (Emphasis added.)

Very recently the court had occasion to rebuke an agency for treating a particular applicant under a civil service examination differently than similarly situated other applicants for no discernible reason, stating in *Jesse I. Etelson v. Office of Personnel Management*, 684 F.2d 918, 926 (D.C. Cir. 1982):

> Government is at its most arbitrary when it treats similarly situated people differently.

There are countless other court decisions emphasizing the need for consistency or, if policy is to change, for reasoned explanation for the change. See, e.g., *Greyhound Corp. v. I.C.C.*, 551 F.2d 414, 416 (D.C. Cir. 1977), and the many cases collected and discussed in Davis, *1982 Supplement to Administrative Law Treatise*, § 17.07. See also the interesting case of *N.L.R.B. v. Sunnyland Packing Co.*, 557 F.2d 1157, 1161 (5th Cir. 1977) where, according to Professor Davis (op. cit., p. 260) the court allowed the agency to follow its most recent decisions without further explanation although it had gone the other way in the past.

This discussion does not mean that agencies cannot change their policies. However, in this case, I see no basis for the abrupt change from current precedent shown in *Chumet, Tokyo Express, Arguelles,* and so many other cases, by which forwarders are given an opportunity to do business under surveillance notwithstanding past violations of law but must pay fines or penalties and undergo certain auditing or other types of surveillance, unless there are no mitigating circumstances and their conduct has been flagrantly dishonest with no signs of future redemption. Abruptly changing current law to conform to the Bureau's hard-nosed position when the record shows this applicant to be no worse and less culpable than other Persons allowed to receive or retain licenses cannot be supported on this record. Furthermore, the danger of such an abrupt change in which this one applicant in a formal proceeding before the Commission suffers rejection not expected from previous decisions is that confidence in the entire administrative system suffers. As one authority in the field states it:

> The lack of definite standards deprives applicants of sufficient notice, allows retroactive application of new policy, prevents the growth of precedent and leads to a cynical public suspicion of a "corrupt" commission. S. Breyer and R. Stewart, Administrative Law and Regulatory Policy (Little Brown & Co. 1979), p. 373.

As I have indicated, I believe Mr. Stettner and his Intercorp company are as fit to receive a forwarding license as Chumet, Tokyo Express, and Arguelles, as well as other forwarders who have reached settlements with the Bureau and, for a variety of violations of law, have paid fines and undergone auditing or monitoring of their businesses. As I have also indicated, I find Mr. Stettner's defenses and excuses as valid as the ones accepted in past cases cited (discontinuance of the objectionable practices, promises to behave in the future, cooperation with the Bureau during the proceeding, mistaken belief of the law involved, etc.). But to provide the Commission with the flavor of this applicant's own defense and plea, I quote his own words from a statement (Ex. D) which he read into the record at the hearing (Tr. 43-44). Thus, he states in his own defense and in pleading for a license:

> This case and any "alleged violations" of the law incurred by Robert Stettner/Intercorp Forwarders, Ltd. should be viewed within the context of:
>
> a. The naivete and extreme hardship experienced by Robert Stettner/Intercorp Forwarders, Ltd. during its early days of business.
> b. The repeated denials of license to Robert Stettner/ Intercorp Forwarders, Ltd.
>
> Robert Stettner/Intercorp Forwarders, Ltd. commits itself to the achievement of greater understanding of the laws which govern the perimeters of its activities.
>
> We hope the Commission will view our case with understanding of the business realities faced by Robert Stettner/Intercorp Forwarders, Ltd. in its early days of business and Robert Stettner/Intercorp Forwarders, Ltd.'s present clarified understanding of the law and grant Intercorp Forwarders, Ltd. an independent ocean freight forwarder license with Robert Stettner as its qualifying officer.

I find that Robert Stettner/Intercorp Forwarders should be given a chance to operate his business and that, considering that he filed his present application in October 1980, has been waiting long enough for a license. However, consistent with Commission precedent, like other similarly situated forwarders, he should pay a reasonable civil penalty and be monitored by auditing conducted by Commission investigators, as I now explain.

Penalties and Future Surveillance

After permitting persons to continue forwarding businesses notwithstanding past violations of law, the Commission customarily fixes upon a reasonable civil penalty and maintains periodic surveillance over the forwarder to ensure further against recurrence of objectionable practices. Fixing an amount of penalty is not an exact science. However, there are certain recognized criteria which are applied which, to some extent, are also applied in settlements. For example, the standards found in the Commission's regulations pertaining to settlements, 46 CFR 505.1 which incorporate such criteria as cost of collecting claims, enforcement policy (i.e., deterrent effect), and ability to pay are factors which have been considered. *Arguelless*, cited above, 25 F.M.C. at 45. However, mitigating factors are also considered, such as cooperation with investigators and the voluntary taking of corrective action. See, e.g., *Continental Forwarding Inc.*, 23 F.M.C. 623, 630-631 (1981); *Behring International*, 23 F.M.C. 973 (1981).

Ability to pay is also an important factor that has been considered. See *Emmett I. Sindik—Freight Forwarder License Application*, 23 F.M.C. 731 (1981); *Billie Ione Crtalic et al.—Possible Violations of Section 44(a)*, 23 F.M.C. 565 (1981); *Kuehne & Nagel, Inc.*, cited above, 24 F.M.C. at 332-333. Sometimes, moreover, if the degree of culpability is especially low and a person believed in good faith that he had not violated law and is free of past offenses, no penalty at all may be warranted. See Docket No. 81-59, *General Transpac System—Possible Violations of Section 15, Shipping Act, 1916*, 25 F.M.C. 269 (1982).[10] Furthermore, in order to alleviate the burden of penalties otherwise justified, the Commission permits installment payment schedules over a period of months or even years. See, e.g., *Chumet Shipping Co., Inc.*, cited above, 24 F.M.C. 609 (payments to be made over four years' period of time); *Tokyo Express Co., Inc.*, cited above, 25 F.M.C. at 348 (payments to be made over three years); *Gemini International Co.*, cited above, 24 F.M.C. at 898 ($2,500 payment per each respondent payable over two years); *Arguelles*, cited above, 25 F.M.C. at 45 ($35,000 over five years).

In the last analysis, while these factors are helpful, determining a reasonable amount of civil penalty seems to require an element of subjectivity and a belief by the decision-maker that the penalty is not out of proportion to the violation which has occurred and that it will serve a salutary deterrent purpose while not bludgeoning a person out of business. In this case, there have been mitigating factors noted earlier, for example, the belief by Mr. Stettner that his arrangement with Gateway was legal, his furnishing of all requested records to the Bureau even though they damaged his chances for a license, the termination of his arrangement with Gateway in February 1981 before waiting for a formal decision of the Commission finding it invalid, business pressures from his customs house brokerage customers to handle three more shipments and fears of jeopardizing his business if he had refused, his promises to comply with law in the future and, finally, his refusal to do any more forwarding despite requests and an obvious need for more

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[10] This decision contains a good discussion of the standards employed in assessing penalties, including ability to pay, mitigating factors, etc.

income because of his company's poor financial position, pending Commission decision. Even the Bureau, which otherwise have resolutely insisted upon the most extreme sanction, i.e., outright denial of a license, acknowledge that Intercorp's "relatively precarious financial status" induced the Bureau to reduce the amount of penalty recommended from $20,000 to $5,000. I believe, however, that even a $5,000 penalty might throw little Intercorp over the line into a non-profit situation. In other words, I find little sense in granting a license to Intercorp to enable it to resurrect itself from its current financial distress while at the same time imposing a financial burden of $5,000 which is about five times Intercorp's net income before taxes for its fiscal year 1981 ($1,078.03) (Ex. E). Even if Intercorp could restore itself to its best previous year, fiscal 1980, when its net profit, before taxes, was $9,995.85, and it was operating under its arrangement with Gateway, a $5,000 penalty amounts to about 50 percent of that profit which partially came from lawful non-forwarding services.

The Bureau believe, however, that $5,000 is fair although they do not suggest how Intercorp is to pay such a sum or even suggest a schedule of installment payments such as the type of schedule they have so often entered into with other forwarders to spread the burden over a period of time as the cases cited above show. Again, I find that the Bureau's approach lacks balance and understanding of the pressures facing a small business like Intercorp and appears to single out Intercorp from previous forwarders for special harsh treatment in an abrupt change from previous positions of the Bureau. The Bureau, however, cite the fact that when one totals all fees, forwarder compensation, and mark-ups realized by Intercorp over the three-year period on the 27 shipments, Intercorp received about $12,000. Included in this figure, however, are gross revenue, e.g., forwarder's fees and compensation, not net profits, although the other components of this figure consist of the amount of mark-ups over Intercorp's costs. Even so, as I have noted, the Bureau does not urge a penalty of $12,000 out of their concern over Intercorp's "relatively precarious financial status."

I would assess a civil penalty of $3,000 and permit Intercorp an installment schedule not to exceed three years. I do this after seeing Intercorp's income statements for the past three fiscal years in this record and noting a decline over that period of time in its gross revenues, a net income in fiscal 1981 of only $894.77, after taxes, on gross income of slightly over $58,000 and a net worth and working capital of less than $15,000. I also consider the fact that during the bulk of this time, on 24 out of the 27 shipments forwarded without a license, Mr. Stettner thought he was operating under a valid arrangement as a sales representative and that his mark-ups, except for those associated with the five artificial insurance invoices, were normal business practice albeit his failure to identify mark-ups is a violation of General Order 4 which, not believing he was an independent forwarder, he would not have been following. Finally, I note that the most objectionable of his practices, the use of artificial insurance invoices on five shipments which, by the way, he used only between August and December of 1978 and not thereafter (Ex. A, Schedules A & C), recovered mark-ups of just under $3,000, which is a gross figure since federal income taxes would have to be paid on that amount. (Ex. A, Schedule C, actually $2,993.20 gross). A penalty of $3,000 would, therefore, more than remove all profit derived from that regrettable practice, and, if spread over about three years' time for payment, should permit Intercorp to operate as a forwarder without possibly placing it into a loss position for the first three years of its existence as a licensed forwarder. In considering Intercorp's limited ability to pay because of its shaky income position and attempting to permit Intercorp to pay a civil penalty over a future period of under three years, as I recommend below, and rejecting the view that Intercorp should cash in some of its assets of working capital to pay a penalty immediately, I am following past decisions in which ability to pay has been especially significant in devising the amount and form of payment. I cite *Emmett I. Sindik*, cited above, 23 F.M.C. at 738, especially. In that case the presiding judge reduced the Bureau's recommended penalty (for three forwarded shipments without a license) from $3,000 to $1,000 and suggested payment of that amount out of future earnings after the applicant's license would be granted. Although applicant had assets worth over $5,000, the presiding judge reduced the penalty to $1,000 rather than require applicant to liquidate three-fifths of his assets and, as noted, suggested payment out of future earnings. It is true that in *Sindik* there were other mitigating factors (minimal revenue received from the three shipments, no pattern of deliberate circumvention of the Act). However, ability to pay without undue hardship was uppermost on the mind of the presiding judge, as the decision cited clearly shows. Similarly, I see no basis to order Intercorp to extract $5,000 or even $3,000 from its last year's net worth/working capital of $15,000 but would also allow Intercorp to pay off the $3,000 penalty from future earnings.[11]

I would, therefore, fashion a penalty payment schedule comparable to those fashioned in similar cases, requiring payments every six months in installments of $500 each, commencing 30 days after adoption or administrative finalizing of this Initial Decision, and, similarly following such schedules, require payment of interest on the unpaid balance at 12

[11] Interestingly, Mr. Sindik was found fit to obtain a license notwithstanding past violations. Moreover, the record showed that he had a customs house brokerage license and a good reputation as a broker and that he had lost income because of the delay in awaiting processing of his application for a license. (23 F.M.C. at 737). Mr. Stettner also has such a broker's license and has also been waiting for a decision on his application and has stopped all forwarding since August of 1981 despite requests from shipper clients to perform forwarding services.

percent per annum with payment in full of the remaining balance in case of default, as is commonly done under such schedules. (See, e.g., the Promissory Note attached to the slip opinion in *Arguelles*, cited above, Docket No. 81-42, 25 F.M.C. 39 (1982).

Finally, as is done in the numerous settlement agreements which the Commission has sanctioned, I would maintain surveillance over Intercorp's operations during the life of the payment schedule by having periodic audits by Commission investigators to ensure that Mr. Stettner is correctly interpreting those provisions of General Order 4 requiring itemizations of its actual costs in its invoices to shippers and requiring a separate showing of its total service fee. 46 CFR 510.32(h). See *Arguelles*, cited above, 25 F.M.C. at 45; settlement agreement attached to slip Initial Decision, paragraph 3; *Chumet*, cited above, 24 F.M.C. 609.

Summary of Particular Factors Favoring a Grant of the License

As to the Bureau's contentions that Mr. Stettner and Intercorp are unfit because he cannot be trusted to follow law and Commission regulations if Intercorp is licensed because of past violations, concealed mark-ups, and continued operations after warnings from the Commission's staff, there are five responses. First, as Intercorp itself noted, the Commission has previously rejected arguments against licensing on the basis of speculation as to what the forwarder might do in the future. In *Independent Ocean Freight Forwarder Application—Sequoia Forwarders Co.*, cited above, 19 F.M.C. at 189, the Commission granted a license, stating that:

> What an applicant might do, if licensed, is insufficient to justify the denial of a license if that applicant is otherwise qualified in fact and in law. Once licensed, however, the forwarder is subject to all the Commission's rules and regulations and any conduct or activity can be handled in an appropriate proceeding.

Second, as the above quotation suggests, if there is any future recurrence by Intercorp of conduct of the type described above, the Commission can take steps to institute action leading to suspension or revocation of the license.

Third, as has been done in so many forwarder cases as a condition of licensing, the forwarder may be subject to auditing and monitoring for a limited period of time to guard against recurrence of previous objectionable conduct. Such monitoring can be instituted in this proceeding.

Fourth, although the Bureau believe Mr. Stettner's character to be suspect because of past practices, of which five were bordering on deception, the U.S. Department of the Treasury saw fit to confer on him a customs house broker's license after conducting its own examination and investigation of him between April and August 28, 1978, when it issued him a license. (Tr. 50-51; Ex. C, Appendix X). Treasury

Department laws and regulations pertaining to licensing of such brokers require licensees to be "of good moral character" and subject licenses to revocation if the broker is "incompetent, disreputable," or guilty of fraudulent conduct. Moreover, applicants are subjected to investigations as to their "knowledge" of customs laws and regulations and "fitness to render valuable service to importers, exporters . . ." and as to their "business integrity." See 19 U.S.C.A. § 1641(a); § 1641(b); 19 C.F.R. 111.11(a)(3); 19 C.F.R. 111.13(a); 19 C.F.R. 111.14(a) and (d); 19 C.F.R. 111.14(c)(2); 19 C.F.R. 111.16(b). The fact that the Treasury Department thought enough of Mr. Stettner as of August 1978 to grant him a license is certainly some indication of good character and reputation even if he committed transgressions of the Shipping Act thereafter as he did. Evidence of an applicant's good reputation as a customs house broker has been considered in at least one forwarder case. See *Emmet I. Sindik,* cited above, 23 F.M.C. at 737.

Fifth, although the Bureau argue that Mr. Stettner may well follow applicable law only when it is convenient for him to do so if Intercorp is granted a license, the record shows that he stopped using artificial insurance invoices as of December 1978, that he discontinued forwarding under the Gateway arrangement in February 1981 and handled no forwarding except three shipments handled under pressure for two important clients in his brokerage business, the last in August 1981, and has resolutely rejected requests to perform forwarding from these two important clients as well as other shippers despite the loss of income that such rejections meant. (Tr. 39; 92-93; Ex. D). If Mr. Stettner's character is so weak as the Bureau seem to fear, and if he is prone to devious practices, would not Mr. Stettner have yielded to temptation by now, in view of his company's obvious need for revenue, and done some forwarding while concealing any record of it so as not to prejudice his application, as Mr. Stettner himself remarked at the hearing? (Tr. 93). But, states Mr. Stettner (Tr. 93-94):

> For whatever the reasons, I could have made far more money in 1981 had I done these things, and I didn't. I'm trying to plant the roots of my company on a firm and legal basis for the future. . . . I have now an enhanced understanding of the law as explained to me by Mr. Hunter in our prehearing conferences, and if I am fortunate enough to receive this license, I will abide with the law to the letter.

In short, I find no more reason on this record to find Mr. Stettner any more unfit or untrustworthy than the forwarders in *Chumet, Tokyo Express, or Arguelles,* cited above, all of whom were found fit with the backing of the Bureau.

ULTIMATE CONCLUSIONS

Intercorp Forwarders Ltd., through its President and sole salaried employee, Mr. Robert Stettner, has sought an ocean freight forwarder's license since October 1980 in the name of Intercorp. After having been advised that Intercorp would be denied such license by the Commission's staff pursuant to Commission regulations, Mr. Stettner requested a hearing. The Commission granted him and Intercorp a hearing to determine whether Intercorp had carried on the business of forwarding without a license in the past, in violation of section 44 of the Act and had engaged in certain questionable billing practices and had disguised mark-ups on its fees and, if so, whether Intercorp was fit to obtain a license and should pay civil penalties.

The hearing disclosed that Intercorp had carried on forwarding without a license under an arrangement with a licensed forwarder known as Gateway Shipping, in which Intercorp performed most of the forwarding services on 24 shipments during 1978 through early 1981, Gateway performing limited services, and on three later shipments in 1981, Intercorp performed the forwarding entirely on its own, having terminated the arrangement with Gateway in February of 1981. Moreover, Intercorp marked up its service fees without identifying the mark-ups to its shipper clients and on five occasions used artificial insurance invoices to disguise mark-ups. Intercorp and Mr. Stettner operated with Gateway in the belief that he had a valid arrangement as Gateway's sales representative, thereby not requiring his own license. After Intercorp terminated the arrangement with Gateway in February 1981 during the course of this proceeding. Intercorp forwarded three more shipments for two of its customs house broker clients in the belief that it would lose their business vital to its existence if it refused. Its disguised mark-ups were used in the belief that such practices were necessary to obtain a profit. Mr. Stettner pleads economic hardship and misunderstanding of the applicable law during the relevant period of time and promises to conform to law if given a license and cites the fact that he terminated his forwarding, although later requested by clients to perform forwarding, pending Commission decision. He also states that he has been trying since October 1980 and even since 1977 to obtain a license and has obtained a customs house broker's license after passing an examination and undergoing an F.B.I. investigation, facts he cites as evidence of his fitness.

Denial of a license plus a penalty of $5,000 with no chance at redemption, as the Bureau urge, marks a radical departure from Commission precedent and current law which permits persons to obtain or retain license notwithstanding past violations of law absent flagrant abuses of law but with mitigating factors but imposes civil penalties for the violations and requires a certain degree of monitoring and auditing to ensure continued compliance with law. In three recent forwarder cases, moreover, in which the respondents seemed more culpable than Mr. Stettner and Intercorp by operating without licenses, using phony invoices, withholding shippers' moneys, etc., the Bureau urged findings of fitness, after settling the issues of violations. The Commission approved the settlements, found fitness, granted or allowed licenses, imposed fines, and required auditing of the forwarders' records in finalizing these three cases. Imposing a more severe sanction against Intercorp than was done in the three cases, which are typical of many others, would be unfair and arbitrary according to the prevailing views of sound administrative law.

Intercorp should be and is found fit, and should be and is given a chance to conduct a forwarding business subject to periodic auditing and payment of civil penalties in the amount of $3,000 spread within a three-year period. This amount is determined after consideration of numerous mitigating factors but especially the precarious financial condition of Intercorp and the danger that a greater penalty might disable the company from getting its business underway by imposing too great a financial onus at the very outset of its struggle to succeed.[12]

(S) NORMAN D. KLINE
Administrative Law Judge

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[12] Because Mr. Stettner is not an attorney and has represented his own corporation without familiarity with the Commission's rules of practice and procedure, I advise him that both he and the Bureau have the right to file exceptions to this Initial Decision within 22 days after the date of service and, furthermore, to file replies to the Bureau's exceptions within 22 days after the Bureau serves their exceptions. 46 Code of Federal Regulations, section 227(a). Furthermore, as done with Respondent's Opening Memorandum of Law, he should file an original and 15 copies for the Commission's use as well as mailing one copy to Hearing Counsel. 46 Code of Federal Regulations, section 118(a). Mr. Stettner should also realize that this decision is initial only and may be reversed, modified, or adopted by the Commission after the Commission considers the exceptions and replies to exceptions or, if none are filed, reviews the decision on its own motion if it chooses to do so.

FEDERAL MARITIME COMMISSION

DOCKET NO. 80-52

AGREEMENTS NOS. 10186, AS AMENDED, 10332, AS AMENDED,

10371, AS AMENDED, 10377, 10364 AND 10329

Agreements Nos. 10364 and 10371, space charter agreements, approved subject to certain reporting requirements.

Agreement No. 10332, approved subject to certain reporting requirements and on condition that the revenue pooling provisions be deleted.

Seymour H. Kligler and *David R. Kay* for proponents of Agreement No. 10186.

Dennis N. Barnes for proponents of Agreement No. 10329 and Agreement No. 10377.

Charles F. Warren and *George A. Quadrino* for proponents of Agreement No. 10332 and Agreement No. 10371.

Donald J. Brunner for proponents of Agreement No. 10364.

John M. Ridlon on behalf of Sea-Land Industries, Inc., as to Agreement No. 10364.

Robert T. Basseches and *Timothy J. Shuba* for protestant American President Lines, Ltd.

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

Paul McElligott for protestant Sea-Land Service, Inc. as to Agreement No. 10332-1.

Russell T. Weil and *Daniel M. Conaton* for protestant United States Lines, Inc.

Charna J. Swedarsky, Alan J. Jacobson and *Paul J. Kaller* for the Commission's Bureau of Hearings and Field Operations (Hearing Counsel).

REPORT AND ORDER

December 22, 1982

BY THE COMMISSION: (ALAN GREEN, JR., *Chairman*; THOMAS F. MOAKLEY, *Vice Chairman*; JAMES JOSEPH CAREY AND JAMES V. DAY, *Commissioners*)

This proceeding was initiated to determine whether six space chartering agreements among Korean-flag carriers and other carriers in the U.S./Korea/Far East trades should be approved or, if currently approved, remain approved pursuant to section 15 of the Shipping Act, 1916 (46 U.S.C. § 814).[1]

[1] The Commission's Order of Investigation and Hearing also directed the parties to address the following issues:

Continued

Administrative Law Judge William Beasley Harris (Presiding Officer) issued an Initial Decision in which he concluded that all the agreements under investigation, except two withdrawn or terminated[2] during the course of the proceeding, should be approved or continue approved.[3]

The proceeding came before the Commission upon the Exceptions of the Bureau of Hearings and Field Operations (Hearing Counsel), and protestants Lykes Bros. Steamship Co., Inc., and American President Lines, Ltd. (APL). The other protestants which participated in the proceeding before the Presiding Officer did not file exceptions or replies thereto.

THE AGREEMENTS

There are now only three agreements remaining at issue in this proceeding: Agreements Nos. 10332, 10332-1, 10332-2, 10371-1, 10364 and 10364-1. All three were granted approval *pendente lite.*

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1. whether and to what extent approval of any or all of the subject agreements will significantly affect the availability of waivers to shippers seeking to transport cargo on non-Korean flag vessels;
2. whether and to what extent approval of any or all of the subject agreements will significantly affect cargo capacity in the United States trades with Korea;
3. whether approval of any or all of the subject agreements will adversely affect rate stability in the United States trades with Korea;
4. whether approval of any or all of the subject agreements will result in unjust discrimination or unfairness against non-signatory carriers serving the United States trade with Korea;
5. the manner in which approval of any or all of the subject agreements will affect voting patterns within steamship conferences operating in the United States trades with Korea;
6. whether approval of any or all of the subject agreements is consistent with existing treaties of friendship, commerce, and navigation between the United States and other nations whose interests are represented in the United States trades with Korea;
7. whether the imposition of the waiver system by the Korean Government under its Maritime Transportation Promotion Law and other governmental cargo control activities have forced third-flag carriers to enter into these space charter agreements in order to have reasonable access to cargo in the U.S.-Korean trades; and
8. if the waiver system and other cargo control activities of the Korean Government have forced third-flag carriers to enter these space charter agreements, whether the agreements are so impregnated with unilateral government action as to be, in reality, non-commercial agreements over which the Commission should take no jurisdiction under section 15 of the Shipping Act, 1916.

[2] Agreements Nos. 10377 and 10329 were withdrawn and terminated, respectively.

[3] Subsequent to the issuance of the Initial Decision, APL filed a motion to reopen the proceeding which was supported by Lykes and Hearing Counsel. APL's motion was based on two events which allegedly had a bearing upon Agreement No. 10186. These were the acquisition in late December, 1980, by the owners of OOCL of a 51% interest in Seapac Container Services and the entry by the parties to Agreement No. 10186, and Neptune Orient Lines, into a agreement, Agreement No. 10409. If approved, Agreement No. 10409 would have superseded Agreement No. 10186. APL felt that these events warranted reopening the proceeding for the limited purpose of developing a record which would reflect their impact on the approvability of the agreement. Subsequently, Agreement No. 10409 was withdrawn and Agreement No. 10422, a new space charter agreement among the Korean Shipping Corporation (KSC), Neptune Orient Lines (NOL) and Orient Overseas Container Lines (OOCL) was filed to supersede Agreement No. 10186. By Order dated March 3, 1982, the Commission conditionally approved Agreement No. 10422. The conditions were met and the agreement approved on March 16, 1982. With the demise of Agreement No. 10186, APL's motion to reopen has been overtaken by subsequent events and rendered moot.

Agreement No. 10332, originally approved by the Commission on November 13, 1978, between Korea Marine Transport Company (KMTC) and Nippon Yusen Kaisha (NYK) provides for each to operate a 1,050 TEU container vessel in a direct service between Korea and the U.S. Pacific Coast, including Hawaii and Alaska. It also permits KMTC and NYK to charter space to each other on terms as they may agree. Under the agreement, sailing schedules are coordinated and revenues from containerized cargo are shared equally. Each carrier operates its own service and issues its own bills of lading. KMTC serves as NYK's agent in Korea and NYK serves as KMTC's agent in the U.S. Empty containers and related equipment may be interchanged as required and each party may, upon 90 days' written notice to the other, withdraw from the agreement. Agreement No. 10332 contains Commission imposed reporting requirements and was due to expire on June 30, 1980. Agreement No. 10332-1 would extend the term of the basic agreement through July 1, 1983.

Subject to a limitation of 80 TEUs per week, Agreement No. 10332-2 would permit NYK to carry containers transshipped at Korean ports as part of a through movement to or from Hong Kong and Taiwan.

Agreement No. 10371, approved August 16, 1979, permits KMTC and NYK to subcharter collectively up to 420 TEU's per month to Showa Lines, Ltd. Showa must issue its own bills of lading and is responsible to its customers for the carriage of their cargo. It is also required to carry only that cargo that moves directly between Korea and the U.S., with no intervening ports of call. Showa may not carry any cargo booked, forwarded, transshipped, or feeder-fed to or from Japan or any other East Asian nation. Agreement No. 10371 was scheduled to expire on June 30, 1980. Agreement No. 10371-1 extends the basic agreement through July 1, 1983, and also permits NYK to serve other trades in the commerce between the U.S. and the Far East. The cargo carried outside of the U.S./Korea trade would not be subject to revenue sharing but would be subject to the agreement's reporting requirements.

Agreement No. 10364 permits Sea-Land Service, Inc. and Hanjin Container Lines, Ltd. to charter up to 10,500 TEU's eastbound and 10,500 TEU's westbound per quarter on each other's vessels in the trade between the U.S. West Coast and Japan and Korea. Neither carrier may charter more than 70 percent of the eastbound or westbound total from the other, and no more than 70 percent of the vessel capacity of any one-way voyage may be chartered. The agreement also contains reporting requirements concerning vessel capacity and the number of TEU's and revenue tons chartered by each carrier. Cargo required to be carried by U.S.-flag vessels under U.S. cargo preference laws is not subject to the terms of this agreement. Agreement No.

10364 was approved on January 14, 1980, and is not scheduled to expire until January 8, 1983.

POSITIONS OF THE PARTIES

Agreements Nos. 10332 and 10371

KMTC, NYK and Showa maintain that approval of Agreement No. 10332 will permit the introduction of a direct non-stop service in the Korea-U.S. Pacific Coast trade with less tonnage than would otherwise be required to maintain a viable service. It is argued that this will, in turn, contribute to rate stability and will benefit the environment. Moreover, proponents argue that by scheduling their sailings, they are able to use only a single berth at ports in Korea and the United States thereby relieving terminal congestion.

The proponents argue that the additional carryings permitted by Agreement No. 10332-2 will have a *de minimis* impact on the trade while increasing competition by introducing a new service into the Hong Kong/Taiwan trade. By filling these additional 80 TEU's, NYK argues that it would increase its utilization under the agreement by more than 10 percent.

The proponents further contend that without revenue sharing allowed it Agreement No. 10332 would be less effective as a rationalizing device because neither party could be expected voluntarily to share its area of expertise with the other.

Both Agreements Nos. 10332 and 10371 are viewed by APL as the initial stage of the Korean Government's program to secure for Korean carriers 40% of the U.S.-Korean trade cargo. APL alleges that as a result of the Korean Government's promotional activities, cargo carryings on Korean-flag vessels in the U.S.-Korean trade have grown from a few percent in 1978 to over 20% in 1979 while the U.S.-flag carriers' share declined by 25% eastbound and more than 30% westbound between 1978 and the first half of 1980.

APL observes that the justification for the agreements is based upon the premise that absent approval of the agreements, proponents of Agreement No. 10332 will *individually* provide the service now performed *jointly* under the agreements. APL argues that the third-flag members of the agreements will simply leave the trade rather than attempt to compete without the preferred status conferred by the subject agreements. Moreover, it is said that the Korean-flag carriers are underutilized and would not aggravate that situation by adding additional vessels. APL notes that Agreement No. 10332 allows the sharing of profits and use of common agents. It does not believe that these elements of the agreement can be justified on the basis that NYK requires KMTC's Korean contacts to gain access to the Korean market and that KMTC needs protection from ordinary market forces while it learns to operate a container service. APL notes that NYK is one of the world's major ocean carriers and that KMTC is hardly inexperienced as it operates a total of 18 vessels. APL believes that Agreement Nos. 10332 and 10371 should be disapproved, or in the alternative, modified to delete those provisions relating to pooling, joint agencies and transshipment of Hong Kong cargo. Finally, APL believes that the agreements, "if approved at all must include conditions which guarantee to the U.S.-flag carriers a share commensurate with their national-flag status and their level of service."

Instead of discouraging overtonnaging, Lykes believes that these space charter agreements have had the opposite effect. Lykes claims that under Agreements Nos. 10332 and 10371, NYK and Showa increased their Far East and Korea capacities above those offered in their existing Far East services under the Japanese agreements. Lykes further states that the agreements have contributed to overtonnaging by allowing KSC and KMTC to inaugurate services which they could not have commenced by themselves. It notes that while certain independent carriers were forced out of the trade, KMTC and KSC were able to continue to operate under the space charter agreements.

Lykes concedes that the agreements are not responsible for all the ills which plague the Far East trade. It suggests, however, that the Commission has a responsibility to insure that the agreements, if approved, are not unjustly discriminatory, unfair to non-parties, or contrary to the public interest or detrimental to the commerce of the United States. Lykes argues that the agreements should not be approved unless the Commission first adopts certain policy guidelines and places limitations upon the joint operations permitted under the agreements to prevent adverse impact upon the United States/Korea trade and the other operators in the trade.

Lykes urges certain specific limitations for each of the agreements. It believes that the authority to serve Hawaii and Alaska under Agreement No. 10332 should be eliminated, as direct service has never been performed in those trades and no justification has been offered to support it. It would also have the Commission restrict operation under that agreement to a bimonthly frequency and no more than 22,644 TEU's annually, the capacity presently offered. Lykes feels that neither KMTC nor NYK should be permitted to carry non-Korean cargo, as KMTC has never carried that cargo and to permit NYK to do so would be to grant it an additional competitive advantage not justified by this record. Lykes, like APL, believes that NYK should restrict itself to the carriage of Korean cargo as do KMTC and Showa. Finally, Lykes would like the 420 TEU per month ceiling reduced to 200 TEU's per month.

Hearing Counsel argues that, by permitting the parties to share revenues, Agreement No. 10332 diminishes the incentive for competition among the participants. As such, Hearing Counsel argues that it requires more justification than space-chartering alone and that the required level of justification is not present. Because KMTC has had two years of experience to establish itself, Hearing Counsel believes that revenue sharing cannot be justified as part of a start-up operation. It notes that the parties to the other agreements do not require revenue sharing.

Hearing Counsel would also amend Agreement No. 10332-2 to conform to the understanding of the parties that the agreement permits each to operate any vessel of *up to* 1,050 TEU's and does not require a vessel of 1,050 TEU capacity.

Agreement No. 10364

Sea-Land and Hanjin argue that the January 8, 1980 order approving Agreement No. 10364 is fully supported by the record which was before the Commission at that time and that nothing has occurred subsequently which materially affects the findings and conclusions contained in that Order.

APL and Hearing Counsel do not oppose the continued approval of Agreement No. 10364. Lykes notes that Agreement No. 10364 has been rarely used and suggests that the Commission impose cross-charter limitations consistent with the actual use by the parties plus a reasonable additional amount to account for potential trade growth.

DISCUSSION

Before considering the merits of Agreements Nos. 10332, 10371 and 10364 under the standards and criteria governing the approvability of section 15 arrangements, we will first direct our attention to the eight specific issues which the Commission requested the parties to address as part of this investigation.

Generally, the eight issues were not fully developed by the parties, nor directly resolved by the Presiding Officer. This may in part be due to the breadth and complexity of some of these issues and the time restraints placed on the proceeding. In any event, the record is of marginal value in actually adjudicating all of these issues. We believe, however, that the Commission can properly address the merits of the agreements at issue and determine the approvability of each without attempting to expressly resolve every one of the eight issues.[4]

[4] Thus, to the extent the resolution of Issues 1, 2 and 3 turn on whether or not one believes that, absent the agreement, proponents would add tonnage to the trade, these issues are different facets of the ultimate factual issue to be resolved in this case. Also, Issue 5, relating to the effects of the agreements on conference voting patterns, may not be susceptible of proof under the circumstances of this case. To the extent it is, the issue is, in retrospect, of questionable relevance to the approvability of any *particular* agreement. Finally, Issues 6, 7 and 8 relate to Commission jurisdiction over the agreement, which no party has challenged.

Although the record does not permit detailed conclusions to be made as to each of the eight issues, it does allow certain more general findings. These are presented below:

> 1. Whether and to what extent approval of any or all of the subject agreements will significantly affect the availability of waivers to shippers seeking to transport cargo on non-Korean flag vessels.

Korean Ordinance No. 636 effectively increases the capacity of the Korean-flag fleet by exempting from the cargo promotion law third-flag carriers to the extent they charter space to Korean-flag operators. If the space charter agreements were disapproved, the Koreans might replace the capacity laws with additional tonnage and enforce the cargo promotion laws more vigorously. In all likelihood, this would increase the availability of waivers. However, there is a wide divergence of opinion among the parties as to whether this is likely to occur.

Lykes believes that approval of the agreements will result in a reduction of availability of waivers to shippers seeking to use third-flag vessels other than those operated by signatories to the subject space charter agreements. APL believes that if the agreements are disapproved, third-flag capacity in the trades under Agreement No. 10332 would be withdrawn which would increase cargo available to other third-flag carriers in the trade.

Proponents, on the other hand, contend there is no evidence to prove that approval or disapproval of the agreements will significantly affect the availability of waivers. Likewise, Hearing Counsel does not believe disapproval of the agreements would increase the availability of waivers.

The Commission is not satisfied that the protestants have established a causal connection between the agreements and the availability of waivers. Accordingly, it cannot be concluded on the basis of the record that approval of the agreements would be detrimental to the commerce of the United States or be unjustly discriminatory by reducing the availability of waivers.

> 2. Whether and to what extent approval of any or all of the subject agreements will significantly affect cargo capacity in the United States trades with Korea.

In the absence of capacity and service limitations, Lykes believes that approval of the agreements will significantly encourage overtonnaging in the trade. APL states that if the agreements are disapproved, the capacity in the U.S. Korea trades will be reduced.

Conversely, proponents argue that while approval of the agreements will not significantly affect cargo capacity, disapproval will cause proponents to introduce additional tonnage to maintain their semi-monthly service. Hearing Counsel agrees that, on balance, approval of the agreements with certain modification will have a more positive impact on overtonnaging than would disapproval.

Resolution of this issue turns on whether or not one believes that absent the agreements, proponents would add tonnage to the trade. On the basis of the evidence discussed below, the Commission is satisfied that proponents are likely to add additional tonnage to the trade if the agreements are disapproved.

3. Whether approval of any or all of the agreements will adversely affect rate stability in the United States trades with Korea.

All parties agreed that low utilization of vessel capacity leads to rate instability while improved utilization has a salutory effect on rate stability. As discussed above, the parties differ on whether the agreements have the effect of decreasing capacity. Since the Commission has concluded that the agreements will tend to reduce overtonnaging, it follows that they are not likely to adversely affect rate stability.

4. Whether approval of any or all of the subject agreements will result in unjust discrimination or unfairness against nonsignatory carriers serving the United States trade with Korea.

No party disputes the fact that the agreements result in a certain degree of market concentration which enhances the member lines' ability to compete. Lykes and APL allege that the member lines are carrying cargo which, but for the agreements, might be carried on their vessels. This, it is alleged, amounts to unfair and discriminatory competition against U.S. and third-flag carriers in the trade.

Proponents contend that approval of the agreements does not result in unjust discrimination or unfairness against other carriers in the trade. Hearing Counsel agrees, believing that the market advantage gained by approval of the agreements has no significant impact on other carriers in the trade.

The capacity subject to the agreements is not large and no single agreement under examination in this proceeding appears to provide its members with a dominant position in the Far East trade. Protestants' fear of increased competition is not in and of itself evidence that the agreements are unjustly discriminatory or unfair.

5. The manner in which approval of any or all of the subject agreements will affect voting patterns within steamship conferences operating in the United States trade with Korea.

The parties generally believe that the record in this proceeding fails to establish a causal connection between the subject agreements and conference voting patterns. The Commission agrees. The Korea trade is only part of the total Far East trade. There are myriad factors, relating to both the Korea trade and the total trade, which would potentially influence conference decisions. No attempt has been made to isolate the effect of these agreements on conference voting.

> 6. Whether approval of any or all of the subject agreements is consistent with existing treaties of friendship, commerce and navigation between the United States and other nations whose interests are represented in the United States trades with Korea.

No party alleges that approval of the agreements would be inconsistent with the existing treaties of friendship, commerce and navigation between the United States and the other nations which participate in the U.S./Korean trade. In *Agreement No. 9939, Pooling, Sailing, and Equal Access to Government-Controlled Cargo Agreement*, 16 F.M.C. 293, 308-309 (1973), the Commission concluded that a pooling agreement which was based in part on the cargo preference laws of Peru was not contrary to the terms of the Treaty of Friendship, Commerce and Navigation between the United States and Norway. There are no facts of record in this proceeding which would distinguish this proceeding from that in *Agreement No. 9939*. The reasons underlying the Commission's decision in *Agreement No. 9939* remain valid in the instant case.

> 7. Whether the imposition of the waiver system by the Korean Government under its Maritime Transportation Promotion Law and other governmental cargo control activities have forced third-flag carriers to enter into these space charter agreements in order to have reasonable access to cargo in the U.S.-Korea trades.

Unquestionably, the waiver system has acted as a strong incentive to third-flag carriers to enter into space charter agreements. However, no party alleges that this incentive "forced" third-flag carriers to take this action.

> 8. If the waiver system and other cargo control activities of the Korean Government have forced third-flag carriers to enter into these space charter agreements, whether the agreements are so impregnated with unilateral government action as to be in reality non-commercial agreements over which the Commission should take no jurisdiction under section 15 of the Shipping Act, 1916.

As discussed in connection with the previous issue, no party suggests that third-flag carriers were "forced" into space charter agreements. All parties believe that the agreements are fully subject to section 15, and that the waiver system and other cargo control activities of the Korean Government have not removed the agreements from the Commission's jurisdiction.

With these thoughts in mind, we turn now to a consideration of the approvability of the particular agreements at issue under the applicable standards of section 15.

Agreement No. 10364

Section 15 provides in relevant part that the Commission *must* approve an agreement subject to that section unless it can *find* that such agreement is, or will be, (1) discriminatory or unfair as between certain specified segments of the industry, (2) detrimental to United States commerce, (3) contrary to the public interest, or (4) otherwise in violation of the Shipping Act, 1916. In considering an agreement under the "public interest" standard of section 15, the Commission must evaluate the possible anticompetitive consequences of an agreement and determine whether they are outweighed by the agreement's legitimate commercial objectives. *United States Lines, Inc. v. Federal Maritime Commission*, 584 F.2d 519 (D.C. Cir. 1978).

Agreement No. 10364 is nothing more than an arrangement whereby the parties charter space on each other's vessels on a space available basis subject to a maximum. There is no provision authorizing the fixing of rates, coordination of sailings, joint solicitation of cargo or joint bills of lading. The vessel owner retains full control over the vessel. In short, the space charter places little or no restriction on the competition between the parties. Nor has it been shown, to the extent it was even argued,[5] that the agreement will adversely affect other operators in the trade competitively.

On the other hand, proponents of Agreement No. 10364 have come forward with evidence indicating that the agreement will allow for more direct calls, prevent the introduction of additional tonnage to the trade and result in a generally more efficient transportation service to the shipping public. The Commission is satisfied that these benefits outweigh any anticompetitive features of the agreement. Therefore, upon careful examination of Agreement No. 10364, in light of the record developed in this proceeding, we cannot find that the agreement presently operates or will, with reasonable probability, operate contrary to the public interest or in any other manner proscribed by section 15 of the Act. It will, accordingly, be approved.

Agreements Nos. 10332 and 10371

Because Agreements Nos. 10332 and 10371 have common parties and are otherwise interrelated, they will be considered and discussed together. Protestants object to the revenue pooling features of Agreement No. 10332 as well as its space chartering provisions. APL questions whether even the requested space chartering authority is justified in terms of reducing overtonnaging in the trade, which all parties agree exists.

Given the trade's overtonnaging APL does not believe that any non-Korean party to a space charter agreement would exacerbate the situa-

[5] As noted earlier, APL and Hearing Counsel do not oppose the continued approval of Agreement No. 10364.

tion and increase their tonnage to offset the capacity lost as a result of any disapproval of that agreement. APL argues that the addition of such tonnage would cause utilization levels to drop substantially thereby making the parties' service even more unprofitable, a situation they would endeavor to avoid. It is allegedly more likely that the non-Korean operators would, in the event of disapproval, withdraw that capacity currently operated under the space charter agreements.

While APL's contention has appeal, at least on a theoretical basis, it is not supported by history in the trade or the record in this case. The record demonstrates that despite past serious overtonnaging, several carriers have continued to place additional tonnage in the trade. Proponents of Agreements Nos. 10332 and 10371 have made clear their intentions to do likewise if those agreements are not approved.

In his direct testimony, Hiroshi Takahashi of NYK states that in the event of disapproval, NYK and KMTC would place additional vessels in the trade. Mr. Takahashi claims that despite the current unfavorable market conditions, which he views as transitory, NYK would unquestionably increase its tonnage by chartering a vessel or moving a vessel from another trade to this one. As for the Korean-flag operators, the Korean Government states that, in the event of disapproval, Korean-flag carriers would not abandon the U.S./Korean trade. Korea expects its exports to reach one hundred billion dollars by 1991 and believes that it cannot enjoy world trade without an effective shipping program. The Korean government would, if necessary, provide financial assistance to Korean-flag carriers to enable them to continue their service. Based on all the foregoing, the Commission is satisfied that proponents of Agreements Nos. 10332 and 10371 would in the future and in the absence of the agreements, increase their individually operated tonnage and thereby exacerbate the problem of overtonnaging. To that extent, Agreements Nos. 10332 and 10371 can be said to confer important public and transportation benefits by tempering overtonnaging which is a major cause of malpractices and rate instability.

Undoubtedly, the space chartering provisions of Agreements Nos. 10332 and 10371 gives proponents some advantage over lines such as APL and Lykes. However, the record fails to establish that this advantage is unjust, discriminatory or unfair to competing lines or otherwise contrary to the standards of section 15. The most that can be said is that protestant carriers face greater competition for cargo than they would in the absence of an agreement. This, standing alone, is not grounds for disapproving the agreements. *Alcoa Steamship Company, Inc. v. C.I.A. Anonima Venezolana de Navigacion*, 7 F.M.C. 345, 361 (1962) and *Agreement Nos. 9847 and 9848—Revenue Pools v. U.S./Brazil Trade*, 14 F.M.C. 149, 158 (1970). The Commission concludes therefore that, subject to certain modifications and reporting requirements discussed below, Agreements Nos. 10332 and 10371 meet the criteria for section 15 approval.

A semi-annual report of vessel capacity, utilization and cross-chartering of space, similar to that suggested by Hearing Counsel and Lykes, would enable the Commission to more efficiently and effectively maintain continuing surveillance over the chartering provisions of the agreements and to monitor their operations to ensure that the legitimate transportation objectives underlying the approval of those provisions are being realized.[6] Such a reporting requirement will therefore be imposed as a condition to approval.

Hearing Counsel's suggestion that the provisions of Agreement No. 10332-2 relating to transshipment be clarified also has merit. Accordingly, we will require the parties to amend the agreement to conform to the understanding of the parties that it does not require each party to operate a 1050 TEU vessel, but instead permits each party to operate a vessel of up to 1050 TEU's.

Although Agreement No. 10371 and the space chartering provisions of Agreement No. 10332, modified as indicated above, are found to satisfy section 15 approval requirements, the same cannot be said of the revenue pooling. Coordinations of sailings and joint agent provisions of Agreement No. 10332 reflect activity generally found violative of the antitrust laws. As such, they are deemed contrary to the public interest within the meaning of section 15 and must be disapproved unless proponents can make a countervailing showing that the provisions in question are necessary to meet a serious transportation need, secure an important public benefit or further a valid regulatory purpose of the Shipping Act, 1916. *Federal Maritime Commission v. Aktiebolaget*

[6] APL and Lykes urge the Commission to place capacity and geographic limitations on the agreements to protect them from unjust and unfair competition. The Commission is not satisfied that such limitations are necessary. Absent a showing that the agreements are operating in a discriminatory or unfair manner the Commission will not impose limitations on the number of TEU's carried, or the ports served. The Commission also rejects Lykes' proposal that the Commission adopt certain "statements of future policy" with respect to the Korea trade. These concern the Commission's continuing surveillance of the agreements rather than the conduct of carriers. They would require that the Commission's continuing surveillance take a particular form and thus, in essence, constitute conditions on the Commission. As such, they would place unwarranted limitations on the flexibility of the Commission in exercising continuing surveillance over the subject agreements. Lykes also proposes that the Commission adopt certain "general standards and guidelines." While the Commission may adopt new standards as part of an adjudication in order to meet particular, unforeseeable situations:

> [t]he function of filling in the interstices of the Act should be performed, as much as possible, through . . . quasi-legislative promulgation of rules to be applied in the future.
>
> *Securities and Exchange Commission v. Chenery Corporation*, 332 U.S. 194, 202 (1947).

The choice between proceeding by general rule or by individual, *ad hoc* litigation is one that lies primarily in the informed discretion of the agency. *Columbia Broadcasting System v. United States*, 316 U.S. 407, 421 (1942).

The Commission has established and the courts have sanctioned general standards which are applied to all section 15 agreements. We are not satisfied that conditions in the Korean trade are so unique as to require a separate set of standards in addition to those of general applicability.

Svenska Amerika Linien, 390 U.S. 238 (1968). Proponents have failed to sustain this burden. The record simply will not support the approval of the pooling and coordination arrangements. A space charter is all that can be justified on the basis of the record in this case.

We cannot agree with Proponents that KMTC needs protection from ordinary market forces while it learns to operate a container service. As APL points out, KMTC is hardly an inexperienced carrier as it operates a total of 18 vessels. KMTC has had two years of experience in the trade to establish itself. Under the circumstances, it does not need to pool revenues with NYK, one of the world's major carriers, in order to service the trade.

THEREFORE, IT IS ORDERED, That Agreements Nos. 10364, 10364-1, 10371 and 10371-1 are approved pursuant to section 15 of the Shipping Act, 1916 (46 U.S.C. $ 814); and

IT IS FURTHER ORDERED, That Agreement No. 10332-2, as amended by Agreement Nos. 10332-1 and 10332-2, is disapproved pursuant to section 15 of the Shipping Act, 1916, effective February 24, 1983, unless the Commission actually receives at its offices in Washington, D.C., on or before February 23, 1983, a modified version of that agreement, signed by the parties or their duly authorized representatives that:

1. Deletes Article 6;
2. Amends Article 1(a) to read:

   (a) The parties will operate two vessels of a capacity of no more than 1,050 twenty-foot equivalent container units (TEU's) each, in a direct, non-intervening ports of call service . . .
3. Amends Article 1(b) to limit capacity of any replacement vessel to 1,050 TEU's rather than 1,100 TEU's.
4. Amends Article 1(c) to read:

   NYK will transport commodities to and from Korea in accordance with Article 1(a), and will not transport in the service authorized here any cargoes booked, forwarded, transshipped, or feeder-fed from or to Japan or any other Far Eastern nation by any line including NYK, except for transshipment cargo destined to or originating from Hong Kong or Taiwan. The carriage of such transshipment cargo shall not exceed 80 TEU's per month.
5. Amend Article 13(B) to read:

   (B) *Cargo Data*:

   For each six-month period of operation, or part thereof, the parties shall compile and submit to the FMC, and to KMPA to the extent it desires, the following:

(i) the name, owner, flag, TEU capacity, and number of sailings for every vessel employed by the parties in the trades covered by this agreement,

(ii) for each party, stated separately eastbound and westbound, the total TEU capacity, Far East TEUs carried (excluding Korea), Korea TEUs carried, total TEUs carried and utilization,

(iii) for each party, stated separately eastbound and westbound, the total number of TEUs carried on its vessels and the number of TEUs carried for each of the other parties to this agreement and Showa Line Ltd. (stated separately).

IT IS FURTHER ORDERED, That upon full and timely compliance with the conditions set forth in the above ordering clause, Agreement No. 10332-3 shall be approved.

By the Commission.

(S) FRANCIS C. HURNEY
Secretary

FEDERAL MARITIME COMMISSION

DOCKET NO. 82-44

INGERSOLL RAND COMPANY

v.

WATERMAN STEAMSHIP CORPORATION

NOTICE

December 27, 1982

Notice is given that the time within which the Commission could determine to review the November 10, 1982 order of dismissal in this proceeding has expired. No such determination has been made and accordingly, that order has become administratively final.

(S) FRANCIS C. HURNEY
Secretary

FEDERAL MARITIME COMMISSION

DOCKET NO. 82-44

INGERSOLL-RAND COMPANY

v.

WATERMAN STEAMSHIP CORPORATION

MOTION TO DISMISS GRANTED

Finalized December 27, 1982

By order dated November 10, 1982, the undersigned granted Ingersoll-Rand's Motion to Dismiss the complaint. In the order reference was made to the Commission's Rules of Practice and Procedure, section 536.5(d)(20), 46 CFR 536.5(d)(20), which makes "carrier custody" provisions in tariffs invalid. It should be noted that the Commission has "stayed" the final rule which was to become effective November 8, 1982, for 45 additional days.

The Commission's action in no way affects the validity of the granting of the Motion to Dismiss the complaint here. As the previous order notes there is no real justifiable controversy so that all that is really involved is the complainant's Motion to Dismiss the complaint which it now properly seeks to withdraw. Consequently, the previous order of November 10, 1982, is hereby reaffirmed.

(S) JOSEPH N. INGOLIA
Administrative Law Judge

FEDERAL MARITIME COMMISSION

DOCKET NO. 81-51

TIME LIMIT FOR FILING OVERCHARGE CLAIMS

ORDER ON RECONSIDERATION

January 5, 1983

This proceeding is before the Commission upon receipt of three Petitions for Reconsideration[1] and one Petition for Amendment[2] of the Commission's Final Rule, published August 10, 1982 in the *Federal Register* (47 Fed. Reg. 34556), (25 F.M.C. 185), proscribing carrier and conference tariff provisions which require overcharge claims to be filed with the carrier within six months or while the cargo is still in the carrier's custody. That rule was issued following consideration of 35 comments received from both shipper and carrier interests in response to the Commission's earlier Notice of Proposed Rulemaking (46 Fed. Reg. 43472).

PETITIONS FOR RECONSIDERATION

The petitions for reconsideration generally constitute repetitions of the arguments already raised in response to the Notice of Proposed Rulemaking, and therefore may not meet the procedural requirements of Rule 261 (46 C.F.R. § 502.261), which sets forth criteria to avoid summary rejection of petitions for reconsideration. However, the Commission will waive those requirements and address the merits of the petitions in order to consider fully the arguments presented by Petitioners.

All three Petitioners argue that this rulemaking reached a conclusion different from previous rulemakings on the subject of overcharge claim time limits, and did not explain or distinguish those proceedings. Petitioners contend that the Commission's previous conclusions were founded on evidentiary hearings, and that the Commission cannot now make a contrary decision in the absence of further evidentiary hearings. The FEC also suggests that should the Commission determine not to

[1] One Petition for Reconsideration was submitted by the Far East Conference (hereafter, FEC), and another was filed jointly by the Japan/Korea-Atlantic & Gulf Freight Conference, New York Freight Bureau, Philippines North America Conference, Trans-Pacific Freight Conference of Japan/Korea, Trans Pacific Freight Conference (Hong Kong) and Agreement Nos. 10107 and 10108 and their members (JKAG *et al.*). A Petition for Reconsideration and Stay and Motion for Waiver of Time were filed by the Pacific Westbound Conference (PWC). The motion for stay was granted by the Commission on November 4, 1982 deferring the November 8 effective date of the rule for 45 days, for the purpose of allowing sufficient time to rule on the petitions for reconsideration. The motion for waiver of time limit is also granted.

[2] The Petition for Amendment was filed by Sea-Land Service, Inc.

rescind its decision, it should at least reopen the proceeding to obtain evidence concerning whether circumstances have changed since the prior proceedings. Petitioners also generally argue that there is no probative evidence that six-month rules and cargo custody rules are unfair or unreasonable, and that the Commission is therefore bound to adhere to its previous findings.

The Commission took note of previous proceedings on the subject of overcharge claim time limits in the Final Rule. Both *Proposed Rule Covering Time Limit on the Filing of Overcharge Claims*, 12 F.M.C. 298 (1969), reaffirming 10 F.M.C. 1 (1966) and *Carrier-Imposed Time Limits on Presentation of Claims for Freight Adjustments*, 4 F.M.B. 29 (1952) either preceded or disregarded the Commission's recognition that it is not necessary to make specific findings of Shipping Act violations prior to adopting substantive rules, providing that the rules are in furtherance of general Shipping Act objectives. *See, e g., Austasia Container Express—Possible Violations of Section 18(b)(1) and General Order 13*, 19 F.M.C. 512, 521 (1977), reversed on other grounds. In those earlier rulemakings, the Commission focused its attention on whether the record evidenced specific statutory violations. Because the proposed rules in those proceedings were unsupported by findings of facts thought necessary to adopt such rules, the Commission failed to do so. The Commission's factual findings and conclusions of law in that context are not, therefore, dispositive in the instant proceeding.

A subsequent rulemaking, Docket No. 78-30, *Time Limit for Filing of Overcharge Claims*, 21 F.M.C. 713 (1979), did not include hearings, but was based solely on comments to the Notice of Proposed Rulemaking. The Commission's ultimate failure to proscribe time limits in that proceeding was primarily based on the inadequacy of the grounds set forth in the Notice. The operative portion of the Notice was limited to a recitation of two provisions of the Shipping Act, one of which, section 22, seemed in retrospect to have been inappropriately applied.[3]

In announcing its decision in Docket No. 78-30 not to prohibit time limits for filing claims, the Commission made no *factual* findings which could be considered to establish contrary precedent within the meaning of *Local 777, Democratic Union Organizing Committee v. NLRB*, 603 F.2d 862 (D.C. Cir. 1978), cited by JKAG *et al.* The Commission's conclusions in the Final Rule of Docket No. 78-30 regarding the sections 14 and 22 issues consisted of the following, *in toto*:

[3] To the extent the Notice in Docket No. 78-30 would have precluded six-month time limitations under section 22 as a matter of law, it was overreaching. Section 22 establishes a two-year period with respect to claims filed with the Commission, not with those filed directly with the carrier. The instant proceeding considers whether the tariff time limits have the *practical effect* of restricting or discouraging shippers' rights under section 22.

> Carrier commentators argued that neither section cited by the Commission in its Notice of Proposed Rulemaking, *i.e.*, section 14 Fourth and section 22, supports the promulgation of [a ban on six-month rules]. Upon consideration of these comments, the Commission has decided not to adopt [such a ban].

21 F.M.C. at 716.

The Notice of Proposed Rulemaking in this proceeding clearly set forth the Commission's determination that tariff time limitations "*may . . . act as an obstacle* to the redress of section 18(b)(3) violations" and are "*likely to conflict with several* [other] *objectives* of the Shipping Act" (emphasis supplied). This rulemaking was not conditioned on the actual finding of Shipping Act violations, but was premised on the principle set forth above that rules may be adopted if they are *in furtherance of general Shipping Act objectives.*[4] The Notice discussed in detail why the proposed rule was necessary to meet each of several Shipping Act objectives, and cited sections 15 and 18(b)(3) as well as sections 14 Fourth and 22.

The Commission remains satisfied that, for the reasons set forth in the Final Rule and reiterated herein, promulgation of the Final Rule is necessary to meet and to further those statutory objectives. Moreover, the administrative burden to the Commission in adjudicating essentially *undisputed* claims brought before it by the operation of six-month time limits and carrier-custody requirements is less tolerable now, in this era of increasingly limited resources, and therefore constitutes an additional, compelling reason for the Commission to take action at this time.

Petitioners raise a number of other arguments, none of which the Commission finds persuasive.

PWC objects to carriers having to rule on post-custody claims, saying it is a waste of time to do so because the shipper can always get a *de novo* review before the Commission. PWC's argument overlooks the fact that, as noted in the Final Rule, a large percentage of claims before the Commission are undisputed or are even supported by the carriers. A carrier's consideration of an admittedly meritorious claim is not a waste of time; the waste occurs when these undisputed claims are filed with the Commission, thus resulting in an unnecessary burden on the administrative process. When a claim is disputed, the carrier's letter to the claimant rejecting the claim for specified reasons need only be copied and submitted to the Commission to constitute the carrier's participation in any claim eventually brought before the Commission. This hardly comprises the duplicative burden of which PWC complains.

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[4] *See New York Freight Forwarders and Brokers Assn. v. Federal Maritime Commission*, 385 F.2d 981 (D.C. Cir. 1967); *New York Freight Forwarders and Brokers Assn. v. Federal Maritime Commission*, 337 F.2d 289 (2d Cir. 1964).

JKAG *et al.* and PWC suggest that the Commission is attempting to absolve itself of its responsibility to resolve claims by delegating the responsibility to the carriers. The Commission fully intends to continue to expend its resources resolving real disputes. In fact, those resources will be more efficiently and effectively applied when they will no longer be diverted toward unnecessary proceedings. The Final Rule will help the Commission to avoid only those *uncontested* claims which can and should be handled without government intervention.

FEC criticizes the Final Rule's statistical analysis as "one-sided," and complains that the statistics do not consider the total number of claims filed with carriers and perhaps acted upon by the carriers. The data of which FEC complains were extracted from the publicly available files of the 189 informal docketed proceedings which were noticed for filing or assignment during calendar year 1981. The data showed that the percentage of *undisputed* informal docketed proceedings before the Commission as a result of six-month or carrier-custody rules was at least 39.7%, and probably higher. They were not relied upon to draw any negative inferences regarding the number of claims acted upon directly by the carriers within the six-month period, but rather to compute the extent to which Commission resources are expended on uncontested claims. Indeed, the Commission has utmost confidence in carriers' ability to resolve overcharge claims satisfactorily—including denying claims which are unsupported.

JKAG *et al.* and PWC suggest that the Commission should adopt simplified or expedited procedures for uncontested claims. As noted at footnote 15 of the Final Rule, this suggestion has already been taken under advisement, but in any case would be an appropriate subject for a future proceeding. It is beyond the scope of this rulemaking.

JKAG *et al.* argue that the Final Rule will result in an increase in claimants filing unsupportable, invalid claims and in rebating by carriers who will "cater" to the claims of their shippers. Again, the Final Rule has already fully addressed and dismissed that proposition:

> The Commission does not believe that reliance on carriers and shippers to resolve disputes will necessarily result in unlawful activity, either in the form of false shipper claims or unwarranted reparations by carriers. It rejects the proposition that both carriers and shippers need as much supervision as possible because they will act in bad faith at every opportunity, or at least will be tempted to yield to pressure to do so. The Commission expects parties subject to the Shipping Act to comply with it, and will vigorously make use of the statutory remedies for violations of the Act.

Moreover, to give credence to this argument would require the Commission to prohibit carriers and shippers from resolving *any* claims among themselves, including those filed within six months after the shipment.

JKAG *et al.* argue that the assessment of an administrative fee for filing overcharge claims, a practice proscribed by the Final Rule, should in fact be permitted, because "the vast majority of overcharge claims result from errors committed by shippers, consignees or their agents." They argue that carriers should be permitted compensation for expense and effort in processing claims resulting from such errors.

The Commission disagrees. A flat claim-filing fee constitutes a penalty for seeking correction of a statutory violation, particularly if it applies regardless of who, if anyone, is "at fault" for the overcharge.[5] The Final Rule does *not*, however, bar a tariff provision which requires legitimate, actual expenses incurred in the investigation of a claim to be borne by the party at fault, or if no error is found, by the claimant. Thus, those parties responsible for an error in measurement or description could be held responsible for the expenses suffered in identifying the error.[6]

THE PETITION FOR AMENDMENT

Sea-Land's petition is limited to requesting reconsideration of the decision not to prescribe minimum standard documentation in post-custody overcharge claim cases.[7] Sea-Land requests the Commission to require, in post-custody claims involving alleged errors in weight, measure or cargo description, that claimants submit certified copies of mandatory documentation, *viz.*, the commercial invoice and either the Shipper Export Declaration (Form 7525-V) or the Special Customs Invoice (Form 5515), depending upon whether it was an export or import shipment. Other types of documentation, such as promotional or advertising literature, Sea-Land says, would be strictly corroboratory.

It is not entirely clear whether Sea-Land suggests these minimum standards apply to claims filed directly with the carrier, or to claims filed with the Commission as well. Should Sea-Land intend the latter, it must be stated that the Commission will not consider minimum specified standards of proof for *Commission* proceedings. The Commission shall, and perhaps must under section 18(b) of the Shipping Act, 1916,

[5] If an overcharge is the result of the carrier's misapplication of a tariff's commodity descriptions to a particular shipment, then a claim-filing fee would clearly be unreasonable. If the overcharge resulted from the claimant's mismeasuresent, to require the claimant to pay the carrier's expenses in remeasuring in those circumstances would appear reasonable.

[6] It would appear that in a claim based solely on a disagreement over which commodity description should apply to a particular product, no actual investigatory expenses on the part of the carrier would be incurred and none could therefore be charged to a claimant.

[7] Sea-Land's concern is also addressed by PWC, which argues that there are no commercial standards which can be applied in post-custody cases, and that carriers should therefore be allowed to deny all post-custody claims. Sea-Land draws the opposite conclusion, however, and makes specific suggestions of minimum documentary support.

continue to consider and weigh *all* proffered evidence both in support of and in opposition to claims brought before it.

As to standards of proof for use in claims brought directly to the carrier, the Final Rule rejected Sea-Land's original suggestion in its comments to the Notice of Proposed Rulemaking that the Commission impose some standards of minimum documentation. The Commission noted:

> Any such list of documents would, on the one hand, be likely to omit means of proof which in certain circumstances would suffice to make a shipper's case, while on the other hand, include standards which in certain circumstances would be insufficient.

For example, it is likely that promotional material or evidence of prior or subsequent shipments could sometimes suffice to prove to a carrier that a particular shipper ships only an easily identifiable product, or one which comes only in a uniform size or weight. On the other hand, the documentation Sea-Land would require might, because of the way the various documents are prepared, all contain the same error of description or measurement.

Thus, the Commission has determined not to prescribe minimum standards for use by carriers in considering overcharge claims. However, the Final Rule does not prohibit carriers from adopting and publishing minimum requirements. It would be incumbent upon carriers, if they choose to adopt requirements, to maintain some degree of flexibility. Sea-Land's proposed standards would, for example, appear reasonable if *not* read to mean that the existence of an error in description or measurement must be provable in the prescribed documents alone. When adequate proof of overcharge in unspecified documents is afforded only "corroboratory" status, then probative evidence is being impermissibly excluded. The Commission's endorsement of carrier-imposed minimum documentary requirements is *not* an endorsement of carrier-imposed, *exclusive* means of proof. What must be avoided is a situation similar to that created by the tariff time limitations—that is, where carriers acknowledge or do not contest the validity of a claimant's argument but point apologetically to a tariff rule as an unavoidable bar to reparation. The Commission does not wish to discourage carriers from drafting requirements which strike an appropriate balance, giving to shippers reasonable opportunity to prove their case with reliable evidence, and giving to carriers guidance in adjudging shippers' claims by requiring adequate substantiation so as to assure the integrity of the system. All questions or challenges to the lawfulness if carrier-imposed requirements will be addressed by the Commission.

THEREFORE, IT IS ORDERED, That the Petitions for Reconsideration and the Petition for Amendment are denied; and

IT IS FURTHER ORDERED, That this proceeding is discontinued.

By the Commission.

(S) FRANCIS C. HURNEY
Secretary

FEDERAL MARITIME COMMISSION

DOCKET NO. 82-28

GILA RIVER PRODUCTS

v.

SEA-LAND SERVICE, INC.

NOTICE

January 7, 1983

Notice is given that the time within which the Commission could determine to review the November 23, 1982 initial decision in this proceeding has expired. No such determination has been made and accordingly, that decision has become administratively final.

(S) FRANCIS C. HURNEY
Secretary

FEDERAL MARITIME COMMISSION

DOCKET NO. 82-28

GILA RIVER PRODUCTS

v.

SEA-LAND SERVICE, INC.

Commodity properly classified and rated. Respondent ordered to cease and desist from efforts to reclassify and re-rate the commodity and from all attempts to collect additional freight charges on shipment.

Frank J. Dempsey, Jr., for complainant.

Claudia E. Stone and *John M. Ridlon* for respondent.

INITIAL DECISION [1] OF JOHN E. COGRAVE, ADMINISTRATIVE LAW JUDGE

Finalized January 7, 1983

The complainant, Gila River Products, alleges that respondent Sea-Land Service, Inc. misrated a shipment of its products (one 40-foot container) in violation of section 18(b)(3) of the Shipping Act, 1916, 46 U.S.C. 819(b)(3).

The contents of the container were described on the bill of lading as:

> 1 40' CONT. S.T.C. 1504 Cartons Plastic and Plastic Strips Not Fabricated or Metal Clad—Item No. 893.0071

The item number referred to on the bill of lading (893.0071) is from the Gulf European Freight Association (GEFA) Tariff No. 5, FMC-10, and bears the description:

> Plastic Plate, Sheets, Strip Film or Mulch, N.O.S. (Not Fabric Backed or Metal Clad) . . . . WM 78.50

The container moved from Houston to Le Harve, and freight charges of $2,073.35 were assessed based on the rate for "Plastic Plate, Sheets, etc." Gila paid the freight charges. However, a routine vessel audit led Sea-Land to bill Gila for an additional charge of $5,231.95.

The audit was conducted by The Adherence Group (TAG), hired by GEFA to perform cargo inspection, self-policing and enforcement functions in the GEFA trade. The audit, which actually consisted of a review of the documents covering the cargo aboard the *Sea-Land*

[1] This decision will become the decision of the Commission in the absence of review thereof by the Commission (Rule 227, Rules of Practice and Procedure, 46 CFR 502.227).

Venture on Voyage 138, showed a discrepancy in the documentation for the shipment in question. While the bill of lading listed the contents of the trailer as 1504 cartons of Plastic, etc., the Export Declaration described the contents as "1504 Ctns. containing Gila Automotive Accessories." After unearthing the discrepancy, the TAG man called Gila and in a letter sent in response to the call, Gila described the commodity as "film kits" and attached a products catalog to the letter. On the basis of all this, TAG concluded that the shipment should have been rated under GEFA item No. 732.1001, "Automobile, Passenger and Commercial, including Accessories . . ." TAG then sent Gila the bill for additional freight. Gila refused to pay the additional money and filed this complaint asking the Commission to issue an order compelling TAG and Sea-Land to cease their efforts to collect that additional freight.

Item No. 732.1001 provides:

> Automobiles, Passenger and Commercial, including Accessories and Parts (NOT Automobile Air Conditioners, which see, under Item 719.1201) (Not Tractors, Trucks, Trailers and Stackers especially designed for materials handling in and around Industrial Plants, Depots, Docks, Terminals, and similar installations)—Vehicles shall be freighted on the basis of extreme dimensions (including bumpers) as offered for shipment:

New for Commercial Export Sale:	
Packed	117.50
Unpacked	WM 131.00
New or Used, N.O.S.:	
Packed	WM 123.00
Unpacked	WM 150.00

> Accessories and Parts which shippers elect to export unprotected will be assessed the PACKED rate, but subject to carriage at owner's risk. Semi-boxed vehicles MUST be assessed the UNPACKED Rate. This is an all inclusive classification and embraces Automobiles; Bodies; Trucks; Busses; Chassis; Trailers, Truck and Truck Tractor Type; Special Purpose Vehicles; Ambulances; Fire engines; Hearses; Maintenance and Repair Trucks, etc.

The commodity in question is a plastic sheeting which when placed over glassed windows acts as an insulator by reflecting or "rejecting" the sun's heat in summer and by "reradiating" interior heat in winter. The film can be used on any windows including automobile windows.

The 1504 cartons actually shipped included 7592 units of "Gila Window Classics." These units are "kits" which contain one "decorative window covering" and "transfer adhesive and trim blade." According to Gila, "These attractive, hand silk screened designs are easily attached to the windows of most pick-ups, cars, station wagons and vans by the average do-it-yourselfer." The silk screened designs range from "The American Eagle" to the "Rebel Flag," with tributes to Olympia, Anheuser-Busch and Coors along the way. These pictured coverings are most often seen on the rear and side windows of pick-ups and vans. The shipment also contained 3024 units Gila Window Film—Reflective Kits which contain "Gila Window Film [which] blocks out over 95% of the sun's damaging ultra violet rays, virtually eliminating fade damage to carpets, drapes and furniture." The shipment also included 4164 "Gila Window Film—Non-Reflective Kits," the rolls of plastic sheet which contain no designs and can be used on either vehicle or building windows. The remainder of the shipment was made up of 20 display stands for rolls of the "plastic film" and various cartons holding rolls of the plastic itself.

Complainant contends that Sea-Land's insistence that the commodity shipped should be rated as Automobile Accessories is based upon a strained and unnatural interpretation of Item 893.0071. To Gila the item by its plain language provides for the shipment of Automobiles and "allows for the inclusion of accessories" for those vehicles when they are shipped along with them. In other words, "The item reads 'including' not 'and,' therefore it is not applicable for shipments of accessorial items by themselves, but they can be included with the vehicle when the vehicle is shipped."

Gila further points out that the item deals primarily with the vehicles shipped under it and distinguishes between new cars for commercial sale and "new and used" cars and cars which are "packed" and those "unpacked." Moreover, says Gila, if "Accessories" were intended to be a "major entree" under the items, what need would there be for items such as 732.1003, Auto Lamps, 732.1005, Spray resistent flaps and/or sheets, and for item 732.8922, Shock Absorbers, Auto, which latter would move under the "Parts" heading of Item 732.1001.

Sea-Land's response to Gila is most notable for its brevity:

> Respondent submits that as demonstrated by the commercial invoice and the products catalog the majority of identifiable units comprising this shipment were decorative window covering kits described exclusively for application on vehicles. As such, Sea-Land submits that the shipment was properly rerated by The Adherence Group as Automobiles including Accessories and Parts pursuant to GEFA tariff item No. 732.1001.

As is easily seen, respondent's argument does not deal with complainant's contentions as to the proper construction of Item 732.1001, *i.e.,* must the accessories shipped under it be those for a particular vehicle which they accompany? Sea-Land simply assumes the very point at issue—that the item covers accessories, whether they are shipped with an automobile or separately. I cannot read the item that way.

Tariffs are but "forms of words" and a "fair and reasonable" construction must be given the terms of the tariff. *CSC Int'l v. Lykes Bros.*, 20 FMC 552, 555 (1978).

The item in question deals with "Automobiles . . . *including* Accessories and Parts." I can only read this as covering accessories which accompany an automobile which is shipped under the item. The total context of the item virtually precludes any other construction. While one can readily understand a reference to a packed (boxed) automobile, how can a shipment of accessories be "unpacked" unless the accessories are stowed within the automobile with which they are shipped? How, for instance, could the shipment in question be placed aboard the vessel "unpacked?"

It seems to me that this item allows a shipper to strip the vehicle of such things as outside mirrors, spotlights or chrome stacks (which would increase the outside dimensions of the vehicle) and ship them within the vehicle (either packed or unpacked), for installation after delivery at the destination. As mentioned above, Sea-Land simply does not bother to deal with complainant's construction of the item offering neither reasoned argument nor a single example to show complainant's construction is unreasonable or wrong.

But Sea-Land says that Item 893.0071, Plastic Plate, Sheets, etc., does not cover the shipment, and here again, Sea-Land's argument borders on the simplistic. It is simply that the "overwhelming majority of the contents of the container shipment, as identified by the products catalog and the commercial invoice, was decorative window covering kits and window film kits and not plastic film." Sea-Land says, "Of the entire 17,828 units comprising the container shipment, only 20 units identified as Gila Window Film-Bulk Roll Displays . . . may qualify for description as plastic film under GEFA tariff item no. 893.0071." This shows "clearly, that the rate for plastic film is not applicable to the shipment at issue."

Thus, Sea-Land's argument is based on the characterization of the units shipped as "kits," and the question becomes whether the inclusion of a tube of adhesive and a razor blade in the box with the roll of plastic film creates a "kit" which is no longer covered by the description "Plastic Plate, Sheets, Strip, Film or Mulch. . . ." The Gila Window Film is a thin plastic sheet (or film) that is shipped in rolls 22 or 30 inches wide and 5 or 10 feet long. The "Gila Window Classics" are in rolls 18 by 64 inches. These rolls are shipped in cardboard cartons or tubes and except for the Bulk Roll Displays, the cartons and tubes each contain a razor blade and a tube of adhesive. The addition of the razor blade and tube of adhesive does not, of course, change the fact that the article they accompany is a roll of "plastic film." If Sea-Land is correct and these are plastic "kits," why then by the same reasoning are they not "accessory kits" and, as such, not accessories? It seems to me that Sea-Land's reasoning would just as readily serve to remove the shipment from the accessory description as it would the plastic item. And finally, what of the units of Window Film which it is admitted can be used on building as well as vehicle windows? Here it would seem that their classification as auto accessories is somewhat arbitrary.

I am well aware that the inclusion of other commodities in a package may remove the main or primary commodity from the coverage of an item description. However, in this case I think it would do violence to common sense to conclude that the adhesive and razor blade so changed the nature of the roll of plastic as to require that it be rated under some N.O.S. classification. What was shipped were rolls of plastic "sheet," "strip" or "film," and I find that the description in item 891.0071 most nearly describes the articles shipped.

For the foregoing reasons, I conclude that the shipment in question was properly classified and respondent is ordered to cease all efforts to collect additional freight charges the shipment.

(S) JOHN E. COGRAVE
Administrative Law Judge

FEDERAL MARITIME COMMISSION

DOCKET NO. 79-68

MILITARY SEALIFT COMMAND,

DEPARTMENT OF THE NAVY

v.

MATSON NAVIGATION COMPANY, INC.

DOCKET NO. 79-67 - IMUA BUILDER SERVICES, LTD.;

DOCKET NO. 80-84 - EAGLE DISTRIBUTORS, INC.;

DOCKET NO. 80-85 - WAIPUNA TRADING COMPANY, INC.;

INFORMAL DOCKET NOS.

707(F) - UNITED STATES COLD STORAGE OF CALIFORNIA;

729(F) - RICHARD T. FUKUDA;

730(F) - GENERAL FOODS INTERNATIONAL.,

A DIVISION OF GENERAL FOODS CORP.;

740(F) - OSCAR MAYER & CO., INC.;

754(F) - YELLOW FORWARDING CO.,

YELLOW FREIGHT INTERNATIONAL DIV.;

856(F) AND 857(F) - SEARS, ROEBUCK AND CO.;

944(F) - GRAY DISTRIBUTING COMPANY, LTD.;

984(F), 985(F) AND 986(F) — HAWAIIAN ISLANDS FREIGHT ASSOC.;

994(F) - CATHERINE S. KANE AND JOHN M. RYAN,

DOING BUSINESS AS FIRE MOUNTAIN POTTERY;

1000(F) - CONTINENTAL MECHANICAL;

1001(F) - HUNTERS, INC.;

1002(F) - METALCRAFT PRODUCTS;

1003(F) - E. E. BLACK COMPANY;

1004(F) - SERVCO PACIFIC CORPORATION;

1005(F) - AMFAC DISTRIBUTION COMPANY;

1006(F) - BUILDERS PRODUCT CORPORATION;

1007(F) - BACON UNIVERSAL COMPANY;

1008(F) - FAMCO CORPORATION;

1009(F) - HONOLULU ROOFING COMPANY:

1010(F) - HAWAIIAN FLOUR MILLS;
1011(F) - OCCIDENTAL CHEMICAL COMPANY;
1012(F) - CITY MILL COMPANY, LTD.;
1013(F), 1014(F), 1015(F), 1017(F), AND 1018(F) - CASTLE & COOKE FOODS DIVISION OF CASTLE & COOKE, INC.
1021(F) - CONSTRUCTION MATERIALS HAWAII;
1022(F) - ATLAS ELECTRIC COMPANY;
1023(F) - BREWER CHEMICAL CORPORATION;
1024(F) - HAWAIIAN DREDGING COMPANY;
1034(F) - CASTLE & COOKE FOODS DIVISION OF CASTLE & COOKE, INC.;
1053(F) - GENERAL ELECTRIC COMPANY;
1054(F) - FOODLAND SUPER MARKET, LIMITED;
1095(F) AND 1096(F) - MCKESSON WINE & SPIRITS

v.

MATSON NAVIGATION COMPANY, INC.

NOTICE

January 18, 1983

Notice is given that no appeal has been taken to the December 17, 1982 dismissal of complaints in these proceedings and that the time within which the Commission could determine to review has expired. No such determination has been made and, accordingly, the dismissal has become administratively final.

(S) JOSEPH C. POLKING
Assistant Secretary

FEDERAL MARITIME COMMISSION

DOCKET NO. 79-68

MILITARY SEALIFT COMMAND,
DEPARTMENT OF THE NAVY

v.

MATSON NAVIGATION COMPANY, INC.

DOCKET NO. 79-67 - IMUA BUILDER SERVICES, LTD.;
DOCKET NO. 80-84 - EAGLE DISTRIBUTORS, INC.;
DOCKET NO. 80-85 - WAIPUNA TRADING COMPANY, INC.;
INFORMAL DOCKET NOS.
707(F) - UNITED STATES COLD STORAGE OF CALIFORNIA;
729(F) - RICHARD T. FUKUDA;
730(F) - GENERAL FOODS INTERNATIONAL.,
A DIVISION OF GENERAL FOODS CORP.;
740(F) - OSCAR MAYER & CO., INC.;
754(F) - YELLOW FORWARDING CO.,
YELLOW FREIGHT INTERNATIONAL DIV.;
856(F) AND 857(F) - SEARS, ROEBUCK AND CO.;
944(F) - GRAY DISTRIBUTING COMPANY, LTD.;
984(F), 985(F) AND 986(F) — HAWAIIAN ISLANDS
FREIGHT ASSOC.;
994(F) - CATHERINE S. KANE AND JOHN M. RYAN,
DOING BUSINESS AS FIRE MOUNTAIN POTTERY;
1000(F) - CONTINENTAL MECHANICAL;
1001(F) - HUNTERS, INC.;
1002(F) - METALCRAFT PRODUCTS;
1003(F) - E. E. BLACK COMPANY;
1004(F) - SERVCO PACIFIC CORPORATION;
1005(F) - AMFAC DISTRIBUTION COMPANY;
1006(F) - BUILDERS PRODUCT CORPORATION;
1007(F) - BACON UNIVERSAL COMPANY;
1008(F) - FAMCO CORPORATION;

1009(F) - HONOLULU ROOFING COMPANY:
1010(F) - HAWAIIAN FLOUR MILLS;
1011(F) - OCCIDENTAL CHEMICAL COMPANY;
1012(F) - CITY MILL COMPANY, LTD.;
1013(F), 1014(F), 1015(F), 1017(F), AND 1018(F) - CASTLE & COOKE FOODS DIVISION OF CASTLE & COOKE, INC.
1021(F) - CONSTRUCTION MATERIALS HAWAII;
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1024(F) - HAWAIIAN DREDGING COMPANY;
1034(F) - CASTLE & COOKE FOODS DIVISION OF CASTLE & COOKE, INC.;
1053(F) - GENERAL ELECTRIC COMPANY;
1054(F) - FOODLAND SUPER MARKET, LIMITED;
1095(F) AND 1096(F) - MCKESSON WINE & SPIRITS

v.

MATSON NAVIGATION COMPANY, INC.

SETTLEMENT APPROVED; COMPLAINTS DISMISSED

Finalized January 18, 1983

By motion, filed December 15, 1982, Matson Navigation Company, Inc., the respondent in this consolidated proceeding encompassing forty-three individual reparation cases, requests approval of the terms of an agreement settling all of those cases.

In my judgment, the settlement should be approved.

BACKGROUND AND HISTORY

This proceeding has its genesis in Docket No. 76-43, *Matson Navigation Company - Proposed Rate Increases in the United States Pacific Coast/Hawaii Domestic Offshore Trade*. Docket No. 76-43 was an investigation into the justness and reasonableness of a 3.5 percent general rate increase on nearly all cargoes carried by Matson in the trade described in the title of that proceeding. In the Report and Order deciding Docket No. 76-43,[1] the Commission determined that Matson

[1] *Matson Navigation Company - Proposed Rate Increases in the United States Pacific Coast/Hawaii Domestic Offshore Trade*, 21 F.M.C. 532 (1978).

should be allowed a maximum rate of return on equity of 13 percent for the test year beginning August 1, 1976, and ending July 31, 1977. It was found that, on a projected basis, Matson would earn 12.75 percent on rate base and 13.98 on common equity. Applying those factors, the Commission held that 2.8 percent of the increase was justified and the remainder was unreasonable.

Matson and Military Sealift Command (MSC) [2] petitioned for reconsideration of the decision in Docket No. 76-43. Matson asked for a finding that the rate increase was just and reasonable in its entirety. Among other things, MSC asked the Commission to fashion a remedy so that shippers could recover the portion of charges found to be unjust. The Order on Reconsideration [3] denied Matson's petition and granted MSC's petition, in part.

Briefly, the Order on Consideration determined that any shipper paying the unjust rates had a cause of action for reparation under section 22 of the Shipping Act, 1916,[4] and postulated that this cause of action did not accrue until the date when the Commission found the rates to be unjust and unreasonable.[5]

Thereafter, these forty-three proceedings were initiated. As the titles in the caption indicate, four were filed as formal complaint proceedings and thirty-nine were filed under the provisions of the Commission's Rules of Practice and Procedure for adjudication of small claims.[6] Matson objected to the handling of the latter under informal procedures and requested that they be processed under formal procedure, in coordination with the other formal complaints. Under the rules, this request was granted.

In accordance with pertinent portions of the Report and Order and Order on Reconsideration in Docket No. 76-43, each of the forty-three complaints sought reparation for .007 [7] of freight charges paid during the period from August 2, 1976, through July 30, 1977.[8] Two of the complaints [9] added second causes of action based on the contention that the unreasonable portion of the 3.5 percent rate increase continued to be charged as an incremental part of subsequent rate increases put into effect by Matson. In its individual answers to all forty-three com-

[2] MSC was a party in Docket No. 76-43. It is the complainant in Docket No. 79-68, the lead docket in this consolidated proceeding.

[3] *Matson Navigation Company - Proposed Rate Increases in the United States Pacific Coast/Hawaii Domestic Offshore Trade*, 21 F.M.C. 987 (1979).

[4] 46 U.S.C. 821.

[5] December 12, 1978, the date when the Report and Order in Docket No. 76-43 was issued, became the date the cause of action accrued.

[6] Subpart S - Informal Procedure for Adjudication of Small Claims, 46 CFR 502.301 et seq.

[7] The complaint in Docket No. 79-67 erroneously sought damages calculated at .07 of freight charges, but the correct rate of .007 has been applied to the settlement.

[8] The complaint in the lead docket, 79-68, inadvertently extended the period to July 31, 1977. This was corrected.

[9] Docket Nos. 79-68 and 80-84.

plaints, Matson denied liability for reparation and asserted eight separate affirmative defenses.[10]

Inasmuch as the MSC complaint in Docket No. 79-68 sought the greatest amount of damages and included all of the issues raised in the other proceedings, the complainants in the other proceedings consented to a procedure whereby their proceedings would be held in abeyance pending the determination, in Docket No. 79-68, of certain legal issues pertaining to particular affirmative defenses and to the second cause of action.

Accordingly, in Docket No. 79-68, the legal issues raised by the affirmative defenses and the second cause of action were severed from the issue of the amount of damage and Matson and MSC filed briefs addressed to those legal issues. However, after those briefs were filed, Matson filed another petition in Docket No. 76-43, seeking modification of certain findings and conclusions contained in the Commission's Report and Order and Order on Reconsideration. By Order, issued May 2, 1980, the Commission denied Matson's petition for modification but added that it would be appropriate for Matson to introduce evidence of events subsequent to the Docket No. 76-43 test year as equitable defenses to ancillary actions for reparations.

I treated the briefs filed by Matson and MSC, in Docket No. 79-68, as cross-motions addressed to the pleadings whereby MSC was asking for dismissal of particular affirmative defenses and Matson was asking for dismissal of the second cause of action. Thereafter, I issued a ruling on the cross-motions.[11] Among other things, I determined that: (1) Matson would not be precluded from asserting its affirmative defense addressed to the statute of limitations. This meant that I disagreed with what I viewed as dicta in the Order on Reconsideration concerning the date of accrual of the first cause of action; (2) Matson would not be precluded from asserting its affirmative defense involving equitable considerations. This meant that Matson could introduce evidence showing that its earnings in test years before and after the Docket No. 76-43 test year were depressed; (3) MSC's second cause of action based on presumed inherent defects in Matson's rates, subsequent to the Docket No. 76-43 test year, should be dismissed. However, I preserved MSC's right to proceed with the second cause of action on the basis of proof (as opposed to presumption) of unreasonableness.

MSC appealed the ruling. By Order of January 26, 1982, the Commission affirmed and adopted the ruling as to the second cause of

[10] With respect to the two complaints alleging second causes of action, Matson denied that its rates were excessive after July 30, 1976, and averred that there was nothing contained in either the Report and Order or Order on Reconsideration in Docket No. 76-43 which would support the allegations of unreasonableness subsequent to that date.

[11] Order Affecting (1) Particular Affirmative Defenses Asserted By Respondent and (2) The Second Cause of Action Alleged in the Complaint; served May 8, 1981.

action and Matson's equitable affirmative defense, but the Commission adhered to the views it expressed in the Order on Reconsideration in Docket No. 76-43 and reversed as to the statute of limitations.

Subsequent to the Order of January 26, 1982, Matson moved for consolidation of the forty-three cases. This was granted by Order of Consolidation served May 20, 1982. Thereafter, Matson commenced settlement negotiations with MSC, alone, at first, and then with the other complainants, simultaneously.

THE SETTLEMENT

Matson opened up negotiations to settle with MSC about the time the cases were consolidated. On June 29, 1982, Matson submitted an offer of settlement, in writing, to MSC. As pertinent, Matson offered to settle MSC's claim on the basis of 50 percent of the damages alleged in MSC's first cause of action,[12] together with interest thereon from December 12, 1978. Interest would be calculated in accordance with Rule 253 of the Commission's Rules of Practice and Procedure.[13] The settlement was made contingent upon acceptance by the other complainants[14] and approval by the Commission. By letter dated July 14, 1982, MSC accepted Matson's offer. (The pertinent portion of Matson's letter containing the offer and MSC's letter of acceptance are attached as Appendix I.)

Matson informed me of the contingent agreement with MSC and sought approval to communicate the details to the other complainants together with similar offers patterned on the MSC agreement. After reviewing Matson's proposed letter to the other complainants, I authorized its transmission. The authorized mailing was sent to the complainants on August 25, 1982. (A copy of the letter and its attachments, except for the service list, is attached as Appendix II.) One of the attachments to Matson's letter (Exhibit A) apprised every claimant of the details of the offers made to all the complainants.

Each of the complainants in the other forty-two cases accepted the offer.[15]

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[12] In each of the forty-three cases, the complainants submitted freight bills to Matson. Matson verified those bills and does not dispute the amounts claimed. Fifty percent of the MSC claim for reparation amounts to $29,500.

[13] 46 CFR 502.253. Under that rule, which prescribes the rate of interest to be awarded in cases arising under section 18(b)(3) of the Shipping Act, 1916, 46 U.S.C. 817(b)(3) (except special docket cases under 46 CFR 502.92), and section 2 of the Intercoastal Shipping Act, 1933, 46 U.S.C. 844, interest will be calculated by averaging the monthly rates on six-month U.S. Treasury bills commencing with the rate for the month that freight charges were paid and concluding with the latest available monthly Treasury bill rate at the time reparation is awarded. It should be emphasized that an award of interest lies within the discretion of the Commission.

[14] Two complaints were filed by single instance shippers. The offer proposed that those claims be paid in full.

[15] The written acceptances will be filed with the Secretary of the Commission.

DISCUSSION, CONCLUSION AND ORDER

It is well settled that legislative and Commission policy foster the settlement of administrative proceedings. The right to seek settlement of administrative proceedings carries the same Congressional mandate as the right to submit proposed findings of fact and legal arguments.[16] The Commission has implemented its mandate by rule [17] and thereafter emphasized "The law, of course, encourages settlements and every presumption is indulged in which favors their fairness, correctness and validity generally." *Merck Sharp and Dohme v. Atlantic Lines*, 17 F.M.C. 244, 247 (1973).

In furtherance of this policy the Commission has authorized settlements of administrative proceedings on the basis of a compromised reparation payment absent admissions or findings of violation of the Shipping Act.[18] *Com-Co Paper Stock Corporation v. Pacific Coast-Australasian Tariff Bureau*, 21 F.M.C. 62 (1978); *Robinson Lumber Co., Inc. v. Delta Steamship Lines, Inc.*, 21 F.M.C. 354 (1978); *Old Ben Coal Co. v. Sea-Land Service, Inc.*, 21 F.M.C. 505 (1978); *Organic Chemicals v. Atlanttrafik Express Service*, 18 SRR 1536a (1979); Docket No. 81-62, *Westinghouse Electric Corporation v. Delta Steamship Lines, Inc.*, 25 F.M.C. 488 (1982).

I find it in the public interest to approve the settlement.

This has been a strenuously contested proceeding, at least insofar as MSC and Matson are concerned. Absent a settlement, if the past is a guide to the future, the promise of lengthy evidentiary hearings in Honolulu, Los Angeles, and San Francisco is real. This is so because Matson's equitable defense concerning depressed rates during the years 1978 through 1981, inclusive, would entail complete financial data and rate of return evidence for each of those years. In effect, if not in fact, the record would then consist of four separate rate cases. Under the theory of Matson's defense, the results of those four rate cases would have to be balanced against the overpayments in Docket No. 76-43.

The sum of all these claims is $137,022.75. The settlement, which includes payment of 50 percent of the face amount of the claims, together with interest, calls for a payout of about $100,000.00. It is

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[16] Section 5(b)(1) of the Administrative Procedure Act, 5 U.S.C. 554(c)(1), provides: "The agency shall give all interested parties opportunity for—(1) the submission and consideration of facts, arguments, offers of settlement, or proposals of adjustment when time, the nature of the proceeding, and the public interest permit;"

[17] Rule 91 of the Commission's Rules of Practice and Procedure, 46 CFR 502.91, provides in pertinent part: "Where time, the nature of the proceeding, and the public interest permit, all interested parties shall have the opportunity for the submission and consideration of facts, argument, offers of settlement or proposal of adjustment. . . ."

[18] It may be argued that, technically or inferentially, the various decisions and order in Docket No. 76-43 and the order of January 26, 1982, in Docket No. 79-68, subsume a finding of violation of section 18(a) of the Shipping Act, 1916, 46 U.S.C. 817(c). However, this is not conceded by Matson within the framework of the settlement agreement.

clear that the potential cost of litigation (trial and appeal) before the Commission would dilute the value of the judgment, whichever side wins. Moreover, there is a continuing likelihood of judicial review of certain issues, notably Matson's statute of limitations and equitable defenses and MSC's second cause of action. This would mean even more expense, greater uncertainty over the outcome, and a more protracted course to finality.

In settling with the one-time shippers [19] for 100 percent of their claims, Matson has not departed from the mandate of section 14 Fourth (c) of the Shipping Act, 1916, 46 U.S.C. 812. That section proscribes unfair treatment of or unjust discrimination against a shipper by a common carrier in adjusting or settling claims. Matson could not have asserted its allowable equitable defense against those two shippers because that defense is based upon continuing carriage at depressed rates, a fact not present in the case of single use. Cf. Docket No. 79-11, *Del Monte Corporation v. Matson Navigation Company*, 22 F.M.C. 365 (1979). Moreover, although aware of these differing offers, none of the forty-one complainants accepting 50 percent has objected to the terms of settlement with respect to these two shippers.

I find the settlement is a bona fide and realistic means of resolving all elements of the dispute between all parties and that the settlement will not result in any violation of the Shipping Act nor does it appear to do violence to any aspect of the regulatory scheme. The settlement merits approval.

Accordingly, it is ordered that the settlement be approved. Matson shall make payment of the principal amount agreed upon, together with interest thereon, in accordance with the calculations prescribed in Rule 253, to the date when payment is made. The date of payment shall be the date when Matson's remittance is placed in the United States mail. Complaints dismissed.

(S) SEYMOUR GLANZER
Administrative Law Judge

[19] Docket Nos. 729(F) and 994(F).

APPENDIX I

June 29, 1982

Milton J. Stickles, Jr., Esq.
Counsel
Military Sealift Command
4228 Wisconsin Avenue, N.W.
Washington, D. C. 20390

Re: FMC Docket No. 79-68, MSC v. Matson Navigation Company

Dear Mr. Stickles:

* * * * *

I have been authorized to offer settlement of this matter on the basis of 50 percent (*i.e.,* $29,500) of the first count of MSC's complaint with interest from December 12, 1978 calculated in accordance with Rule 253 of the Commission's Rules of Practice and Procedure. This is a final and non-negotiable offer because Matson believes that it would better to litigate than to offer more. In view of the equities in Matson's favor as set forth in my letter of April 28, it is more than a fair offer. I hope MSC will see fit to accept it. If it is accepted by MSC, I will make the same offer to all but two of the other claimants.* As you know, the Commission will have to approve any settlement. If the offer is not accepted, Matson will request an opportunity to present its evidence on the equitable issues.

YOURS VERY TRULY,

DAVID F. ANDERSON
Counsel

*Two small claims involve noncontinuing shippers. They would be paid in full.

David F. Anderson, Esq.
Matson Navigation Company
333 Market Street
P.O. Box 3933
San Francisco, California 94119

MSC v. Matson, FMC Docket 79-68

Dear Mr. Anderson:

Receipt of your letter of June 29, 1982 regarding the above-entitled matter is acknowledged.

* * * * *

Be that as it may, the Military Sealift Command is prepared to accept your settlement proposal provided that it receives the approval of the Federal Maritime Commission.

SINCERELY YOURS,

MILTON J. STICKLES, JR.
Counsel

APPENDIX II

August 25, 1982

To All Parties of Record in Federal Maritime Commission
Docket No. 79-68 and 42
Related Reparation Complaint Proceedings*

Gentlemen:

The complaint of Military Sealift Command in Docket No. 79-68 and the 42 other. complaint proceedings based on the Federal Maritime. Commission's Orders of December 12, 1978 and April 27, 1979 in Docket No. 76-43, have been consolidated for further proceedings. Matson has the right to offer evidence in support of its equitable defenses set forth in its answers to the complaints, and is prepared to do so. In the meantime, however, Matson and Military Sealift Command have negotiated a settlement on the basis of 50% of the principal amount demanded in the first count of MSC's complaint plus interest since December 12, 1978. That is the date of the FMC Order determining Matson's rates to have been excessive to the extent of .7 of one percent for the test year August 1, 1976 - July 31, 1977 in Docket No. 76-43.*

Matson is willing to extend its offer to settle for 50% plus interest from December 12, 1978 to all parties, subject to approval by the Federal Maritime Commission. The basis for Matson's offer is set forth below.

The FMC decisions in general rate increase proceedings establish that Matson's rates were reasonable for several years prior to the test year in Docket No. 76-43. The Commission found Matson's rates to be excessive for the test year August 1, 1976 - July 31, 1977 by only .7 of one percent. The ceiling was fixed by the FMC for that test year at a rate of return of 13% on common equity. On the basis of the data presented in the proceeding, that was equivalent to a rate of return on rate base of 12%.

At any evidentiary hearing in these complaint proceedings, Matson will offer evidence to show that its rates of return on common equity and rate base during the years 1978 through 1981 were well below those authorized in Docket No. 76-43 and far below those authorized for carriers in the Puerto Rico trade.

Specifically, Matson will show that its actual rates of return on common equity and rate base (computed in accordance with Matson's

*Docket numbers, names of complainants and representatives of complainants are shown on attached service list.

understanding of the FMC rules for each year) were as follows for the years 1978 through 1981:

	1978	1979	1980	1981
Rate of Return on Common Equity	8.16%	7.12%	5.61%	5.64%

	1978	1979	1980	1981
Rate of Return on Rate Base	8.28%	8.09%	7.89%	8.59%

The further rate increases Matson would have needed to bring its earnings up to the level of 13% on common equity for the years in question are as follows:

	1978	1979	1980	1981
Rate of Return on Common Equity	3.23%	4.22%	5.64%	8.41%

To bring the earnings up to the level of 12% on rate base, Matson would have needed the following rate increase:

	1978	1979	1980	1981
Rate of Return on Rate Base	5.81%	6.49%	7.60%	8.01%

Matson would further show that each of the complainants (with two exceptions which will be explained below) continued to ship via Matson during the years 1978 through 1981 and in fact received the full benefit of Matson's depressed rates in those years.

If you apply the percentages shown above by which Matson's rates were below the level permitted in Docket No. 76-43, to the total freight charges paid Matson in those subsequent years, it is apparent that all complainants (with two exceptions) have benefited because Matson's rates were depressed. Those benefits exceed by many times the amount of excessive freight charges each complainant paid during the test year 1976 - 1977. In short, Matson's voluntary action in holding rates down went far beyond any rollback order the FMC could lawfully have entered. It is Matson's position that under these circumstances the Commission ought not to allow reparations and that each complaint should be dismissed.

Matson makes this offer to settle for 50% plus interest to avoid further, possibly lengthy proceedings in these matters for the presentation and evaluation of Matson's evidence in support of its equitable defenses. Further proceedings for judicial review are probable if the FMC does not uphold Matson's defenses.

This is a final and non-negotiable offer. In Matson's view, the Shipping Act, 1916 requires that settlement on the same basis be made with all parties having similar claims. If all parties agree to this offer and the settlement is approved by the Federal Maritime Commission, payment will be made as full and final settlement.

For your convenience, the attached Exhibit A (Settlement Offer) sets forth the case name and number, 50% of the principal amount of the claim,** interest as provided for in the FMC Rules of Practice (i.e., averaging the monthly rates on six month U.S. Treasury bills) from December 12, 1978 through July 1982, and the total amount. Interest will be extended up to the date of payment.

The foregoing letter was submitted to Judge Glanzer in advance of mailing. Judge Glanzer has authorized me to include this and the following paragraph in this letter.

Judge Glanzer offered no objections to the form or context of the letter, however, this should not be construed to mean that the terms of settlement have been approved. Judge Glanzer will not rule on the terms of settlement until a formal motion for approval is submitted to him.

I will prepare and submit the motion upon return of the acceptances.

If you accept this offer, please so indicate by executing the acceptance at the foot of the duplicate copy of this letter, having a notary public take an acknowledgment of your signature (unless an attorney-at-law signs as counsel of record) and returning it to me.

See the following pages for Acknowledgment forms for corporation, partnership and individual. Please use the one appropriate for you.

YOURS VERY TRULY,

DAVID F. ANDERSON

cc: Honorable Seymour Glanzer

**MSC and Eagle Distributors amounts are based on the first counts of their complaints. In Matson's view, the FMC Order of January 26, 1982 effectively disposes of the issues raised by the second count. The Fire Mountain Pottery and Richard Fukuda claims will be paid in full because they were not continuing shippers.

ACCEPTANCE

The foregoing offer is hereby accepted.

____

(Name of Claimant)

By: ______________________________
Title: ______________________________
Date: ______________________________

CERTIFICATE OF ACKNOWLEDGMENT (Individual Form)

STATE OF ______________________________)
COUNTY OF ______________________________) ss.

On this ______ day of ______________ in the year 1982 before me, a Notary Public, personally appeared ______________________________ ______________________________, known to me (or proved to me on the oath of ______________________________) to be the person whose name is subscribed to the within instrument and acknowledged that he (she or they) executed the same.

____

Notary Public

CERTIFICATE OF ACKNOWLEDGMENT (Corporate Form)

STATE OF ______________________________)
COUNTY OF ______________________________) ss.

On this ______ day of ____________ in the year 1982 before me, a Notary Public, personally appeared ______________________________, known to me (or proved to me on the oath of ______________________________) to be the person who executed the within instrument on behalf of the corporation therein named and acknowledged to me that such corporation executed the same.

____

Notary Public

CERTIFICATE OF ACKNOWLEDGMENT (Partnership Form)

STATE OF ______________________________)
COUNTY OF ____________________________) ss.

On this _____ day of _______________ in the year 1982 before me, a Notary Public, personally appeared ______________________________ ______________________________________, known to me (or proved to me on the oath of ____) to be one of the partners of the partnership that executed the within instrument and acknowledged to me that such partnership executed the same.

____
Notary Public

EXHIBIT A (SETTLEMENT OFFER)

Docket Number and Name	50% of Principal Amount	Interest	Total
1. 79-67, Imua Builders Services, Ltd.	[1] $43.85	$18.90	$62.75
2. 79-68, Military Sealift Command	29,500.00	12,712.44	42,212.44
3. 80-84, Eagle Distributors, Inc.	4,549.22	1,960.40	6,509.62
4. 80-85, Waipuna Trading Company, Inc.	1,453.51	626.36	2,079.87
5. 707(F), United States Cold Storage of California	1,953.11	841.65	2,794.76
6. 729(F), Richard T. Fukuda	[2] 8.94	3.85	12.79
7. 730(F), General Foods International, a Division of General Foods Corp.	1,667.48	718.57	2,386.05
8. 740(F), Oscar Mayer & Co., Inc.	489.86	211.10	700.96
9. 754(F), Yellow Forwarding Co., Yellow Freight International Div.	743.58	320.43	1,064.01
10. 856(F), Sears, Roebuck & Company	2,480.37	1,068.87	3,549.24
11. 857(F), Sears, Roebuck & Company	2,458.39	1,059.39	3,517.78
12. 944(F), Gray Distributing Company, Ltd.	317.84	136.97	454.81
13. 984(F), Hawaiian Island Freight Assoc.	168.42	72.58	241.00
14. 985(F), Hawaiian Island Freight Assoc.	2,363.25	1,018.40	3,381.65
15. 986(F), Hawaiian Island Freight Assoc.	1,472.94	634.73	2,107.67
16. 994(F), Catherine S. Kane & John M. Ryan, d/b/a Fire Mountain Pottery	[2] 171.13	73.75	244.88
17. 1000(F), Continental Mechanical	154.45	66.56	221.01
18. 1001(F), Hunters, Inc.	236.71	102.01	338.72
19. 1002(F), Metalcraft Products	101.19	43.61	144.80
20. 1003(F), E. E. Black Company	50.66	21.83	72.49
21. 1004(F), Servco Pacific Corporation	605.95	261.12	867.07
22. 1005(F), Amfac Distribution Company	365.45	157.48	522.93
23. 1006(F), Builders Product Corporation	126.65	54.58	181.23
24. 1007(F), Bacon Universal Company	81.08	34.94	116.02
25. 1008(F), Famco Corporation	12.15	5.23	17.38
26. 1009(F), Honolulu Roofing Company	212.68	91.65	304.33
27. 1010(F), Hawaiian Flour Mills	543.59	234.25	777.84
28. 1011(F), Occidental Chemical Company	293.64	126.54	420.18
29. 1012(F), City Mill Company, Ltd.	869.33	374.62	1,243.95
30. 1013(F), Castle & Cooke Foods Division of Castle & Cooke, Inc.	197.27	85.01	282.28
31. 1014(F), Castle & Cooke Foods Division of Castle & Cooke, Inc.	88.24	38.03	126.27
32. 1015(F), Castle & Cooke Foods Division of Castle & Cooke, Inc.	1,159.60	499.71	1,659.31
33. 1017(F), Castle & Cooke Foods Division of Castle & Cooke, Inc.	1,898.23	818.00	2,716.23
34. 1018(F), Castle & Cooke Foods Division of Castle & Cooke, Inc.	908.10	391.33	1,299.43
35. 1021(F), Construction Materials Hawaii	911.83	392.93	1,304.76
36. 1022(F), Atlas Electric Company	27.56	11.87	39.43
37. 1023(F), Brewer Chemical Corporation	1,350.46	581.95	1,932.41
38. 1024(F), Hawaiian Dredging Company	119.45	51.47	170.92
39. 1034(F), Castle & Cooke Foods Division of Castle & Cooke, Inc.	2,170.35	935.27	3,105.62

EXHIBIT A (SETTLEMENT OFFER)—Continued

Docket Number and Name	50% of Principal Amount	Interest	Total
40. 1053(F), General Electric Company	1,559.94	672.22	2,232.16
41. 1054(F), Foodland Super Market Limited	2,460.73	1,060.40	3,521.13
42. 1095(F), McKesson Wine & Spirits	606.58	261.39	867.97
43. 1096(F), McKesson Wine & Spirits	1,647.65	710.02	2,357.

[1] This complainant erroneously multiplied total freight charges by .07 rather than .007. Number shown is 50% of correct amount ($87.69).

[2] Full amount.

FEDERAL MARITIME COMMISSION

DOCKET NO. 81-28

TRANSPORTACION MARITIMA MEXICANA, S.A.

v.

BOARD OF COMMISSIONERS OF THE PORT OF NEW ORLEANS

Charge on cargo stored in transit areas beyond the expiration of the free time period found unreasonable in violation of section 17 of the Shipping Act, 1916, because calculated on the basis of the length of the vessel calling for the cargo.

Kenneth H. Volk, Wade S. Hooker, Jr. and *Geoffrey W. Crawford* for Complainant.

Edward J. Sheppard for Respondent.

REPORT AND ORDER

January 28, 1983

BY THE COMMISSION: (ALAN GREEN, JR., *Chairman*; JAMES J. CAREY and JAMES V. DAY, *Commissioners.*)*

This proceeding was initiated upon the complaint of Transportacion Maritima Mexicana, S.A. (TMM), which alleged that the Board of Commissioners of the Port of New Orleans' (the Port) "penalty dockage" tariff provisions were in violation of section 17 of the Shipping Act, 1916 (46 U.S.C. § 816). In an Initial Decision served April 6, 1982, Administrative Law Judge William Beasley Harris found the tariff provisions to violate section 17. The proceeding is now before the Commission upon Exceptions filed by the Port, to which TMM has replied.

BACKGROUND

Although there is some disagreement concerning particular factual allegations, the basic events giving rise to this proceeding are generally clear and undisputed. A TMM vessel, M/V GELA, was scheduled to arrive at the Thalia Street wharf at the Port on May 29, 1980. Although cargo had begun accumulating at the wharf several days beforehand, the proposed call of M/V GELA was cancelled the day it was due to arrive. More cargo accumulated at the wharf until mid July,

* Vice-Chairman Moakley's concurring and dissenting opinion is attached.

1980. At that time M/V RISHI AGASTI, also operated by TMM, docked at Thalia Street and loaded all the TMM cargo.

As a result of TMM's delay in picking up the cargo, the Port assessed TMM charges under Item 15-K, Section 3(b) of its tariff, which states:

> Dockage charges shown in Section (4) of this item shall be assessed the vessel beginning on the first day after the expiration of the free time for assembling outward cargo [excepting certain categories of cargo] . . ., if the vessel has not arrived at her inward and/or outward berth . . . .

Section (4) refers to Column 1 of Item 20, which sets forth rates based on "vessel over-all length." The charges assessed on the accumulated cargo were based on the RISHI AGASTI's length and amounted to $22,099.

DISCUSSION AND CONCLUSIONS

The Port's Exceptions allege both substantive and procedural errors in the Initial Decision. In the interest of clarity, each exception, any reply to the exception and the Commission's discussion and disposition thereof will be presented *seriatim.*

The four alleged "errors in substantive findings" in the Initial Decision are as follows:

1. The Port excepts to the suggestions in the Initial Decision that the tariff is ambiguous, that it does not clearly notify users of the charges to be assessed, and that it is faulty for containing "no definition of penalty dockage or penal-level charges." The Port argues that there is no requirement that each and every item in the the tariff be defined. The Port further argues that the penalty dockage provision is clearly set forth in the tariff and was well understood by TMM.

TMM does not explicitly refer to this Exception. However, previous pleadings indicate that TMM does not dispute that the charge was correctly computed in accordance with the tariff.[1] The record indicates that there was never any confusion by either party as to whether and how the charges applied to TMM's cargo. The Commission concludes that the Port's exception is well founded.

2. The Port objects to the Presiding Officer's conclusion that the penalty dockage charge is a charge for the storage of cargo and that it is unreasonably high. The Port explains that the charge is "a penalty to *discourage* the storage of cargo in the Board's transit sheds," and that

[1] TMM's Opening Brief charged disparities in the tariff's application, in that the tariff excepted several categories of cargo from the 15-day free time allowance for assembling outward cargo, providing 30 or 90 days instead, and "adjusted demurrage" thereafter. The "disparate application" charge appears to have been abandoned because neither party has raised the issue subsequent to the Initial Decision. In any event, the Commission's ultimate disposition in this proceeding renders unnecessary further consideration or this matter.

under the standards of *West Gulf Maritime Association v. Federal Maritime Commission,* 21 F.M.C. 244 (1978), the charge is legitimate because it is (1) otherwise lawful, (2) not excessive, and (3) reasonably related, fit and appropriate to the ends in view. The Port argues that penalty dockage charges are necessary to deter prolonged storage of cargo on wharves; they are in widespread use in other ports, though under various names; [2] and their existence was found to be necessary by the Commission in *Free Time and Demurrage Charges on Export Cargo,* 13 F.M.C. 207 (1970).

TMM argues in response that even if intended to be a penalty, the dockage charge is unlawful because it is assessed on an arbitrary basis. TMM cites *Volkswagenwerk A.G. v. Federal Maritime Commission,* 390 U.S. 261 (1968), in which the Court ruled that "the proper inquiry under § 17 is . . . whether the charge levied is reasonably related to the service rendered." 390 U.S. at 282.[3]

The nomenclature assigned to the charge cannot disguise its admitted nature and purpose - it is an assessment designed to discourage storage of cargo on wharves beyond the free time period.[4] It is not a "dockage" charge in the traditional sense of the term; it is triggered by the arrival of cargo, and was applied here 38 days before the RISHI AGASTI arrived at the dock. It is not a "berthing charge," in which the length of the vessel would be relevant. Application of the charge to its evident and admitted purpose - to discourage the storage of cargo in transit areas - demonstrates that, as written, the charge is not reasonably related to that end. A relatively small amount of cargo stored at the Port's transit sheds and picked up by a large vessel could be assessed a higher fee than an enormous load picked up by a small vessel. Although intended to deter the clogging up of wharf areas with cargo, the penalty dockage formula does not include volume, tonnage, or square footage as a factor. Counsel for the Port conceded at oral argument that if TMM had accumulated only 1,001 tons of cargo instead of the over 5,000 tons which actually accumulated, its charge would have been the same. The formula also fails to take into account whether the stored cargo accumulated gradually, whether the entire volume was present from the outset, or whether the bulk of the cargo arrived only one day before the vessel.

The Port does not contest these disparities or defend the appropriateness of this particular formula. It emphasizes instead that this is a *penalty* charge, and that because it would discourage storage of cargo

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[2] *E.g.,* "demurrage," "wharfage demurrage," "pier demurrage," or "storage" charges.

[3] The Port argues that the *WGMA* test is the appropriate standard for judging a penalty dockage system, rather than *Volkswagenwerk's* cost-benefit analysis.

[4] The charge in issue might be more appropriately called a "penalty demurrage" charge, but it will be referred to in this Order as a "penalty dockage" charge because this is the name which has been used throughout this proceeding.

in transit space, it is therefore "reasonably related, fit and appropriate to the ends in view." Using that rationale, the fee would be equally related, fit and appropriate if it were calculated on the basis of random figures established by chance.

The tests in *WGMA* and *Volkswagenwerk* are not significantly different; the Port's penalty dockage fee fails under either one. It is not reasonably related, fit and appropriate to the ends in view within the meaning of *WGMA*, and it is not reasonably related to the service rendered under *Volkswagenwerk*.

There is no apparent logic to the Port's argument that because the fee in issue is a penalty charge and not a compensatory charge, a different standard applies. The *level* of penalty charges can be expected to be higher than that of compensatory assessments. *See Free Time, supra.* However, there must still be a rational nexus between the fee itself and that which is being penalized. There is no reasonable relation between a fee based upon the length of a vessel and the prolonged storage of cargo. The Port's penalty dockage fee is therefore unreasonable and in violation of section 17.[6] The Port's exception on this point will be denied.

3. The Port alleges that the Presiding Officer erred in ruling that the "tariff must be construed from its four corners," and in "refusing to consider" evidence of custom and practice of penalty dockage at the Port as well as at other Gulf Coast terminals.

The Port's evidence of the history and necessity of penalty charges on prolonged storage of cargo would have been relevant had the issue in this proceeding been whether such penalty charges are lawful. That is not the issue, however; the issue is whether the Port's method of computing the charge used in its penalty dockage system is lawful. The propriety of penalty demurrage in principle is well established. Thus, the Port's evidence on this point was indeed irrelevant.

Evidence of the custom and practice of vessel length-related demurrage charges at other ports might have been relevant, but no such similarly calculated charge was presented. In fact, the Port's evidence that four other Gulf ports assess penalty charges for cargo stored beyond the free time period underscores the defect in the Port's fee; the ports of Galveston, Houston, Mobile and Tampa all base their penalty charges on cargo tonnage, not on vessel length. The Port's exception will be denied.

4. The Port excepts to the Presiding Officer's finding that TMM caused no impediment to the Port's use of the Thalia Street wharf. The Port relies on uncontroverted evidence that drastically reduced volumes of cargo moved on the wharf during the relevant 40-day period

[6] The Commission does not concur, however, with the Presiding Officer's conclusion that the charge is unreasonably high. *See* discussion, *infra.*

compared with the same period in several preceding and subsequent years.[6] TMM argues that the Port produced no evidence of congestion due to the TMM cargo's presence.

The Presiding Officer's failure to find that the TMM cargo impeded the Port's usage of the wharf is supported by the record, and the Port's exception will therefore be denied. The Port established no causal relationship between the decline in cargo movement and the presence of TMM cargo on the wharf. The decrease in cargo movement could have resulted from a lull in vessel calls or from other possible factors, rather than from the storage of the TMM cargo. There was no evidence of congestion or of vessels being turned away. The record simply does not support a finding that the TMM cargo impeded the Thalia Street operation.

More significantly, the matter is irrelevant. The issue before the Commission is use of vessel length as a factor in the computation of a penalty demurrage charge. Whether, in this particular instance, the storage of cargo beyond the free time period created discernible problems is not to the point. The length of the RISHI AGASTI is not alleged to be a factor in the alleged impediment caused by the TMM cargo. The matter has no bearing on the issues to be considered in this proceeding.

The Port's remaining exceptions involve allegations that the Presiding Officer made several procedural errors.

The Port objects to the Presiding Officer's finding that TMM sustained its burden of proof.[7] It argues that TMM's only evidence was that of a Mr. Varuso, who presented confused and erroneous written testimony, particularly on the issue of wharf congestion, and that TMM failed to prove that the Port's charge is unreasonable.

TMM responds that the only matter in issue is a question of law, and that no presentation of proof was therefore necessary.[8]

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[6] The 1977-1981 average (excluding 1980) for the period was 17,525 tons; only either 3413 tons or 4903 tons (the parties disagree) moved in the same period in 1980.

[7] Specifically, the Port excepts to a paragraph in the Initial Decision's concluding section, which, the Port argues, is unfounded in fact and irrelevant to the determination that TMM met its burden of proof. The paragraph reads in full:

> The Presiding Administrative Law Judge finds and concludes he agrees with the complainant that the lack of correlation between the benefits conferred and the dockage charged, have been admitted in the respondent's answer. The Presiding Judge finds and concludes that the admissions of the respondent in its answer to the complaint, the opportunity for the respondent to ask at the hearing for the production of a witness for cross-examination (which was not asked for), as well as the respondent's failure to have any witnesses at the hearing, provide a basis for inferring the complainant had produced with the respondent's admissions, the material on file, the record herein, sufficient to meet its burden of proof. [underscoring in the original]

[8] TMM also argues that its witness' testimony was sufficient to establish that there was no wharf congestion. TMM does not attempt to explain or defend the particular paragraph in the Initial Decision cited by the Port.

It is unclear why the Port characterizes its argument that TMM has not established the unreasonableness of the Port's tariff provision as a "procedural" issue. At any rate, Mr. Varuso's testimony concerning other vessels' activities at the Thalia Street wharf is entirely irrelevant for the reason heretofore mentioned; whether particular impediments were created by the TMM cargo is not germane to the issue in this proceeding. The Commission therefore has disregarded the Varuso testimony in its entirety.

The Varuso testimony constituted the sole evidence presented by TMM. What remains of TMM's case is its Complaint, which establishes a *prima facie* case of unreasonableness under the standard enunciated in *Volkswagenwerk.* The question before the Commission is one of law. Upon careful review of the submissions of both parties, the Commission concludes that the fee formula has not been justified by the Port in responding to TMM's case. The Commission does not adopt the specific findings and conclusions of the Presiding Officer in the paragraph which is the object of the Port's exception,[9] except for his ultimate conclusion that TMM has met its burden of proof.

The Port alleges that it was denied its right to cross-examine TMM's affiant, Mr. Varuso. TMM replies that the Presiding Officer offered to permit cross-examination of Mr. Varuso through written interrogatories, an offer which the Port rejected. The record also indicates that the Port eventually objected to live testimony and oral cross-examination of Mr. Varuso.[10] As the Port rejected opportunities to cross-examine Mr. Varuso both by interrogatories and orally, and as the Varuso testimony has been struck by the Commission as irrelevant, the Port's exception will be denied.

The Port alleges that the Presiding Officer improperly denied all prehearing discovery. The Presiding Officer gave the following oral explanation for not issuing a ruling on the Port's motion to compel TMM to respond to its discovery request:

> JUDGE HARRIS: Because the hearing is today, and under the rules, as you well know, discovery does not have to be completed before there is a hearing.

TMM points out in response that the Port served its discovery request 50 days after the publication of the Complaint in the *Federal Register.*

The Commission's Rules of Practice and Procedure provide that discovery "shall be commenced no later than 30 days" after publication, "unless otherwise ordered by the presiding officer for good cause

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[9] To this extent, the Port's exception is granted.

[10] When the Presiding Officer determined *sua sponte* to reopen the proceeding and hold a hearing with live witnesses, the Port objected, stating that cross-examination of Mr. Varuso would serve no purpose, and that "his testimony goes only to marginal matters which will not affect the outcome of the controversy." The Presiding Officer then cancelled the proposed hearing.

shown." 46 C.F.R. § 502.201(b)(2). The Port's discovery request was untimely under Rule 201, and could therefore be properly ignored by TMM absent the Presiding Officer's finding of "good cause" for tardiness. Although the Presiding Officer perhaps should have articulated the inappropriateness of a motion to compel this discovery request, his failure to grant that motion was not error. The Port's exception is therefore without merit and is denied.

The Port excepts to the Presiding Officer's having twice granted requests made by TMM without having waited for a Port reply. One request was that written interrogatories be substituted for oral cross-examination of Mr. Varuso. The second was TMM's Motion for Leave to File a Substitute Affidavit (of Mr. Varuso). The Port also excepts to the Presiding Officer's refusal to allow it to introduce an affidavit from a Mr. Parker to rebut Mr. Varuso's first affidavit. TMM responds that the Port's objections were mooted when it declined an opportunity to cross-examine Mr. Varuso orally and to present live testimony from Mr. Parker.

Because the Varuso testimony has been struck, the Port's exceptions must be denied.

Finally, the Port excepts to its being denied the opportunity to respond on brief to TMM's case, pursuant to the presiding Officer's briefing schedule, which provided for simultaneous opening briefs by both parties, but a reply brief by only TMM. The Port requested by motion an opportunity also to file a reply brief, but this motion was denied.[11] TMM argues that there was nothing left to argue, that "there were not surprises lurking in the briefs of either side," and that the Port's Exceptions evidence the fact that there were "no fresh arguments" which might have been made to the Presiding Officer.

The Commission's Rules do not specify that there is any "right" to file a reply brief.[12] Because imbalance in opportunity to be heard can, in certain circumstances, be considered unfair, the better course of action in this proceeding would have been to provide each party an equal number of chances to present its case and to respond to that of its adversary. That opportunity has been provided in the current stage of this proceeding. Each party has now had equal opportunity to make its arguments before the Commission and to rebut those of its opponent.[13] The Commission has heard oral argument. Moreover, the record in this case has been carefully reviewed by the Commission *de novo* in order to reach a determination absent consideration of evidence and arguments

[11] In its motion, the Port suggested that it and not TMM be the sole party to file a reply brief.

[12] Rule 221 states only that the presiding officer shall fix the time and manner or filing briefs. 46 C.F.R. § 502.221. Rule 74, dealing generally with replies, merely refers back to Rule 221 on the subject of reply briefs. 46 C.F.R. 502.74(a).

[13] That is, the Port in its Exceptions and TMM in its Reply were able to respond fully to all previous arguments made in this proceeding.

found to be irrelevant.[14] Any disadvantage allegedly accruing to the Port by virtue of the briefing schedule has now been remedied.

Although not stated in the pleadings in this proceeding, counsel for TMM informed the Commission at oral argument that TMM has paid the Port the entire $22,099 assessed as a result of this incident.[15] The relief sought by TMM did not include award of reparation pursuant to section 22 of the Shipping Act, 1916 (46 U.S.C. § 821),[16] nor would award of reparation appear to be warranted.

The relief provided by section 22 is clearly discretionary and permissive, and is not automatic following a finding of a violation of the Shipping Act. *Consolo v. Flota Mercante Grancolombiana,* 383 U.S. 607, 621-22 (1965); *United States v. Columbia Steamship Company, Inc.,* 17 F.M.C. 8, 9-10 (1973). Equitable considerations existing here militate against the award of reparations.

TMM has made no showing that the amount assessed pursuant to the unlawful tariff rule is itself unreasonably high. In fact, evidence presented by the Port suggests that the sum assessed TMM for the storage of its cargo in the Port's transit sheds may be in line with if not lower than what a reasonable penalty demurrage fee might be. Moreover, the record indicates that assessment of the fee came as no surprise to TMM. TMM was forewarned of the charges but made no effort to take action which may have avoided their assessment. Finally, to allow TMM to make use of the Port's transit facilities for the extended storage of its cargo without payment of any charges would bestow upon that carrier an unwarranted windfall. *See Parsons & Whittemore, Inc. v. Johnson Line,* 7 F.M.C. 720, 732 (1964).[17] Section 22 relief is not intended to yield inequitable results. With regard to the actual payment of charges, therefore, the Commission will leave the parties as it found them.

THEREFORE, IT IS ORDERED, That the Exceptions of the Board of Commissioners of the Port of New Orleans are granted to the limited extent indicated and denied in all other respects; and

IT IS FURTHER ORDERED, That Item 15-K, Section 3(b) of the Board of Commissioners of the Port of New Orleans Dock Department Tariff is cancelled; and

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[14] The Commission is not adopting the Initial Decision, although it reaches the same ultimate conclusion that the penalty dockage fee violates section 17.

[15] The Presiding Officer apparently shared our impression that the contested charges had not been paid, for the ordering language of the Initial Decision is in terms of what the Port "may collect". It is not clear why counsel for either side made no attempt to disabuse the Commission of the impression that charges were not paid, until asked directly at oral argument.

[16] The Complaint did request the Commission "to issue such other and further orders as the Commission shall deem appropriate."

[17] Counsel for TMM indicated at oral argument that the Commission should allow the Port to assess only actual dockage charges, reflecting the three days the RISHI AGASTI was docked at Thalia Street.

IT IS FURTHER ORDERED, That the Board of Commissioners of the Port of New Orleans file an amended tariff within 30 days, deleting Item 15-K, Section 3(b); and

IT IS FURTHER ORDERED, That this proceeding is discontinued.

FRANCIS C. HURNEY
Secretary

Vice Chairman Moakley, concurring and dissenting.

I concur with the result reached by the majority in this proceeding that permits the Port of New Orleans to retain the charges at issue but would take an entirely different path in arriving at that result.

I cannot find on the basis of the record before me that complainant TMM has carried its burden of proof in establishing that the Port's penalty dockage provision violates section 17 of the Shipping Act, 1916.[1]

While acknowledging that TMM has produced no relevant evidence in this proceeding, the majority has concluded that, as a matter of law the Port's penalty dockage provision is unreasonable because, "There is no reasonable relation between a fee based upon the length of a vessel and the prolonged storage of cargo." (Majority Opinion pp. 6, 7). Later, the majority reiterates that "The issue before the Commission is use of vessel length as a factor in the computation of a penalty demurrage charge." (Majority Opinion pp. 8, 9).

These statements, in my opinion, indicate a misperception of both the tariff and the issue in this case.

The issue to be resolved is whether the Port's penalty dockage charge is reasonably related, fit and appropriate to the end for which the Port has established the charge,[2] i.e., to discourage a carrier from tying up its breakbulk facilities. The complainant must therefore establish that the penalty dockage charge is not reasonably related to that end. It has not done so.[3]

The tariff provision in question is a dockage charge, not a demurrage charge, as the majority have characterized it. It states, in essence, that a carrier may begin to assemble outbound cargo in a transit shed adjacent to a breakbulk wharf for up to 15 days prior to a vessel's scheduled arrival. However, dockage for the vessel that picks up the cargo commences on the 16th day, whether or not the vessel has actually arrived.

While other U.S. Gulf Ports have chosen to impose a cargo demurrage charge to discourage the extended use of their pier facilities, New Orleans has continued, for over fifty years, to utilize this "penalty dockage" charge to achieve the same purpose. The majority seem troubled by this fact that the charge in question is apparently unpar-

[1] It is beyond dispute that the burden of proof is upon the complainant in this proceeding. If the burden is not met, the complaint must be denied. *Port of Houston Authority v. Lykes Bros. SS Co., et al.* 19 FMC 192, 200 (1976).

[2] *West Gulf Maritime Association v. Port of Houston Authority*, 21 FMC 244, 248 (1978); *Investigation of Free Time Practice - Port of San Diego, Cal.* 9 FMC 525, 547, (1966). If the level of charges were at issue in this proceeding, which is apparently not the case, the level would also have to be reasonably related to the service performed, or the benefit conferred. See *Volkswagenwerk A.G. v. F.M.C.*, 390 U.S. 261, 282 (1968).

[3] The majority also have concluded that TMM's complaint in this proceeding established a *prima facie* case of unreasonableness of the Port's tariff. A reading of that complaint indicates that TMM failed to mention the tariff item which has been found unreasonable.

alled in other port tariffs. But as the Commission stated in a similar case:

> "The Shipping Act does not require all carriers or all ports to offer identical services or engage in the same practices. Competition and innovation are encouraged. Local differences are permitted up to the point they unfairly injure shippers, ports or other persons protected by the Act." [4]

I would find that TMM has not carried its burden of establishing that the Port's penalty dockage charge is unreasonable and dismiss this complaint.

[4] *Port of Houston Authority v. Lykes Bros. SS Co., et al,* note 1 *supra* at 200, 201.

FEDERAL MARITIME COMMISSION

DOCKET NO. 82-1

CALIFORNIA CARTAGE COMPANY, INC.

v.

PACIFIC MARITIME ASSOCIATION

DOCKET NO. 82-10

CONTAINERFREIGHT TERMINALS COMPANY, ET AL.

v.

PACIFIC MARITIME ASSOCIATION

An assessment agreement which effectively alters a prior agreement so as to provide for the funding of collectively bargained fringe benefit obligations on a tonnage rather than man-hour basis is subject to the Commission's jurisdiction under section 15 of the Shipping Act, 1916, as amended.

Persons who neither directly nor indirectly pay assessments under an "assessment agreement" and allege only a secondary competitive injury resulting therefrom lack standing to file a complaint under section 15, fifth paragraph of the Shipping Act, 1916.

Louis E. Wolcher, Thomas P. Burke and *David W. Slaby* for Complainant California Cartage Co., Inc.

John M. Skonberg and *Richard Harding* for Complainants Containerfreight Terminals Co., Hawaiian Pacific Freight Forwarding, and Richmond Transfer and Storage Co.

R. Frederic Fisher, Alf R. Brandin, Charles L. Coleman and *Harry Pfeifer* for Respondent Pacific Maritime Association.

Norman Leonard for Intervener International Longshoremen's and Warehousemen's Union.

REPORT AND ORDER

January 31, 1983

BY THE COMMISSION: (ALAN GREEN, *Chairman;* JAMES JOSEPH CAREY and JAMES V. DAY, *Commissioners*) *

This proceeding arose upon the filing of a complaint by California Cartage Company, Inc. (CalCartage) against the Pacific Maritime Association (PMA). Another complaint, raising the same factual and legal issues, was filed against PMA by Containerfreight Terminals Company

* Vice Chairman Thomas F. Moakley's concurring and dissenting opinion is attached.

(Containerfreight), Hawaiian Pacific Freight Forwarding (Hawaiian), and Richmond Export Service (Richmond). The International Longshoremen's and Warehousemen's Union (ILWU) intervened in the proceedings which were subsequently consolidated.

The complaints attack the legality of Section V of a PMA/ILWU agreement filed with the Commission on July 2, 1981, designated Agreement No. LM-81 (Agreement or LM-81). Implementation procedures for the Agreement were filed on September 29, 1981 and the Agreement was deemed approved by the Commission on October 8, 1981, pursuant to section 15, of the Shipping Act, 1916 (46 U.S.C. § 814).[1] The complaints allege that the Agreement violates sections 15, 16 and 17 of the Shipping Act, 1916 (46 U.S.C. §§ 814, 815 and 816), and, alternatively, that the Commission lacks jurisdiction over the Agreement. Should the Commission determine that it has jurisdiction, Complainants request that we issue a cease and desist order prohibiting further actions under the Agreement and order retrospective assessment adjustments.

Administrative Law Judge Joseph N. Ingolia (Presiding Officer) issued an Initial Decision (I.D.) on October 26, 1982, finding that Agreement No. LM-81 did not fall within the Commission's jurisdiction. PMA and ILWU have filed Exceptions to the Initial Decision. CalCartage has filed Replies to these Exceptions.[2]

INITIAL DECISION

The Presiding Officer found that the Commission lacked jurisdiction over Agreement No. LM-81 because the Agreement does not expressly provide for the funding of fringe benefits. He held that the Commission's authority must be clearly and unambiguously indicated from the specific agreement which is the subject of a complaint. He added that any doubts should be resolved in favor of a finding of no jurisdiction.

The Presiding Officer characterized LM-81 as an assessment agreement which imposes a "tax" on containers and distributes these funds to ILWU-manned CFS stations in proportion to the man-hour assessments made under a previous assessment agreement, Agreement No. LM-80. He rejected arguments that the two agreements be read together and that, so read, the net economic effect was the funding of fringe benefits on other than a man-hour basis. Instead, he restricted his analysis to the provisions of LM-81 and found that its stated purpose and economic

[1] The pertinent provision of section 15 is as follows:

> Assessment agreements, whether part of a collective bargaining agreement or negotiated separately, to the extent they provide for the funding of collectively bargained fringe benefit obligations on other than a uniform man-hour basis, regardless of the cargo handled or type of vessel or equipment utilized, shall be deemed approved upon filing with the Commission.

[2] Containerfreight and Hawaiian also filed a Reply to Exceptions. However, this pleading, which was filed after its due date, merely adopts the CalCartage Replies to Exceptions and attaches a copy of Complainants' Reply Brief.

effect were to reverse the trend of CFS work leaving the on-dock facilities of PMA members. The Presiding Officer also found that the Agreement was conditional, in that if other PMA-ILWU "work preservation" agreements became operative, LM-81 would become null and void. This reinforced his determination that the Agreement was for cost reimbursement purposes and not for the funding of fringe benefits.

In reaching his jurisdictional finding, the Presiding Officer relied on the legislative history of the Maritime Labor Agreements Act of 1980 (MLAA).[3] He found that the underlying purpose of this Act was to take the Commission out of the collective bargaining process by removing from its jurisdiction agreements which were the result of collective bargaining; that the MLAA subjects to Commission jurisdiction only those agreements which impose assessments to provide for the funding of fringe benefits, and only if those assessments are levied on an "other than man-hour basis;" and that Commission consideration of assessment agreements is for the limited purpose of determining the fairness of the assessments as between shippers, carriers and ports and whether those agreements are otherwise detrimental to commerce.

POSITIONS OF THE PARTIES

PMA

PMA argues that the Presiding Officer erred in confining his jurisdictional analysis to the literal language of LM-81 without regard to the economic result achieved by that Agreement's interaction with LM-80. It maintains that the Agreement need not *expressly* direct the payment of funds to a fringe benefit plan to fall within the Commission's jurisdiction if its effect is to shift cost allocations of a pre-existing agreement to an "other than man-hour" basis.

The Presiding Officer also allegedly erred in relying on the union motives underlying the Agreement and ignoring its economic effects. PMA contends that the "work preservation" motive does not alter the fact that the effect of the Agreement is to shift fringe benefit funding from a man-hour assessment to a tonnage assessment. PMA states that LM-81 is not a limited fund, but is directly proportional to man-hour assessments under LM-80 and achieves a reallocation of costs within the container sector.

PMA also challenges the Presiding Officer's finding that the MLAA overruled *Volkswagenwerk*.[4] The MLAA allegedly removed only the "public interest" standard and the pre-implementation approval requirements of section 15 for collective bargaining agreements that did not fall within the then existing "labor exemption." PMA argues that the

[3] The MLAA (P.L. 96-325, 94 Stat. 1021) modified sections 1 and 15 and added a section 45 to the Shipping Act, 1916 to provide for the separate treatment of maritime labor agreements.

[4] *Volkswagenwerk Aktiengesellschaft v. F.M.C.*, 390 U.S. 261 (1968).

MLAA upheld the Commission's jurisdiction over assessment agreements and collectively bargained assessment agreements except those involving man-hour assessments. All other assessment agreements are said to be subject to the standards of section 15, fifth paragraph.

Exception is taken to many of the characterizations of the Agreement made by the Presiding Officer. Challenged is the Presiding Officer's finding that the conditional nature of LM-81 affects jurisdiction on the ground that the future expiration or shift in assessment methods does not affect jurisdiction over the current method. Moreover, that LM-80 funds fringe benefits allegedly does not alter the fact that LM-81 shifts the funding obligations and therefore itself "provides" for "funding" within the meaning of the MLAA.

PMA further argues that it was error for the Presiding Officer to compare the Agreement with other work preservation rules previously instituted by PMA but enjoined by the court. It insists that LM-81 is distinguishable in that it does not impose a tax only on non-ILWU stuffed containers, is not isolated to "hot cargo" and does not contain a "no subcontract" clause. PMA also challenges the finding that PMA "established" the CFS Program Fund Implementation Procedures. PMA claims that it only drafted these procedures, which themselves were the product of collective bargaining, agreed to by the ILWU.

Finally, PMA states that the Presiding Officer erred in failing to dismiss the subject complaints for failure to state a cause of action under the MLAA. It argues that the MLAA was intended only to provide a remedy for persons paying assessments, which Complainants here did not.

ILWU

ILWU argues that the Presiding Officer should have found that Complainants' wage and benefits rates are inferior to those provided by the ILWU-PMA contract, that container traffic has increased dramatically over the years and that ILWU productivity has also dramatically improved in the same period of time. On the other hand, the ILWU insists that it was error for the Presiding Officer to find that the CFS Program Fund was a "result" of the ILA Work Incentive Program. The Fund allegedly resulted from ILWU's own demand for a shift from a man-hour assessment to a tonnage assessment in order to preserve CFS work and accommodate PMA's demand for efficiency and productivity improvements at CFS stations.[5]

CalCartage

CalCartage notes that the Presiding Officer did not make a finding that the actual purpose of LM-81 was limited to "work preservation."

[5] The balance of ILWU's Exceptions are basically the same as PMA's.

Therefore, it views the Initial Decision as not ruling out a finding in another forum that the intent of LM-81 was to capture work not previously done by the ILWU. CalCartage considers the ILWU's wage rate and container traffic growth exceptions to be irrelevant to the jurisdictional finding made in the Initial Decision. It also supports the Presiding Officer's finding that PMA established the CFS Program Fund.

CalCartage supports the Presiding Officer's jurisdictional determinations. It adds, however, that if the Commission reverses the Initial Decision and finds that it has jurisdiction over LM-81, it should also (1) find that Complainants have "standing" to sue under the MLAA, and (2) remand the proceedings for a decision on the merits.

CalCartage considers itself a "person" entitled to file a complaint under section 22 of the Shipping Act, 1916 (46 U.S.C. § 821) and therefore having the requisite "standing." It does not view the provisions of section 22 and those of the MLAA as being mutually exclusive. Allegedly, only the *remedies* of the two sections conflict, and this is no impediment here because Complainants seek only a cease and desist order and prospective assessment adjustments. CalCartage argues that it has suffered injury in fact and stands within the zone of protection of the MLAA.

Complainants allege that they are not arguing antitrust violations but rather violations of sections 15, 16 and 17 of the Shipping Act. It is argued that the criteria stated in *Volkswagenwerk* apply here and that PMA and ILWU have failed to show that the benefits inuring to those paying the assessments are proportional to the level of their assessment. CalCartage maintains that the assessments are intentionally unrelated to the amount of ILWU man-hours utilized by the assessed entities. PMA and ILWU have also allegedly failed to put forward any justification for shifting fringe benefit obligations other than that of buying labor peace, which CalCartage views as being beyond the scope of FMC review under the MLAA. In the event it may be found to be within the scope, however, CalCartage adds that LM-81 does not meet the Commission's "labor exemption" and therefore traditional antitrust considerations would be relevant.

DISCUSSION

Jurisdiction

The Commission has determined that LM-81 falls within its jurisdiction over assessment agreements under the MLAA. In effect, LM-81 operates to impose an assessment for the funding of fringe benefits on other than a man-hour basis and is the proper subject of complaints under section 15, fifth paragraph of the Shipping Act, 1916. Accordingly, the Initial Decision issued in this proceeding will be reversed.

Admittedly, LM-81 does not by its terms provide for the funding of fringe benefits. LM-80 is the agreement which funds fringe benefits and imposes these funding obligations on PMA members, predominantly on a man-hour basis. However, LM-81 imposes a tonnage assessment on containerized cargo handled by PMA members and reimburses PMA's CFS operators on the basis of the man-hour assessments made under LM-80. The clear net effect of the two agreements, therefore, is to provide for fringe benefit funding by CFS operators on a tonnage rather than a man-hour basis.

Section 45 of the Shipping Act (46 U.S.C. § 841c) provides a broadly worded exemption from Shipping Act jurisdiction for "maritime labor agreements," except for those which provide "for the funding of fringe benefit obligations on other than a uniform man-hour basis." While the legislative history of the MLAA suggests that it was intended to provide a broad immunity from section 15 requirements for collective bargaining agreements,[6] the "assessment agreements" exception should not be read so narrowly as to exclude labor agreements from Commission jurisdiction merely because the agreement document itself does not contain an express provision providing for the funding of fringe benefits. Such an interpretation would lead to a result which is inconsistent with the legislative compromise reflected in the MLAA.

Several interests, including the Commission, had argued before Congress that those entities which bear the costs of maritime labor agreements should have a forum to hear complaints concerning the fairness and equity of the assessments made under those agreements.[7] A strict interpretation of the fringe benefit funding exception would largely defeat this purpose. It would in essence allow the drafters of assessment agreements to determine whether those bearing the assessments will have access to the Commission. Although this case does not involve such a situation because PMA, for its own reasons, seeks the Commission's assertion of jurisdiction and no parties paying assessments have filed a complaint, the possibility cannot be ignored. Jurisdictional determinations should not depend on the motives and tactics of individual parties in a particular case.[8]

Ultimately, the meaning of a statute is determined by the language of the statute and the intent of Congress.[9] While the language of the statute is, of course, the first consideration in statutory construction,[10] the Commission will not interpret the MLAA in a manner which defeats its legislative purpose.[11] Any determination regarding Commis-

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[6] *See, e.g.,* I.D. at 22; H.R. REP. NO. 96-876, 96th Cong., 2d Sess. 2.

[7] *See, e.g.,* S. REP. NO. 96-854, 96th Cong., 2d Sess. 10.

[8] *Swift & Co. v. Hocking Valley R. Co.,* 243 U.S. 281 (1917).

[9] *See, e.g., U.S. v. General Motors Corp.,* 518 F.2d 420, 438 (D.C. Cir. 1975).

[10] *Ernst & Ernst v. Hochfelder,* 425 U.S. 185, 197 (1976).

[11] *National R.R. Passenger Corp. v. National Ass. of R.R. Passengers,* 414 U.S. 453, 458 (1974).

sion jurisdiction under the MLAA must take into consideration the purposes of the statute. The MLAA does not limit the scope of the Commission's jurisdictional inquiry to the specific wording of an "assessment agreement" document. Nor does it preclude a jurisdictional analysis based on the agreement's ultimate operation and economic effect. The Commission will therefore construe the MLAA in a manner that will best achieve its purposes. To this end, we find that LM-81 operates in a manner that Congress intended to be subject to Commission scrutiny, and accordingly falls within the jurisdiction conferred upon this agency by the MLAA.

Sufficiency of Complaints and Standing

PMA's Exceptions challenge the sufficiency of the complaints, the standing of Complainants [12] and the order in which these matters were addressed by the Presiding Officer.

We cannot find that the Presiding Officer erred in first addressing the question of jurisdiction.[13] Having found no jurisdiction there was no need for him to consider the legal sufficiency of the complaints or the right of Complainants to sue. Given the Commission's jurisdictional finding above, however, it now becomes necessary to address these two remaining threshold issues. Because these are essentially legal issues, not requiring the resolution of factual disputes, they can be considered by the Commission directly, without a remand to the Presiding Officer.

Sufficient allegations of possible Shipping Act violations exist to overcome arguments that the complaints should be dismissed on grounds of lack of legal sufficiency.[14] Complainants allege discrimination in the assessments and disbursements method of LM-81 and also allege that the charges assessed bear no reasonable relationship to the benefits obtained under the Agreement.[15] Apart from the question of standing, the complaints on their face therefore state a cause of action regardless of whether the standards ultimately found to govern the legality of the Agreement are limited to those of section 15, fifth paragraph, or also include those of sections 16 and 17.

Complainants' standing to bring an action under the MLAA in this proceeding turns upon whether the complaint procedures of section 22 of the Act apply. If they do, then Complainants must be found to have the requisite standing as they clearly come within the term "any person", as section 22 defines the universe of those entitled to file complaints under that section.[16] The MLAA itself is silent on whether

[12] *See* PMA Exceptions at pp. 49-50.

[13] *See Jackson v. U.S.*, 428 F.2d 844, 847-848 (Ct. Cl. 1970).

[14] *See Carton-Print v. Austasia Container Express*, 20 F.M.C. 31, 33 (1977).

[15] Complaint of CalCartage at 8-9; Complaint of Containerfreight, et al., at 10-11.

[16] *See F.M.C. v. Zim Israel Navigation Co.*, 263 F.Supp. 618 (S.D.N.Y. 1967); *Isthmian S.S. Co. v. United States*, 53 F.2d 251 (S.D.N.Y. 1931).

section 22 governs causes of action arising under it. It does provide, however, that to the extent that its operative provision, *i.e.*, section 15, fifth paragraph, may conflict with section 22, the former shall control.[17] The question then becomes whether the complaint procedures of section 22, and, specifically, its liberal standing provision, are consistent with the provisions of section 15, fifth paragraph. We find that they are not.

A reading of the provisions of the MLAA, particularly that provision which added section 15, fifth paragraph, to the Shipping Act, and an examination of its legislative history convinces us that the MLAA contemplates a separate complaint procedure from that provided in section 22 of the Act. Section 15, fifth paragraph, has its own time limitation on both the filing of a complaint and issuing a decision, states substantive standards to be applied, and identifies available remedies.[18] That provision also expressly identifies the classes of entities intended to receive the protection of the statute against discriminatory or unfair assessments, to wit: "carriers, shippers, or ports." It would therefore appear to be inconsistent with the scheme of the MLAA to find that "any person", regardless of how remotely associated with a given assessment agreement, may utilize the carefully circumscribed complaint procedures of the MLAA.

This conclusion also comports with the overall legislative history of the MLAA. That history at various places speaks of affording "affected" or "aggrieved" parties the right to challenge assessment agreements.[19] Complainants might qualify as aggrieved parties if this were the only consideration determining standing under the statute.[20] However, the injury upon which Complainants rely as a basis for standing is not one that is addressed by the substantive requirements and affirmative remedies contained in the MLAA.

The overall purpose of the MLAA complaint procedure was to afford a forum to those who directly or indirectly pay assessments to challenge their fairness.[21] Section 15, fifth paragraph, permits the Commission to inquire whether an assessment agreement "operate[s] to the detriment of the commerce" or is "unjustly discriminatory or unfair as between shippers, carriers or ports." As so stated, section 15 clearly does not contemplate an inquiry into the impact of an assessment agreement on the competitive positions of other third parties. That antitrust considerations are beyond the scope of inquiry intended by section 15, fifth paragraph, is further indicated by the fact that the

[17] 46 U.S.C. § 814, paragraph 5; P.L. 96-325 § 4.
[18] *Id.*
[19] *See* S. REP. NO. 96-854, *supra* at 11.
[20] *See Tax Analysts & Advocates v. Blumenthal*, 566 F.2d 130, 138 (D.C. Cir. 1977).
[21] This is reflected not only in the legislative history of the MLAA, S. REP. NO. 96-854, *supra*, at 14, but also in the method established for providing remedies for successful complainants. *Id.*

"public interest" standard, which embodies antitrust considerations and which governs the acceptability of *other* agreements under section 15, was intentionally not made applicable to assessment agreements.[22]

Complainants' alleged injury is not caused by an assessment obligation directly or indirectly placed upon them by the challenged Agreement. Rather, and at best, it is an economic effect of the assessment on their competitive standing vis-a-vis those who *are* subject to assessment obligations, *i.e.,* PMA members. Congress did not intend such a remote consequence to form the basis of a complaint seeking disapproval of a collectively bargained assessment agreement under the MLAA.[23] Parties so removed from the operative effects of an assessment agreement are outside the classes of interests protected by the statute, and, as such, not intended to be beneficiaries of its remedies.[24] The Commission therefore concludes that Complainants lack standing to file a complaint against LM-81 under section 15, fifth paragraph, of the Shipping Act, 1916.

THEREFORE, IT IS ORDERED, That the Exceptions to the Initial Decision filed by the Pacific Maritime Association and the International Longshoremans' and Warehousemans' Union are sustained to the extent indicated above and denied in all other respects;

IT IS FURTHER ORDERED, That the complaints filed in this proceeding are dismissed; and

IT IS FURTHER ORDERED, That this proceeding is discontinued.

By the Commission.

FRANCIS C. HURNEY
Secretary

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[22] *See* S. KEP. NO. 96-854, *supra*, at 14.

[23] Complainants do have available to them, however, section 22 complaint procedures against any matter required to be set forth in a tariff on file with the Commission which may be in violation of other sections of the Shipping Act, 1916. *See* 46 U.S.C. § 845; P.L. 96-325 § 5.

[24] *See* S. REP. NO. 96-854, *supra*, at 14. *Compare Association of Data Processing Service Org. v. Camp,* 397 U.S. 150, 154-155 (1970) *with Tax Analysts and Advocates v. Blumenthal, supra,* at 138-145.

Vice Chairman Moakley, concurring and dissenting.

I do not agree with the majority's conclusion that LM-81 is subject to the Commission's jurisdiction. However, assuming *arguendo,* that the agreement is subject to FMC jurisdiction, I concur with the majority that the complainants lack standing to bring these actions.

By enacting the Maritime Labor Agreements Act (MLAA), Congress succeeded in extracting this Commission from a very difficult position following the Supreme Court's *PMA* decision.[1] That decision was the culmination of a series of more and more expansive interpretations of the Commission's jurisdiction over labor agreements and left this Commission in the untenable posture of having to consider the Shipping Act ramifications of maritime collective bargaining agreements before they could be implemented.

At the Commission's urging, therefore, the 96th Congress was proposing to remove all collective bargaining and related agreements from the Commission's section 15 jurisdiction. However, certain shippers and ports raised concerns over the possibility of unfair and discriminatory assessments of fringe benefit obligations and the lack of protection from such assessments under other laws. Litigation over such assessments had been a prominent feature of the maritime labor scene for the decade prior to that legislation. Heeding these concerns, Congress carved out a narrow class of labor agreements which would remain subject to limited FMC jurisdiction. This class was defined as:

> Assessment agreements, whether part of a collective bargaining agreement or negotiated separately, to the extent they provide for the funding of collectively bargained fringe benefit obligations on other than a uniform man-hour basis.[2]

The agreement before us in this case, LM-81, clearly does not provide for the funding of collectively bargained fringe benefit obligations. It is only by combining the provisions of this agreement with another agreement, LM-80, which does provide for the funding of such benefits, that an argument can be made that the two agreements together meet the jurisdictional test. But, as the Administrative Law Judge articulated clearly in his initial decision, these two agreements are distinct, with separate lives and separate purposes. The assessment agreement to fund fringe benefits, LM-80, is in effect and will remain in effect no matter what happens to LM-81.[3]

Moreover, the Commission's jurisdiction to scrutinize such agreements is triggered only by *complaint.* Under the terms of the MLAA, the Commission cannot investigate assessment agreements on its own motion. Only LM-81 is the subject of the instant complaints.

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[1] *Federal Maritime Commission v. Pacific Maritime Association,* 435 U.S. 40 (1978).

[2] Public Law 96-325, 94 Stat 1021, Sec. 4.

[3] Initial Decision at 45.

I do not share the majority's concern that we would be leaving section 15 jurisdiction to the discretion of the drafter by declining jurisdiction over LM-81. Potential exposure to antitrust penalties is sufficient incentive to discourage any cavalier disregard of section 15.

The majority's decision here expands that class of labor agreements which Congress left to our jurisdiction and leaves the door ajar for further incursions into the labor field. This is exactly the PMA dilemma from which Congress extricated this Commission by enacting the MLAA. I therefore dissent from that portion of the majority order.

FEDERAL MARITIME COMMISSION

46 C.F.R. CHAPTER IV

DOCKET NO. 82-14

NOTICE OF INQUIRY REGARDING

REGULATION OF THE DOMESTIC OFFSHORE TRADES

February 3, 1983

ACTION: Discontinuance of Inquiry

SUMMARY: The Commission instituted this inquiry by Notice published March 5, 1982 (47 F.R. 10600) to seek public comment on the effectiveness of regulation of the domestic offshore trades under the Intercoastal Shipping Act, 1933 (46 U.S.C. § 843) and the regulatory and legislative changes necessary to improve the system. The Commission, having reviewed the comments filed in this Inquiry and having transmitted an appraisal of regulation in the domestic offshore trades to appropriate committees of Congress, hereby discontinue this Inquiry. The Commission wishes to express its appreciation to commentators for their assistance in analyzing and developing a revised approach to shipping in these trades.

SUPPLEMENTARY INFORMATION: None

By the Commission.

(S) FRANCIS C. HURNEY
Secretary

FEDERAL MARITIME COMMISSION

DOCKET NO. 82-14

NOTICE OF INQUIRY REGARDING REGULATION OF THE DOMESTIC OFFSHORE TRADES

Finalized February 3, 1983

ACTION:	Notice of Inquiry
SUMMARY:	This solicits public comments on the deregulation of rates in the domestic offshore trades.
DATES:	Comments on or before May 10, 1982.
AUTHORITY:	Intercoastal Shipping Act, 1933; Shipping Act, 1916.

SUPPLEMENTARY INFORMATION:

The Commission, pursuant to the Shipping Act, 1916 (46 U.S.C. § 801 *et seq.*), and the Intercoastal Shipping Act, 1933 (46 U.S.C. § 843 *et seq.*), is charged with regulating rates and charges assessed by ocean carriers operating in the U.S. domestic offshore trades, namely: Hawaii, Alaska, Puerto Rico, Guam, Virgin Islands, American Samoa and the Northern Mariana Islands.

The purpose of these statutes is to ensure fair, reasonable, and nondiscriminatory transportation rates in these trades. In determining the propriety of these rates, the Commission has traditionally applied the public utility standard and limited the overall revenues of carriers to a reasonable return on investment. In theory, this approach allows the regulated carriers sufficient profit to maintain their financial viability while at the same time ensuring the movement of cargoes at reasonable rates.

Affected interests have contended that the Commission's method of regulation fails to account for efficiency, does not consider the long range viability of the carriers, overly emphasizes cost plus return on investment, discourages entry, and rate competition, and creates unnecessary costs. It is claimed that the existence of competitive forces in the domestic offshore trades would, if freed from regulation, achieve the goal of stable and efficient transportation service underlying the Intercoastal Shipping Act.

Competitive conditions vary substantially in the various domestic offshore trades subject to the Federal Maritime Commission's jurisdiction. However, to the extent there exists substantial competition among carriers serving a given trade, it may well be that the purposes of the Intercoastal Shipping Act could be served by subjecting the rate practices of carriers to competitive forces. A brief synopsis of the number of vessel operators and the existence of market dominance in each trade is presented below.[1]

1. *Alaskan Trade*

In 1980, 14 carriers in the Alaskan trade filed financial reports with the FMC, none of which accounted for more than 15 percent of FMC regulated traffic gross trade revenues. The Commission does not have jurisdiction over the preponderance of cargo carried by the two largest carriers serving Alaska, both of which publish through rates and are thus subject to the jurisdiction of the Interstate Commerce Commission. There have been few rate investigations in this trade in the past several years.

2. *American Samoa Trade*

In 1980, three vessel operators in the American Samoa trade filed final reports with the FMC. Each of the three carriers accounted for approximately one-third of gross trade revenues.

There have been no rate investigations in this trade in the past several years.

3. *Guam Trade*

In 1980, two vessel operators in the Guam trade filed financial reports with the FMC, one of which accounted for two-thirds of gross trade revenues. There have been few rate investigations in this trade in the past several years.

4. *Hawaiian Trade*

In 1980, five vessel operators in the Hawaiian trade filed financial reports with the FMC. One operator accounted for over 75 percent of gross trade revenues. There have been a number of rate investigations in this trade in the past several years.

5. *Northern Mariana Islands Trade*

The Northern Mariana Islands trade is a recent addition to the domestic offshore jurisdiction of the Commission. There is presently no carrier financial data available for this trade. Five vessel operators serve this trade.

6. *Puerto Rican Trade*

In 1980, five vessel operators in the Puerto Rican trade filed financial reports with the FMC. One operator accounted for over

[1] The number of vessel operators serving a trade has been determined on the basis of those carriers filing fiscal year 1980 data with the FMC pursuant to General Order 11. In most trades, the number of carriers maintaining a tariff on file with the FMC exceeds the number of carriers filing financial data with the FMC.

50 percent of overall gross trade revenues.[2] There have been a number of rate investigations in this trade in the past several years.

7. *Virgin Islands Trade*

In 1980, the Virgin Islands was served by direct vessel call from ports in Florida and by transshipment from Puerto Rico. Two vessel operators offered direct calls between Florida and the Virgin Islands. One of these carriers accounted for the majority of trade revenues. Gross trade revenues were evenly divided between the two vessel operators offering a transshipment service in the trade. There have been several rate investigations in this trade in the past several years.

The Commission has recently made efforts to reduce or eliminate unnecessary or overly burdensome regulations affecting carriers serving the domestic offshore trades. These include: (1) eliminating virtually all financial reporting requirements for the 141 non-vessel operating common carriers in these trades; (2) eliminating the filing of annual company-wide financial and operating data of vessel operating carriers; and (3) exempting vessel operating carriers earning less than $10 million annual revenues from filing detailed financial reports concerning domestic offshore operations.

In order to meaningfully evaluate the existing system of regulation, the Commission is seeking comments on a number of issues. The Commission encourages statements on any methodologies or concepts that would enhance the efficiency of regulation of the domestic offshore trades, particularly when accompanied by relevant factual and economic data. After receipt of comments the Commission may schedule public hearings for the presentation and examination of responsible and feasible proposals.

The Commission is not soliciting comments regarding amendments to the provisions of the Jones Act which restrict entry into the domestic offshore trades to U.S. flag vessels. The implementation of that statute is outside the statutory jurisdiction of the Commission.[3] Appropriate issues for comment are:

Legislative Proposals

1) Should the Commission recommend to Congress that its regulatory authority in the U.S. domestic offshore trades be eliminated or reduced? What would be the impact of a reduction or elimination of regulatory authority in the domestic offshore trades?

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[2] Recently, one of these carriers cancelled its FMC tariffs and filed through rate tariffs with the ICC.

[3] Section 27, Merchant Marine Act, 1920 (46 U.S.C. § 883). However, we will accept suggestions and comments which require an explanation of the effects of the U.S. cabotage laws in order to understand the impact of a possible modification of FMC regulatory authority.

2) Does the reduction of regulation in the domestic offshore trades require amendment or repeal of the Intercoastal Shipping Act, 1933?

3) If so, what form should such amendments take and should they permit the FMC to distinguish between competitive and non-competitive trades? Should the Commission have the flexibility to exempt from rate regulation particular trades which are served by a number of competing carriers?

Regulatory Proposals

4) How should competitive uniformity in rates in the domestic trades be considered in Commission rate investigations? What is the impact of such a pricing policy in the domestic trades?

5) Should the Commission adopt a dominant carrier methodology whereby the dominant carriers in a trade would serve as the basis for determining the reasonableness of rates in that particular trade? How should dominance be defined?

6) Should the Commission adopt a dominant carrier methodology whereby the most efficient carrier in a trade (defined in terms of lowest costs per unit of output) would serve as the basis for determining the reasonableness of rates in that particular trade? Under this methodology, rate increases of the most efficient carrier in the trade would be subject to intense scrutiny and an appropriate rate of return developed for that carrier. The rate of return deemed appropriate for the most efficient carrier would then serve as the maximum level which other carriers in the trade would be allowed to earn.

7) If the Commission is given statutory authority to exempt competitive trades from rate regulation, what should be the criteria for determining the number of carriers and their market shares which would allow the exercise of such exemption authority?

8) Should the Commission adopt a constructed carrier methodology, whereby an average rate of return for the trade would be constructed with carriers limited to earning no more than that average rate?

9) In evaluating a carrier's revenue requirements, should a methodology other than return on rate base (i.e., either the fixed charges coverage ratio or some other financial ratio) be utilized in assessing a firm that is tax exempt, totally debt financed, and publicly owned?

10) What other methods could the Commission implement to effectively carry out its responsibility to the public in regulating the domestic offshore trades and yet eliminate ineffective or counter-productive regulatory practices?

An original and 15 copies of each comment should be directed in writing to the Secretary, Federal Maritime Commission, Washington, D.C. 20573.

By the Commission March 5, 1982.

(S) FRANCIS C. HURNEY
Secretary

FEDERAL MARITIME COMMISSION

46 C.F.R. PARTS 503, 542, 543 AND 544

[G.O. 22; AMDT. 12, G.O. 37; AMDT 2, G.O. 40; AMDT. 1, G.O. 41; AMDT. 1]

DOCKET NO. 82-32

February 3, 1983

ACTION: Final Rule

SUMMARY: Fees for public information, financial responsibility for water pollution and financial responsibility for oil pollution are amended to reflect current costs incurred by the Commission in providing such services.

DATE: Effective March 10, 1983

SUPPLEMENTARY INFORMATION:

On July 6, 1982, the Commission published a Notice of Proposed Rulemaking in the *Federal Register* (47 F.R. 29280) which proposed to update its fees schedule to remedy the disparity between costs incurred and revenues collected for certain special services, even though total costs would not be recovered.

Comments were submitted by Senator Slade Gorton, Chairman of the Merchant Marine Subcommittee of the Senate Committee on Commerce, Science and Transportation; Annelise Anderson, Associate Director for Economics and Government, Office of Management and Budget; and Hollywood Marine Incorporated. Both Senator Gorton and Associate Director Anderson support the proposed rule. Hollywood Marine is opposed to the proposed rule contending that proposed increases would act as another factor working against the barge and towing industry at a time when the industry needs to eliminate as many economic burdens as possible. Hollywood Marine requests reconsideration of the proposed rule wherein, if it cannot be deleted in its entirety, at the least it would be postponed to a time when the economy and the barge and towing industry are in a much more stable economic situation. General comments opposing increased fees in both this docket and Docket No. 82-33 are addressed in 82-33.

The Commission does not deem it appropriate to delay implementation of or eliminate the proposed fee schedule to suit one segment of the maritime industry suffering from economic problems. Postponing the proposed rule or eliminating it entirely will not save the barge and towing industry from idle capacity due to declining shipments, high interest rates, and rising fuel prices. Accordingly, the Commission has decided to adopt a final rule which is unaltered from its proposed rule.

Pursuant to the Regulatory Flexibility Act (5 U.S.C. § 601 *et seq.*), the Commission certifies that adoption of this final rule will not have a significant economic impact on a substantial number of small entities.

List of subjects in 46 C.F.R. Maritime Carriers, Freight Forwarders, Practice and Procedure, Fees and User Charges.

Therefore, pursuant to 5 U.S.C. § 553, section 43 of the Shipping Act, 1916 (46 U.S.C. § 841a), and Title V of the Independent Offices Appropriations Act of 1952 (31 U.S.C. § 483a), the Federal Maritime Commission is amending Title 46 of the Code of Federal Regulations as follows:

1. Part 503 - *Public Information* is amended in the following respects.

In § 503.43 *Fees for services,* in paragraph (b), "$3" is amended to read "$5"; in paragraph (c)(1) "$5" is amended to read "$7"; in paragraph (c)(3) "$5" is amended to read "$7"; in paragraph (c)(4) "$1" is amended to read "$2.50"; paragraph (c)(5) is deleted; in paragraph (d)(1) "$175" is amended to read "$195"; in paragraph (d)(2) "$50" is amended to read "$120"; in paragraph (d)(3) "$12.50" and "$2" are amended to read "$16.50" and "$8.25" respectively; in paragraph (g) "$2.50" and "$1.50" are amended to read "$4.25" and "$4" respectively; and in paragraph (h) "$10" is amended to read "$13."

In § 503.69 (b)(2) "$2" is amended to read "$5."

2. Part 542 - *Financial Responsibility for Water Pollution* is amended in the following respects.

In § 542.13 *Fees,* the references in paragraphs (d) and (e) to "$100" and "$20" are amended to read "$75" and "$40" respectively and in paragraph (f) the reference to "$10" is amended to read "$20." Additionally, the first sentence of paragraph (d) is amended to read as follows.

§ 542.13 Fees

* * * * *

(d) Each applicant who submits Application Form FMC-321 for the first time shall pay an initial, nonrefundable application fee of $75.

3. Part 543 - *Financial Responsibility for Oil Pollution - Alaska Pipeline* is amended in the following respects.

In § 543.9 *Fees,* the references in paragraphs (d) and (e) to "$100" and "$20" are amended to read "$75" and "$40" respectively and in paragraph (f) the reference to "$10" is amended to read "$20."

4. Part 544 - *Financial Responsibility for Oil Pollution - Outer Continental Shelf* is amended in the following respects.

In § 544.12 *Fees*, the references in paragraphs (d) and (e) to "$100" and "$20" are amended to read "$75" and "$40" respectively and in paragraph (f) the reference to "$10" is amended to read "$20."

By the Commission.

(S) FRANCIS C. HURNEY
Secretary

FEDERAL MARITIME COMMISSION

46 C.F.R. PARTS 502, 531, 536 AND 540

[G.O. 13, AMDT. 13, G.O. 16, AMDT. 43, G.O. 20, AMDT. 8 AND G.O. 38, AMDT. 4]

DOCKET NO. 82-33

FILING AND SERVICE FEES

February 3, 1983

ACTION: Final Rule

SUMMARY: New fees are being established for filing complaints, petitions for declaratory orders and general petitions, special dockets, informal adjudication of small claims, conciliation services, tariff special permission applications (domestic and foreign), and applications for passenger vessel certification. It is necessary to establish new fees to transfer the cost burden of providing services from the general taxpayer to the recipient of the services. This action will require that all applicants who request these Commission services will have to pay for them.

DATE: Effective March 10, 1983

SUPPLEMENTARY INFORMATION:

On July 6, 1982, the Commission published a Notice of Proposed Rulemaking in the *Federal Register* (47 F.R. 29278) which proposed to establish several new fees for services provided by the Commission. The services selected were those which were readily identifiable and which provided value and utility to a recipient at its request. The Commission assigned to each a fair and equitable assessment based on the cost to the Commission of providing the service.

Comments to the Notice were submitted by: Senator Slade Gorton, Chairman of the Merchant Marine Subcommittee of the Senate Committee on Commerce, Science and Transportation; Annelise Anderson, Associate Director for Economics and Government, Office of Management and Budget; Pacific Coast European Conference (PCEC); Virginia Port Authority and Traffic Board, North Atlantic Ports Association (VPA/NAPA); Latin America/Pacific Coast Steamship Conference and Pacific Coast River Plate Brazil Conference (LAP/PCRPB); North European Conferences (NEC); Puerto Rico Maritime Shipping Authority (PRMSA); Associated Latin American Freight Conferences (ALAF); and International Committee of Passenger Lines (ICPL).

Senator Gorton and Ms. Anderson support the proposed rule without qualification. The other commenting parties oppose the rule for various reasons. The opposition to the rule is discussed below in terms of (1) legal requirements, (2) general comments and (3) comments on specific fee applications.

I. *Legal Requirements*

Four commentators, LAP/PCRPB, NEC, PRMSA, and ALAF, generally contend that the Commission's proposed charges are not justified under the principles established by the courts in interpreting Title V of the Independent Offices Appropriations Act, (IOAA) 31 U.S.C. § 483a, and OMB Circular No. A-25. The Commission disagrees, and believes that its application of Title V and Circular No. A-25 is consistent with these principles.

In two companion cases, the Supreme Court addressed the IOAA and set forth the following guidelines for its implementation:

1. an agency performing a service at the request of an applicant may exact a fee for such service if it bestows a benefit on the applicant not shared by others in society;

2. the proper measure of such a fee is the "value to the recipient;"

3. a charge for a service should be made only to an identifiable recipient who derives a special benefit therefrom; and

4. no charge should be made for services rendered when the identification of the ultimate beneficiary is obscure and the service can be primarily considered as benefitting broadly the general public. *National Cable Television Association v. United States*, 415 U.S. 336 (1974); *Federal Power Commission v. New England Power Co.*, 415 U.S. 345 (1974).

Subsequently, courts of appeal have refined these guidelines by the addition of the following:

1. the fee assessed may not exceed the cost to the agency in rendering the service;

2. the fee assessed should include only those expenses which are necessary to service the applicant;

3. an agency may recover the full cost of providing a service to an identifiable beneficiary, regardless of the incidental public benefits which may flow from the service; and

4. an agency may charge for services which assist a person in complying with statutory duties. *Electronic Industries Association v. Federal Communications Commission*, 554 F.2d 1109 (D.C. Cir. 1976); *see also, Mississippi Power & Light Co. v. U.S. Nuclear Regulatory Commission*, 601 F.2d 223 (5th Cir. 1979); *National Cable Television Association v. Federal Communications Commission*, 554 F.2d 1094 (D.C. Cir. 1976).

A number of specific requirements have been set to implement the above principles:

1. the agency must justify the assessment of a fee by a clear statement of the particular service or benefit for which it expects to be reimbursed;

2. the agency must calculate the cost basis for each fee by including:

   a. an allocation of the specific expenses of the cost basis of the fee to the smallest practical unit;

   b. the exclusion of expenses that serve an independent public interest; and

   c. a public explanation of the specific expenses included on the cost basis for a particular fee, and an explanation of the criteria used to include or exclude particular items; and

3. the fee must be set to return the cost basis at a rate that reasonably reflects the cost of the service performed and value conferred on the payor.

Electronic Industries Association v. F.C.C., 554 F.2d at 1117.

The Commission used these guidelines in developing its proposed fees in this proceeding, and has likewise used them in adopting the fees contained in this final rule. These fees therefore comport with all relevant statutory and judicial requirements.

Analyses were conducted by the Commission on the direct and indirect costs associated with services performed for which fees are being established. The availability of justification for the fee bases was made known in the Notice of Proposed Rulemaking and summary fee schedules were made available to all parties requesting justification data on how the fees were established.[1] The fees assessed include only those costs necessary to service an applicant and do not exceed the cost to the Commission in providing such services. The Commission has also identified the recipient which receives a benefit from its services which are conferred in exchange for fees collected. The Commission has thus met the requirements set out by Title V, Circular A-25 and Court decisions.

Questions have arisen over the concept of value to the recipient in terms of which party receives the benefit, and over whether costs were fully inclusive on the one hand or overly inclusive on the other. The opponents of the rule assert value to the recipient flows to the shipping public or the public at large rather than the applicant for a specific service, and thus the benefit to the applicant is indirect. The Commission finds that the value to the recipient flows to the applicant, and thus the benefit to the applicant is direct. An applicant who will not benefit from filing an application or requesting a Commission service will not

[1] Some opponents of this proposed rule erroneously stated in their comments that no analysis was performed by the Commission. Such incorrect assertions tend to confuse the issues, and serve no useful purpose in the establishment of fair and equitable fees.

request any action that would require payment of the fee. If an applicant desires to request services on behalf of another party, the applicant has to make a commercial decision regarding the value to be derived from the request. If a filing or service fee is not worthwhile in this circumstance, an application or request for service will not be filed with the Commission. The services for which the Commission is assessing fees are not the types which can be considered as primarily benefitting the general public, although incidental public benefits may flow from the provision of these specifically requested services.

Opponents of the proposed rule have stated that indirect benefits to the public should not be included in the cost bases of the fees and that actual costs should be used in determining fees. The Commission agrees and has taken both of these issues into account in arriving at the proposed fees. The fees were derived from processing costs which are incurred for processing applications or providing services. The costs are related to employee activities which are necessary to perform the specified services and include an appropriate increment for overhead costs without including regulatory activity costs. Moreover, in determining the proposed fees, the Commission did not include the total cost of items because to do so would in some cases make the fees extremely high.

The opponents of the proposed rule also refer to the fees in the rule as "penalties" or "taxes" rather than fees. These opinions notwithstanding, the Commission has not established fees above the costs for services provided nor has it intended that the fees be penalties. The Commission does not influence the number of complaints or petitions filed nor does it control the number of special permission applications which are received annually. The Commission is required to process applications and provide other services when requested and it is proper to charge a fee for those services.

VPA/NAPA, NEC, PRMSA, ALAF and ICPL further dispute the level of fees proposed in the rule. The fees were developed by the Commission from 1982 cost data for providing the services identified in the proposed rule. Reductions in fees would establish arbitrary fees having no basis in fact and which would not provide any basis for future fee changes which may be necessary. The Commission has rejected this approach because it removes the cost basis of the fees from the requirements under Title V and it obscures the value-to-the-recipient requirement which is necessary to establish fees.

The Commission has been careful in selecting services which qualify for fee assessment and it has also been careful in observing the requirements of Title V in considering value to the recipient, direct and indirect cost to the Government, public policy or interest served, and other pertinent facts. The fees in the final rule are established to remedy the disparity between costs incurred for services provided to a user of the service and the lack of revenue to offset these costs. These services and accompanying fees benefit the applicant directly to the extent services would not be requested from the Commission if there was no reason for the applicant to make a request. Indirect benefits to the applicant are subject to interpretations which could never be resolved in a fee schedule nor have they been shown to flow to a large segment of public to the extent that no fees should be charged for services rendered.

II. *General Comments*

PCEC opposes the proposed rule on the general principle that one who is involuntarily subject to regulation for reasons of public policy should not be assessed special charges for complying with such regulation. It also contends that carriers do not obtain licenses to act as carriers and thus do not receive special benefit from the Commission which could properly call for an appropriate fee. In addition, PCEC is also concerned about the suggestion in the preamble to the proposed rule that charges for filing section 15 agreements and section 14(b) dual rate contracts might be added to the filing and service fees list at some later time. PCEC ultimately suggests that this proceeding should be dismissed.

VPA/NAPA objects to the exclusion of assessments or agreements from the proposed rulemaking because of proposed changes in legislation without similar exclusion of complaints and petitions for declaratory orders which could also be affected by proposed changes in the law.

In establishing the specific fees, the Commission has distinguished between services which are justified for reimbursement and those which are not. The Commission has also concluded that carriers, conferences and other persons do benefit from the Commission's regulation in advance of and in addition to Commission regulation benefitting the shipping public. The fees for complaints and petitions for declaratory orders are included within the rule because the processing steps are not likely to change in the near future.

III. *Comments on Specific Fee Applications*

Exceptions to specific parts of the proposed rule were submitted by VPA/NAPA, LAP/PCRPB, NEC, PRMSA, ALAF and ICPL. These exceptions and comments are set forth below in the order of the Code of Federal Regulations parts and subparts to which they apply.

A. *Complaints, Petitions for Declaratory Orders and Special Dockets Complaints (Part 502, § 502.62 and § 502.182) and Petitions for Declaratory Orders (Part 502, § 502.68)*

VPA/NAPA asserts that precedential value from Commission decisions in complaint proceedings can extend to the entire shipping industry and the effects from the decisions could further filter down to the consuming public. VPA/NAPA therefore argues that the recipients of benefits of FMC complaint proceedings are not readily identifiable. It further claims that the negative impact of a $25 or $50 filing fee can be a major burden to small shippers in addition to being a disincentive to use the FMC as a forum for resolution of disputes.

The Commission is aware of the precedential values of its decisions. However, the direct value to a complainant or petitioner does not change by virtue of publication of the decision. The proposed rule would establish processing fees for specific services provided and the direct benefit to be gained must be evaluated by the applicant as to whether or not the service is worthwhile. The Commission views the applicant as the readily identifiable recipient of the benefits of the services provided.

Complaint and petition filing fees should not be a major burden to small shippers because of their nominal amount. Moreover, these administrative processing fees do not cover the full cost to the Commission of handling petitions. It is unlikely that a $25 or $50 filing fee for processing complaints or petitions will result in reduced use of the FMC as a forum for resolution of disputes.

Special Docket Applications (Part 502 § 502.92)

VPA/NAPA and LAP/PCRPB both commented on special docket applications. VPA/NAPA points out that this procedure, whereby carriers can refund or waive freight charges where there is an error in a tariff of a clerical, administrative or technical nature, was instituted as an alternative to costly formal proceedings and should not be burdened with the obstacle of a filing fee. LAP/PCRPB allege that shippers, not carrier applicants, are the beneficiaries of the waivers and refunds granted pursuant to such applications. They contend that a charge against the carrier for this procedure is unfair and improper because the carriers will have been charged for something of "special benefit," not to themselves, but to the shippers.

The Commission does not believe the filing fee for special dockets is so costly that it will force applicants to revert to more costly formal proceedings. Nor does the Commission believe that carriers in no way benefit from making such applications on behalf of their customers. Carriers benefit from the good will shown to their customers and they have the opportunity to retain customer business by utilizing the special docket procedure. Moreover, control over the filing of rates and charges in tariffs rests with carriers and they are able to correct their own errors through this procedure. Strong administrative controls by the carriers could eliminate, or at least reduce, the need to seek special docket refund or waiver authority from the Commission.

New fees under Part 502 remain unchanged from the proposed rule because they are reasonable charges for the services provided.

B. *Non-exclusive Transshipment Agreements (Part 524, § 524.4)*

Non-exclusive transshipment arrangements will soon be proposed for exemption from filing requirements. The Commission has removed the proposed filing fee from this final rule and has determined this matter will remain open until further notice.

C. *Special Permission Applications in Domestic Offshore Commerce (Part 531, § 531.18) and Foreign Tariffs Special Permission Applications (Part 536, § 536.15)*

PRMSA, LAP/PCRPB, and NEC protest the proposed $90 special permission application fee.

PRMSA protests the imposition of a $90 fee for filing special permission applications in the domestic offshore trade, and contends that the proposed fee would impose a significant burden on carriers without consideration of economic inefficiencies harmful to the public interest. PRMSA says it filed approximately 50 special permission applications in 1981. It further claims that the direct costs of the proposed charges would represent only part of the potential expense and, in conjunction with special permission applications, the entire cost of reviewing the application, preparing a recommendation, and making a determination is assigned to the applicant without consideration of possible public benefit. PRMSA thus argues that the proposed fees will introduce transaction costs which are contrary to sound economic policy and the underlying purposes of special permissions. PRMSA takes the position that the fee should be withdrawn.

LAP/PCRPB comments that: (1) the impetus for a special permission application mostly comes from a shipper seeking a new rate, (2) the benefit would seem in such cases to flow equally to the shipper or the shipping public at large, and (3) the legislative history of the applicable portion of section 18(b)(2) of the Shipping Act makes it clear that broad public interests were to be served and not the limited interests of the carriers.

NEC does not object to the establishment of a fee for filing special permission applications. NEC contends, however, that the proposed fee is excessive and does not reflect the value of the service to the recipient. NEC states that the Commission has historically and consistently exercised discretion to grant special permission authority for good cause shown and where real merit is demonstrated on the basis of anticipated public benefits - not where special benefits would be obtained by a few companies or persons rather than the general public. It further claims that the Commission has not distinguished the number of special permission applications granted or denied and there is obviously no value conferred on the applicant whose special permission is denied. NEC does not contend there is no value to the special permission application services; rather, the relationship between the fee and the service is more appropriately reflected by the figure of $25. NEC urges the Commission to amend its proposed rule to reduce the fee from $90 for all applications down to $25 for those special permission applications which are granted.

The Commission has considered the public benefit of instituting a filing fee for processing special permission applications. The purpose of a special permission is to waive tariff filing requirements upon a showing of good cause. The carrier applicant seeks to obtain a benefit for itself or its customer through the special permission procedure. Though the general public might benefit from the procedure, its benefit is speculative and incidental to the benefit conferred on the applicant carrier.

The Commission incurs special permission application processing costs regardless of the determination to grant or deny the permission. The grant or denial of the application is provided to the applicant carrier or conference, not the shipper providing the impetus for the request. During fiscal year 1982, the Bureau of Tariffs received 294 special permission applications. Each individual grant of special permission directly affects the applicant carrier and possibly affects its shipping customer. If there is absolutely no benefit to be gained by the carrier, it will not file an application for special permission.

The Commission believes the proposed fee is reasonable in relation to the costs it incurs for processing special permission applications. Limiting the fee to apply to only those instances where special permission is granted would give the appearance of applicants buying approval from the Commission. When an application for special permission is received, it is immediately processed. Special permission applications require special processing to take into account special services or arrangements which are not normally available in tariffs. The application processing costs are the same regardless of the final determination. The Commission believes it is appropriate to charge the requesting parties for the services provided at a rate near but no higher than that which is experienced in servicing the request. Establishing the filing fee shifts the application processing fee burden from the general taxpayer to the applicant without transferring the regulatory costs of ensuring that the special permission is used for its intended purpose. The Commission is not withdrawing nor reducing the filing fee for special permission applications.

D. *Temporary Tariff Filing Fee (Part 536, § 536.10)*

Temporary tariff filing fees are removed from this final rule. New electronic tariff filing methods could make temporary tariff filings unnecessary and because suspension of temporary tariff filings is pending in Docket No. 80-56, this matter is being held open until further notice.

E. *Passenger Vessel Certification Fees (Part 540, § 540.4 and § 540.23)*

The International Committee of Passenger Lines (ICPL) states that applications filed for certification pursuant to 46 C.F.R. Part 540 should not be subject to any fee because the beneficiaries of P.L. 89-777 (46 U.S.C. § 817) are travellers embarking at United States ports, not the passenger lines filing the applications. ICPL notes that foreign passenger lines are entitled to transport passengers between the United States and foreign ports under general principles of maritime law and treaties of friendship, navigation and commerce. It claims that nothing in P.L. 89-777 took away this right of carriage or remotely suggested that charges should be assessed for the Commission performing its duties. ICPL contends that since the statute was enacted to protect passengers against nonperformance of prepaid voyages and to ensure funds are available to meet personal injury and death claims, the only benefits are to provide security for protection of the public; and compliance with statutory requirements of P.L. 89-777 is a burden rather than a benefit to the passenger carrier. Moreover, ICPL notes that the Civil Aeronautics Board exempts foreign air carriers from payment of all filing and license fees (14 C.F.R. § 389.24).

ICPL further states that the Commission's functions apply to certification and not licensing of passenger vessels. It contends that the detailed cost analyses in support of the proposed rule are far from enlightening and it is unlikely that any more staff effort is involved in verifying casualty certificate P & I Club guarantees and surety bonds than in the case of evidence of financial responsibility required for pollution certificate applications under 46 C.F.R. Part 542. The casualty certificate fee is more than five (5) times that of the pollution certificate. It also appears to ICPL that no extra effort is needed to process performance certificates where the applicant provides the maximum $10 million security specified in 46 C.F.R. § 540.9(j). ICPL contends that nothing in the Commission's figures explains the amount of costs or why an application backed by regular guarantees or surety bonds cost approximately $1,691 to process.

The Commission consumes extensive amounts of time and effort in processing passenger vessel certificates. The Office of Vessel Certification receives the application, records and reviews it, discusses it with the applicants, determines the amount of financial responsibility, reviews other pertinent agreements and charters, develops notice of application to be published in the *Federal Register*, reviews evidence of financial responsibility, prepares a recommendation after research is completed, coordinates with other bureaus and offices as appropriate to ensure comments are incorporated in the recommendation, reproduces copies of the recommendation and has the matter placed on the agenda of the Commission for approval. Upon approval, certificates are issued and the notice of approval is published in the *Federal Register*. Audit requirements are then established, and the *Federal Register* is reviewed for publication and to obtain a copy of the published notice of approval. Audit reports and unearned passenger revenues are reviewed to ensure adequacy of evidence of financial responsibility. The time and efforts required to process these passenger vessel certificates vary greatly from the routine functions associated with certifying financial responsibility for pollution liability.

Moreover, the fees set forth in the proposed rule do not include costs to the Commission of conducting field audits, processing activities carried out by bureaus and offices other than the Office of Vessel Certification, or other costs associated with monitoring the passenger cruise lines to ensure compliance with the statute. The direct beneficiaries of the services provided by the Commission are the passenger carriers which are able to do business in the United States upon obtaining the required certificates. The indirect beneficiaries of the services are the passengers receiving the protection required by the statute. In the normal commercial environment, the carriers determine whether or not the fee is going to prohibit them from carrying passengers. If the filing fee is paid and the fares increase for that reason, the passengers who are being protected are thereby paying for the services they are using. The benefit could then flow from the carrier to the passenger and the cost of providing the service would be removed as a burden on the general public. The Commission is not withdrawing nor reducing the casualty and performance certification application fees, nor is it exempting foreign passenger carriers from the rule's requirements, since to do so would be discriminatory to U.S. flag carriers.

The Commission has reviewed all comments submitted by the parties responding to the Commission's notice of proposed rulemaking. The comments are pertinent in many instances, and irrelevant in others because they make assumptions which cannot be verified or which bear no direct relationship to the actual cost criteria from which the proposed filing fees were developed. The Commission is not taxing users of its services, nor is the Commission recovering the costs of regulating the parties subject to Commission authority. The filing and application fees in this rule are based upon direct and indirect costs of providing services which are requested by applicants. The fees are also set to recover the cost of providing services while being careful not to exceed these costs. The fees are being established to recover costs "to the full extent possible" in a manner which is, "fair and equitable taking into consideration direct and indirect cost to the government, value to the recipient, public policy or interest served and other pertinent facts."

Pursuant to the Regulatory Flexibility Act (5 U.S.C. § 601 *et seq.*), the Commission certifies that adoption of the proposed rule will not have a significant economic impact on a substantial number of small entities.

List of subjects in 46 C.F.R. Maritime Carriers, Freight Forwarders, Practice and Procedure, Fees and User Charges.

Therefore, pursuant to 5 U.S.C. § 553, section 43 of the Shipping Act, 1916 (46 U.S.C. § 841a), and Title V of the Independent Offices Appropriations Act of 1952 (31 U.S.C. § 483a), the Federal Maritime Commission is amending Title 46 of the Code of Federal Regulations as follows:

1. Part 502 - *Rules of Practice and Procedure* is amended in the following respects.

a. In § 502.62 the title is amended and a new sentence is added reading as follows:

§ 502.62 Complaints and fee.

* * *

The complaint shall be accompanied by remittance of a $50 filing fee.

b. In § 502.68 the title is amended and a new sentence is added to paragraph (a) reading as follows:

§ 502.68 Declaratory orders and fee.

(a) * * * Petitions shall be accompanied by remittance of a $50 filing fee.

c. In § 502.69 the title is amended and a new sentence is added reading as follows:

§ 502.69 Petitions - general and fee.

* * *

Petitions shall be accompanied by remittance of a $50 filing fee.

d. In § 502.92 the title is amended and a new sentence is added to paragraph (a)(3) reading as follows:

§ 502.92 Special docket applications and fee.

* * *

(a)(3) * * * The application for refund or waiver must be accompanied by remittance of a $25 filing fee.

e. In § 502.182 the title is amended and a new sentence is added reading as follows:

§ 502.182 Complaint and memorandum of facts and arguments and filing fee.

* * *

The complaint shall be accompanied by remittance of a $50 filing fee.

f. In § 502.304 the title is amended and a new sentence is added to paragraph (b) reading as follows:

§ 502.304 Procedure and filing fee.

* * *

(b) * * * Such claims shall be accompanied by remittance of a $25 filing fee.

g. In § 502.404 the title is amended and a new sentence is added to paragraph (a) reading as follows:

§ 502.404 Procedure and fee.

(a) * * * The request shall be accompanied by remittance of a $25 service fee.

2. Part 531 - *Publishing, Filing and Posting of Tariffs in Domestic Offshore Commerce* is amended by adding a new subparagraph (3) to § 531.18(a) as follows:

§ 531.18 Applications for special permission.

(a) * * *

(3) An application for special permission shall be accompanied by a $90 filing fee.

3. Part 536 - *Publishing and Filing Tariffs by Common Carriers in the Foreign Commerce of the United States* is amended in the following respects.

In § 536.15 a new sentence is added to paragraph (b) reading as follows:

§ 536.15 Applications for special permission.

* * *

(b) * * * Such applications shall be accompanied by a filing fee remittance of $90.

4. Part 540 - *Security for the Protection of the Public* is amended in the following respects.

a. In § 540.4 a new sentence is added to paragraph (b) reading as follows:

§ 540.4 Procedure for establishing financial responsibility.

* * *

(b) * * * An application for a Certificate (Performance) shall be accompanied by a filing fee remittance of $1,600.

b. In § 540.23 a new sentence is added to paragraph (b) reading as follows:

§ 540.23 Procedure for establishing financial responsibility.

* * *

(b) * * * An application for a Certificate (Casualty) shall be accompanied by a filing fee remittance of $800.

By the Commission.

(S) FRANCIS C. HURNEY
Secretary

FEDERAL MARITIME COMMISSION

DOCKET NO. 71-29

BATON ROUGE MARINE CONTRACTORS, INCORPORATED

v.

CARGILL, INCORPORATED

NOTICE

February 4, 1983

Notice is given that no appeal has been taken to the December 28, 1982, dismissal of the complaint in this proceeding and that the time within which the Commission could determine to review has expired. No such determination has been made and, accordingly, the dismissal has become administratively final.

(S) FRANCIS C. HURNEY
Secretary

FEDERAL MARITIME COMMISSION

DOCKET NO. 71-29

BATON ROUGE MARINE CONTRACTORS, INCORPORATED

v.

CARGILL, INCORPORATED

DISMISSAL OF PROCEEDING

Finalized February 4, 1983

Cargill, Incorporated, and Baton Rouge Marine Contractors, Inc., have agreed to settle their controversy on the following terms:

a. Cargill will maintain its Baton Rouge service and facility charge (Item 5, Subsection D, Section III, Port Allen Tariff No. 10), at a level not to exceed 11 cents per ton for two years from October 1, 1982.

b. Cargill will refund to BRMC the amount of $75,000.00 and BRMC will make no refund to Cargill.

c. Each party will release the other from all liability with respect to the service and facility charge in accordance with the mutual release set forth in Attachment A.

d. The existing court proceeding between the parties, *Baton Rouge Marine Contractors, Inc. v. Cargill, Inc.*, E.D. La. No. 75-698, shall be dismissed with prejudice in accord with the Stipulation of Dismissal which is Attachment B hereto.

On the basis of the foregoing, both sides have moved for dismissal of this proceeding with prejudice. Since neither side wishes to pursue its interests in the case there is no alternative to dismissal. Of course, should the Commission desire a resolution to any of the questions raised in the case, it may institute a proceeding on its own motion.

The proceeding is dismissed with prejudice.

(S) JOHN E. COGRAVE
Administrative Law Judge

FEDERAL MARITIME COMMISSION

(46 C.F.R. PARTS 534 AND 536;
GENERAL ORDERS 10 AND 13; DOCKET NO. 82-42)
GREEN HIDE WEIGHING PRACTICES; AND PUBLISHING AND FILING TARIFFS BY COMMON CARRIERS IN THE FOREIGN COMMERCE OF THE UNITED STATES

February 9, 1983

ACTION: Final Rule

SUMMARY: This removes unnecessary duplicating regulations which were originally promulgated to ensure a uniform method of declaring shipping weights on green salted hides for export in the foreign commerce of the United States. The result of this action will not change the original regulations in any manner, except as to provide a single codification of the regulation which is now published in the Commission's G.O. 13, 46 C.F.R. 536.5(d)(17).

DATE: Effective February 14, 1983

SUPPLEMENTARY INFORMATION:

On September 15, 1982, the Commission published a notice of proposed rulemaking requesting comments on the proposed removal of Part 534 of Title 46 of the Code of Federal Regulations (29 F.R. 5887) and the amendment of 46 C.F.R. § 536.5(d)(17) to delete reference to 46 C.F.R. Part 534 therein.

The proposed rulemaking incorrectly indicated in the preamble, as well as in paragraph 3 on page 2 and the last paragraph on page 3, reference to "46 C.F.R. § 536.5(c)(17)." The correct reference should have read "46 C.F.R. § 536.5(d)(17)." There is no section "536.5(c)(17)" in § 536.5.

One response was received from the Inter-American Freight Conference. The commentator agreed that there is no need for 46 C.F.R. Part 534. The Conference, however, rationalized that the effect of the proposed modification of section 536.5(d)(17) appeared to increase, not decrease, the regulatory burden upon conferences and carriers. The Conference maintained that the effect of deleting the phrase ". . . in accordance with Part 534 of the Commission's rules . . ." would be to require every tariff to include a rule relating to the weighing of hides even if there were no commodity rates covering green salted hides. This contention represents a misinterpretation of the intent of the Commission's rulemaking, which is simply to provide one single regulation under 46 C.F.R. § 536.5(d)(17) relating to the transportation of green salted hides.

The same regulations applicable to the carriage of green salted hides will continue to be effective for all common carriers. Consequently, if a carrier elects not to provide common carriage on green salted hides, the tariff rule 17 shall continue to indicate such fact by a simple notation "not applicable," as is the current practice with any other tariff rule which fails to have any application in a given tariff.

The present duplicating provisions published in 46 C.F.R. Part 534 and section 536.5(d)(17) will be eliminated by the action proposed herein with no resulting regulatory impact whatsoever. This action will simply codify currently effective regulations under the Commission's General Order 13, § 536.5(d)(17).

List of subjects in 46 C.F.R.

THEREFORE, IT IS ORDERED, That pursuant to 5 U.S.C. § 553 and sections 14(b), 15, 16, 17, 18(b) and 43 of the Shipping Act, 1916 (46 U.S.C. 813(a), 814, 815, 816, 817(b) and 841(a)) the Code of Federal Regulations is amended as follows:

1. 46 C.F.R. Part 534 is rescinded; and
2. The first sentence of 46 C.F.R. 536.5(d)(17) is amended by deleting the phrase: ". . . in accordance with Part 534 of the Commission's rules. . . ."

By the Commission.

(S) FRANCIS C. HURNEY
Secretary

FEDERAL MARITIME COMMISSION

DOCKET NO. 82-43

IN THE MATTER OF BOARD OF COMMISSIONERS OF THE PORT OF NEW ORLEANS, DOCK DEPARTMENT TARIFF FMC T-NO. 1, ITEM 145-0

ORDER

February 22, 1983

The Board of Commissioners of the Port of New Orleans (hereafter, the Port) has filed a Petition for Declaratory Order regarding a dispute between it and Kerr Steamship Company, Inc. over the interpretation and lawfulness of a Port tariff provision.[1] The Port seeks a Commission order declaring that the tariff provision (1) holds a vessel berthing agent liable for collection and payment of inbound demurrage charges, and (2) is lawful, in particular under sections 16 and 17 of the Shipping Act, 1916 (46 U.S.C. §§ 815, 816).

Kerr replied to the Petition, and Petitions to Intervene and accompanying Replies were also submitted by the West Gulf Maritime Association, the Association of Ship Brokers and Agents (ASBA), 19 steamship agencies, filing jointly, and the Commission's Bureau of Hearing Counsel. Additionally, the Port filed a Motion for Leave to File Pleading Out of Time[2] and an accompanying Opposition to Petitions for Leave to Intervene, to which Kerr and ASBA have objected.[3]

The circumstances giving rise to this proceeding commenced with Kerr's having applied to the Port for a berth assignment for the M/V VIDRARU. On April 13, 1981, the vessel was unloaded and a shipment of steel plates remained on the wharves long after the expiration of the 15-day free time period provided in the Port tariff. Citing its tariff, the Port sent demurrage invoices in the amount of $214,729.18 to Kerr. $30,000 of the bill has apparently been paid by a stevedoring

[1] At issue is the following Port tariff provision:

> Any portion of said cargo discharged from a vessel remaining on the public wharves after the expiration of free time allowed as set forth in Item 130 shall incur demurrage charges indicated below. Said demurrage charges shall apply immediately following the expiration of the specified free time allowed. The owner, charterer and agent of the vessel discharging the cargo are responsible for the payment to Board of the demurrage charges which are due and payable before the cargo incurring same is removed from the public wharves.

[2] The Port's Motion is granted. The Port's pleading is not, as characterized by Kerr, a reply to a reply, but is a reply to the Petitions to Intervene.

[3] Kerr's request that a portion of the Port's pleading be stricken is denied. *See* note 2, *supra.* ASBA's submission is stricken because it constitutes a reply to a reply. *See* 46 C.F.R. § 502.74(a).

company. The Port is attempting to collect the remaining $184,729.18 from Kerr.

The Port brought suit against Kerr and several other parties in federal district court in Louisiana. *Board of Commissioners of the Port of New Orleans v. Kerr Steamship Co., Inc., et al.*, E.D. La., C.A. No. 81-4691. Kerr filed a complaint with the Commission (Docket No. 82-15 25 F.M.C. 330 (1982)), but withdrew it on August 10, 1982, citing the existence of the court proceeding. The instant Petition for Declaratory Order was filed on August 18, 1982.

In *Lease Agreement No. T-3753 Between Maryland Port Administration and Atlantic & Gulf Stevedores, Inc.*, 24 F.M.C. 500 (1981), *reconsid. denied*, 24 F.M.C. 792 (1982), the Commission denied a Petition for Declaratory Order which went to the interpretation of a term in a lease agreement previously approved by the Commission. The Commission explained:

> There is no indication . . . that the instant case requires the unique technical expertise of this agency any more than the judgment of the court in which this matter is currently pending litigation.

24 F.M.C. 500.

This consideration is applicable to the instant Petition. The Commission does, of course, have jurisdiction to decide both questions raised in the Port's Petition. However, the threshold issue—whether Tariff Item No. 145-0 covers berthing agents—is an issue which the federal court is as competent to decide as is the Commission. Although the court has been requested by the Port to stay the proceeding pending Commission action, it has declined to do so. Moreover, the court has not sought the Commission's assistance. To rule on the interpretation issue at this time would be duplicative of the court's effort.

Tariff interpretation is often a matter which requires the technical knowledge of an expert body. We do not hold that the pendency before the courts of this or any other issue related to the Shipping Act will deter us from ruling on matters which require such expertise. We simply are of the view that the issue of the applicability of Tariff Item 145-0 is a matter which can be efficiently disposed of by the court without our intervention.

The remaining issue—whether vessel agent liability for inbound demurrage is lawful under the Shipping Act—is one which appears subject to the Commission's primary jurisdiction. However, to initiate a proceeding on that issue, before it has been determined whether the tariff on its face applies to a berthing agent, would be a premature and possibly unnecessary exercise at this time.

The Commission has therefore determined to defer to the court litigation already under way on the issue of the tariff provision's interpretation, and to deny the Port's Petition without prejudice.[4] If any Shipping Act issues remain after the resolution of that issue in the judicial forum, the Commission may address them in response to a section 22 (46 U.S.C § 821) complaint or a subsequent petition under Rule 68 (46 C.F.R. § 502.68).

THEREFORE, IT IS ORDERED, That the Petition for Declaratory Order of the Board of Commissioners of the Port of New Orleans is denied; and

IT IS FURTHER ORDERED, That this proceeding is discontinued.

By the Commission.

(S) FRANCIS C. HURNEY
Secretary

[4] *The Petitions to Intervene are therefore dismissed as moot.*

FEDERAL MARITIME COMMISSION

46 C.F.R. PART 536

GENERAL ORDER 13, AMENDMENT NO. 10

DOCKET NO. 80-56

PUBLISHING AND FILING TARIFFS BY COMMON CARRIERS IN THE FOREIGN COMMERCE OF THE UNITED STATES

February 28, 1983

ACTION: Final Rule

SUMMARY: The Commission is providing for 24-hour receipt of permanent tariff filings, including the use of electronic filing methods, in lieu of accepting temporary tariff filings. This will eliminate what has become an unnecessary burden on the Commission's staff and resources and will also simplify the use of foreign commerce tariffs by shippers, carriers and other interested persons. Providing for the receipt of permanent tariff filings on an around-the-clock basis, including those filed by electronic modes, should benefit carriers, conferences and shippers by enabling them to meet commercial exigencies.

DATE: Effective May 30, 1983

SUPPLEMENTARY INFORMATION:

On September 3, 1981, the Commission stayed its Final Rule in this proceeding (46 F.R. 44190). That rule would have precluded the filing of temporary amendments to tariffs published by carriers or conferences of carriers in the foreign commerce of the United States, effective September 8, 1981 (46 F.R. 35092). The stay was requested by various conferences which sought an additional period for commenting on the rationale employed by the Commission in arriving at this decision.

By notice served December 28, 1981, the Commission granted interested parties an opportunity to comment on the basis for its rule (46 F.R. 62669). This notice also proposed a new procedure which would permit the receipt of permanent tariff amendments before and after the Commission's normal business hours, including weekends and holidays.

Comments were received from fourteen commentators on behalf of twenty-three conferences, two ocean carriers, three shippers and four tariff publishing services. Seven of the commenting conferences support the Commission's proposed discontinuance of the temporary tariff filing privilege,[1] while fifteen conferences object to it.[2]

Other commenting parties support the Commission's proposal, but request that it be expanded to allow the permanent filing of tariff pages by electronic modes, on a 24-hour basis.[3] This suggestion has merit and has been adopted. Also a definition of electronic tariff filing is added to the Commission's tariff filing regulations to recognize such filings as a type of permanent tariff filing. The Commission will receive tariff material 24 hours a day. Material submitted after normal working hours will be stamped in a mail drop in the lobby of the Commission's Washington, D.C. office. The procedure for the receipt of electronic tariff filings will be through the use of a date/time device on receiving machines which are presently, or may in the future be, located in the Commission's public file facilities.[4]

Certain commenting parties request that the Commission expand the rulemaking proceeding to permit the 24-hour filing privilege for tariffs which are filed in the domestic offshore commerce under the requirements of the Commission's General Order 38.[5] Such a request is beyond the scope of this proceeding, which relates only to tariffs filed in the foreign commerce of the United States.

The Commission has also been urged to: (1) continue the telex filing privilege without restriction; (2) allow foreign based filers continued use of telexes, with or without a limit on the number of such messages; (3) provide further justification before eliminating the temporary tariff filing privilege; (4) provide for the use of temporary filings when filed with sequential numbers; (5) assess a fee for the use of temporary tariff filings; (6) allow tariffs to be filed in the Commission's field offices; and

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[1] North Atlantic United Kingdom Freight Conference; North Atlantic French Atlantic Freight Conference; North Atlantic Continental Freight Conference; North Atlantic Baltic Freight Conference; Scandinavia Baltic/U.S. North Atlantic Westbound Freight Conference; Continental North Atlantic Westbound Freight Conference; and North Atlantic Westbound Freight Association.

[2] North Europe-United States Pacific Coast Freight Conference; Sections B and C of the Pacific Coast River Plate Brazil Conference; The "8900" Lines, Greek/U.S. Atlantic Agreement, Iberian/U.S. North Atlantic Westbound Freight Conference, Italy, South France, South Spain, Portugal/U.S. Gulf and Island of Puerto Rico Conference; Marseilles North Atlantic U.S.A. Freight Conference; Mediterranean-North Pacific Coast Freight Conference; North Atlantic Mediterranean Freight Conference; U.S. Atlantic & Gulf/Australia-New Zealand Conference; The West Coast of Italy, Sicilian and Adriatic Ports North Atlantic Range Conference; Trans-Pacific Freight Conference of Japan/Korea; Japan/Korea-Atlantic and Gulf Freight Conference; Thailand/Pacific Freight Conference; and Thailand/U.S. Atlantic and Gulf Conference.

[3] Pacific Westbound Conference; Sea-Land Service, Inc.; and Pacific Coast Tariff Bureau.

[4] An acceptable tariff filing made by an electronic mode is any tariff amendment which has all the characteristics of a permanent tariff amendment. The basic difference between an electronic mode tariff filing and a mail or hand delivered permanent filing is the method of transmission. In other words, electronic filing is electronic mail. The equipment used to compile, send, and/or receive electronic tariff filings is commercially controlled by the tariff filers, with the Commission providing the space for the receiving (printer) machines.

[5] Sea-Land Service, Inc.; Crowley Maritime Corporation; International Tariff Services, Inc.; Pacific Coast Tariff Bureau; and Jim Pitzer, Transportation Consultant.

(7) pursue legislative modifications to the Shipping Act to permit filings to be made within a certain period after contracts of affreightment are concluded.[6] Some of these comments[7] have already been considered during the course of this rulemaking proceeding while others are inconsistent with the intent of this rulemaking and therefore merit no further consideration.

The decision to eliminate temporary tariff filings may be inconvenient to some. However, there are means by which tariff changes considered time sensitive can be transmitted to the Commission for immediate effectiveness. Present tariff filing regulations already contain specific language to permit telephonic special permission applications where "emergency situations" appear to exist (*See* 46 C.F.R. § 536.15(c)). Further, carriers and conferences can still request a waiver of the Commission's permanent tariff page filing requirements if good cause can be shown.

The provisions of the Regulatory Flexibility Act (5 U.S.C. § 601 *et seq.*) do not apply to this Final Rule. The Commission's prior certification that the rule, if implemented, would not have any significant economic impact on a substantial number of small entities was made to the Chief Counsel for Advocacy of the Small Business Administration on January 20, 1982 and published in the *Federal Register* on January 28, 1982.

List of subjects in 46 C.F.R. Part 536

Maritime carriers, Reporting and recordkeeping requirements.

THEREFORE, IT IS ORDERED, That pursuant to 5 U.S.C. § 553, and sections 18(b), 22 and 43 of the Shipping Act, 1916 (46 U.S.C. §§ 817(b), 821 and 841(a)), 46 C.F.R. Part 536 is amended as follows:

1. 536.2 Definitions (Amended). A new paragraph is added to section 536.2 which reads as follows:

   536.2 (p) Tariff filing, Electronic.

   The transmission of tariff filings to the Commission through the use of commercial data processing terminals. The data processing receiving terminal(s) are to be located in the Commission's Washington, D.C. offices. Tariff material filed electronically must conform to all the regulations applicable to permanent tariff filings, except as follows:

   (1) electronically filed tariff pages received from data processing terminals may be used for filing with the Commission; and

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[6] C. H. Dexter Division, the Dexter Corporation; Air Products and Chemicals, Inc.; World Tariff Services, Inc.; North Europe/U.S. Pacific Freight Conference, except Sea-Land Service, Inc.; Sections B and C of the Pacific Coast River Plate Brazil Conference; Trans-Pacific Freight Conference of Japan/Korea, *et al.*; The "8900" Lines, except Sea-Land Service, Inc.; Waterman Steamship Corp.; and E. I. du Pont de Nemours and Company.

[7] *See* 45 F.R. 58385, September 3, 1980.

(2) electronically filed tariff matter shall be accompanied by an electronically filed letter of transmittal; and

2. Paragraph (a) of section 536.3 is redesignated as subparagraph (a)(1); and a new subparagraph is added to section 536.3 which reads as follows:

536.3(a)(2) Receipt of Tariffs - The Commission will receive tariff filings on an around-the-clock basis. Receipt of tariff filings during other than normal business hours will be time stamped at a tariff mail drop in the lobby of the Commission's Washington, D.C. offices. Electronic tariff filings transmitted to the Commission by electronic modes will be receipted by a date/time device on the receiving machine; and

3. Paragraph (c) of section 536.10 is deleted; and

IT IS FURTHER ORDERED, That the stay previously issued in this proceeding on September 3, 1981, is hereby rescinded.

By the Commission.

(S) FRANCIS C. HURNEY
Secretary

FEDERAL MARITIME COMMISSION

DOCKET NO. 82-46

GENERAL MOTORS CORPORATION

v.

COSTA LINE CARGO SERVICES, INC. AND COSTA ARMATORI, S.p.A.

NOTICE

February 28, 1983

Notice is given that no exceptions have been filed to the January 19, 1983, initial decision in this proceeding and the time within which the Commission could determine to review that decision has expired. No such determination has been made and accordingly, that decision has become administratively final.

(S) FRANCIS C. HURNEY
Secretary

FEDERAL MARITIME COMMISSION

DOCKET NO. 82-46
GENERAL MOTORS CORPORATION

v.

COSTA LINE CARGO SERVICES, INC. AND COSTA ARMATORI, S.p.A.

Reparation awarded to complainant.

Dennis J. Helfman and *Benson T. Buck*, attorneys for Complainant; *Otis M. Smith*, General Counsel of General Motors Corporation, of Counsel.

William F. Burns, Vice President, Costa Line Cargo Services, Inc., General Agents for Costa Line, for Respondent.

INITIAL DECISION [1] OF WILLIAM BEASLEY HARRIS, ADMINISTRATIVE LAW JUDGE

Finalized February 28, 1983

This is a proceeding, by consent of the parties and with approval of the Presiding Administrative Law Judge, conducted under shortened procedure without oral hearing, pursuant to Rule 181 et seq. of the Commission's Rules of Practice and Procedure, 46 C.F.R. 502.181 et seq.

The complainant alleges the respondents have subjected it to an overcharge of rates for ocean transportation, for which reparation in the sum of $47,176.36 plus interest is sought and such other relief deemed proper in the premises.

From the materials supplied in this proceeding the Presiding Administrative Law Judge finds the following facts:

FACTS

The complainant General Motors Corporation is a Delaware corporation, with offices at 3044 West Grand Boulevard, Detroit, Michigan, 48202. General Motors Corporation operates through various wholly-owned, incorporated subsidiaries including General Motors Componentes, S.A., located in Cadiz, Spain. Componentes is engaged in the construction and operation of automotive components manufacturing plants in Spain.

[1] This decision will become the decision of the Commission in the absence of review thereof by the Commission (Rule 227, Rules of Practice and Procedure, 46 C.F.R. 502.227).

The respondent Costa Line Cargo Services, Inc., is General Agent for respondent Costa Armatori S.p.A. (Costa Line), a common carrier by water engaged in transportation from the North Atlantic ports of the United States to all Spanish ports and a party to U.S. North Atlantic Spanish Freight Agreement No. 10117, Freight Tariff No. 1, FMC-1. Respondents are subject to the provisions of the Shipping Act, 1916.

In a letter dated April 16, 1981, from Laurence A. Steinseifzer, Staff Assistant, Rate Analysis and Negotiations, Logistic Operations, General Motors Corporation, addressed to Mr. J. S. Moskal, Secretary of the U.S. North Atlantic Spanish Freight Agreement, the member lines were requested to establish a project rate of $92.00 W/M with heavy lift items being discounted less 50 percent, plus any applicable tariff charges, for transportation of supplying machinery and equipment for on site manufacturing purposes of two automotive component manufacturing factories at Cadiz, Spain, with such rate being in effect through about *May 1, 1980,* and conclude March 1982 (shipping period). (Emphasis supplied.)

It was estimated that during the shipping period (May 1, 1980 and concluded March 1982) General Motors Componentes, S.A., a wholly owned subsidiary of General Motors Corporation, located at Puerto de Santa Maria, Cadiz, Spain, and responsible for constructing and operating automotive component manufacturing plants in Spain, in the process of doing so, ordered a large amount of machine tools and other heavy machinery from North American vendors for use in a new automotive component manufacturing plant under construction in Cadiz, Spain. It was estimated that the value of the material moved would be in excess of $20 million, that while a portion of the freight would have to move on a breakbulk basis, it would be an intent to ship via container to the maximum whenever possible.

The proposed project rate for Cadiz was accepted by the U.S. North Atlantic Spanish Freight Agreement and became effective on May 1, 1981. The project rate was published on Original Page 130-0 of U.S. North Atlantic Spanish Freight Agreement No. 10117 Freight Tariff No. 1, FMC-1.

Commodity Description and Packaging	Rate Basis	Rates
Automotive Component Manufacturing Factories		
Machinery, Equipment and Supplies for Automotive Component Manufacturing Factories		
To Spanish Base Ports	WM	110.00
Minimum 600 cft per 20 ft. H/H Container	WM	92.00
Minimum 900 cft per 35/40 ft. H/H Container	WM	92.00

Commodity Description and Packaging	Rate Basis	Rates
(Less 25% for Heavy Lift Charges)		
Bill of Lading to bear the following notation: "All above described materials are of a wholly proprietary nature and may not be resold or otherwise placed in commercial channels for re-sale."		
(Less 25% for Heavy Lift Charges)		
Original Page 130-0—effective date—May 1, 1981		
First Revised Page 130-0, effective May 11, 1981 June 1, 1981 on W/M—thru 5/31/81 $92.00, Eff. 6/1/81 $101.00 WM (Less 50% for Heavy Lift Charges)		
3rd Revised Page 130-0, effective October 1, 1981 Rate Basis $123.25 W/M (Less 50% for Heavy Lift Charges)		
5th Revised Page 130-0, effective May 28, 1982—rate W/M $123.25		
The pages from the Original 130-0 on state the foregoing rates and charges are subject to any general rate increases, increased accessorial charges, or surcharges, subsequently established and in effect at time of shipment.		

Under date of November 23, 1981, Vapores Suardiaz sent a telex to General Motors Componentes, Puerto de Santa Maria, Cadiz, Spain, confirming having a fixed vessel *Acro Geica* Roll-on-Roll-off vessel for carriage of the cargo. Port of loading: Baltimore. Port of discharge: Cadiz.

Cargo:	1 piece 9, 10 x 3, 30 x 4, 10M	-	weighing 97 tons
	1 piece 9, 75 x 3, 50 x 3, 40M	-	weighing 67 tons
	1 piece similar measures	-	weighing 51 tons
	Plus about 12 tons smaller pieces	-	$120,000 lump sum terms

General Motors Componentes, S.A., Cadiz, Spain, replied to Vapores Suardiaz, stating, Re your telex 23 Nov. 1981 we hereby accept your offer for ocean transportation of above machinery in the terms and conditions stated by you.

Costa Line negotiated ocean rates with Vapores Suardiaz; lump sum of $120,000, 50 percent discount when shipped in containers; no specific provision for breakbulk heavy lifts.

Effective June 1, 1981, the special project rate of $92.00 W/M was established and published on 1st Rev. page 130-0 of U.S. North Atlantic Spanish Freight Agreement No. 10117, Freight Tariff No. 1, FMC-1. Changes were the rate as Spanish Base Ports thru September 30, 1981, would be W/M 92.00 thru 5/31/81 effective 6/1/81 $101.00 WM when shipped in containers.

Under Costa Line Cargo Service, Inc., Bill of Lading No. 1, dated at Detroit, Michigan (no date shown), General Motors Corporation on December 14, 1981, at Baltimore, Md., loaded on board the vessel *Cortina* for transportation to Cadiz:

	Gross Weight	Measure-ment
1 Box of machinery, equipment and supplies for automotive component mfg. factories	175500	3651′
1 Box of Machinery, Equipment and supplies for automotive component mfg. factories	156300	2870.0
1 Box of Machinery, Equipment and supplies for automotive component mfg. factories	101000	2334.0′
Freight to be paid		
Measurement		Freight
O/F Lump Sum		90,000.00
Total U.S. Currency		90,000.00

The Bill of Lading does not bear the notation, "all above described material are of a wholly proprietary nature and may not be placed in commercial channels for resale."

The 27th Revised Page 103 of Freight Tariff No. 1, FMC-1, effective December 9, 1981 ((R) Per telex to FMC 12/7/81) - Automobile Manufacturing - consisting of shipments as follows:

1 pc. weighing approx. 101,000 lbs. and measuring approx. 2,334 cu. ft.

1 pc. weighing approx. 165,000 lbs. and measuring approx. 3,205 cu. ft.

1 pc. weighing approx. 144,820 lbs. and measuring approx. 2,902 cu. ft. (not subject to H/L and E/L charges) thru Jan. 9, 1982

Rate Basis L.S. Rates 90,000.00

Parts for above - minimum 11,000 cft. (not subject to H/L and E/L charges) thru Jan. 9, 1982 W/M $120,000

Under Costa Line Cargo Services, Inc., Bill of Lading No. 2 dated at Detroit, Michigan (not date shown), General Motors Corporation loaded on board the vessel *Cortina* on December 14, 1981, at Baltimore, Md., for transportation to Cadiz:

	Gross Weight	Measure-ment
36 Boxes of Machinery, Equipment and supplies for automotive component mfg. factories	297,890#	15,247′
Freight to be paid		
Measurement	Rate	Freight
O/F 15,247 cft.	120.00	45,741.00

The Bill of Lading does not bear the notation "all above described material are of a wholly proprietary nature and may not be placed in commercial channels for resale."

Both of the above freight charges have been collected by the respondents; the charges were paid by complainant.

The Federal Maritime Commission's Office of Energy and Environmental Impact under date of September 27, 1982, served the following:

> The OEEI has examined Docket No. 82-46 and has determined that section 547.4(a)(22) of the Commission's "Procedures for Environmental Policy Analysis" applies. No environmental analysis needs to be undertaken nor environmental documents prepared in connection with this docket.

(S) E. R. MEYER

DISCUSSION, REASONS, FINDINGS AND CONCLUSIONS

The complainant in its amended complaint received November 10, 1982, asserts that the lump sum charge of $90,000.00 as published on Page 103 of Freight Tariff No. FMC-1, is inapplicable, excessive and unreasonably high in violation of section 18(b)(3) of the Shipping Act, 1916 (46 U.S.C. § 817(b)(3)) and should be declared unlawful. In response thereto, the respondents counter the lump sum charge of $90,000.00 was published in Freight Tariff No. 1, at the request of General Motors through their agent Vapores Suardiaz, and is therefore applicable.

The complainant in its Memorandum of Argument attached to the complaint herein which was served September 22, 1982, argues the proper rate applicable on the freight in question was the $92.00 W/M in the U.S. North Atlantic Spanish Freight Conference to Cadiz, Spain. Complainant argues that where two tariffs are appropriate, the shipper is entitled to have applied the one specifying the lower basis of charges, citing *United States v. Gulf Ref. Co.*, 268 U.S. 542, 546 (1925); *U.S. Borax & Chem. Corp. v. Pacific Coast European Conf.*, Docket No. 66-63 and Docket No. 67-27, 11 F.M.C. 451, 463 (1968). In adhering to this doctrine, the Commission has held that the lowest rate voluntarily established automatically becomes the lawful rate, citing *Contract Rates-Port of Redwood City*, Docket No. 629, 2 U.S.M.C. 727, 742 (1945).

The respondents in their December 21, 1982, Memorandum of Response and Arguments to the General Motors Complaint, served September 22nd, state, among other things, the lump sum rate of $90,000.00 for three heavy lifts and the weight or measurement rate of $120.00 for parts was established and published in the Spanish Eastbound Freight Agreement Tariff No. 1, FMC No. 1 at the specific request of General Motors and its subsidiary through their appointed brokers. If General Motors or its subsidiary intended that this cargo be shipped under the project rate established for them, it would not have been necessary to specifically request Costa Line's freight quotation. The lump sum offered by Costa Line was $90,000.00 and not $120,000.00. During the negotiations, the broker in Spain did not clearly state that the principals involved in this shipment were General Motors or its subsidiary. Costa Line submitted the request to the membership, rather than take independent action. The lump sum and weight-measurement rate for parts was unanimously approved by the membership.

Complainant in a rebuttal statement subscribed and sworn to January 7, 1983 (received January 10, 1983), asserts, *inter alia,* respondents in claiming no awareness that movement was for account of General Motors admits they made a mistake, but it provides no reason why General Motors is not entitled to have freight charges assessed on the basis of the project rate. Complainant says the respondents have presented nothing to dispute or rebut applicability of the project rate.

The Presiding Administrative Law Judge does not find the parties absolved of mistakes, for example, the bills of lading involving the shipments do not contain the language the tariff calls for.

Of course, strict adherence to filed tariffs is mandatory. The principle is firmly established that the rate of the carrier as duly filed is the only lawful charge. *Ocean Freight Consultants, Inc. v. The Bank Line Limited,* Docket No. 1185, 9 F.M.C. 211, 215 (1966). Complainant's claim for reparation is dependent upon the conclusion that of the two rates contained in the U.S. North Atlantic Spanish Freight Agreement No. 10117, Freight Tariff No. 1, FMC-1, the lower or project rate was the only applicable rate to its shipments during the period in question. An ambiguity was created. While there was apparent agreement to the "Lump Sum" rate, it was higher than the project rate. The shipper in such an ambiguity situation is entitled to the lower rate. Since it has been deemed herein that the shipments are composed of commodities that come under the project rate, the project rate is the applicable rate. Project shipment is typically composed of materials intended to be used for foreign construction projects such as the plants in this case. See *Free Time and Demurrage Charges on Export Cargo,* Docket No. 68-9, 13 F.M.C. 207, 224 (1970). The effective tariff is the project rate found in the 3rd Revised Page 130-0 of the applicable tariff. The rate in this effective tariff affords the only legal basis upon which freight charges may be collected, any agreement, in this case the lump sum rate, to the contrary notwithstanding.

Note that despite the statement requesting that the project rate of $92.00 W/M with heavy lift items being discounted less 50 percent, plus any applicable tariff charges, with such rate being in effect through about May 1, 1980, and conclude March 1982, the Original Page 130-0 in Freight Tariff No. 1, FMC-1, effective May 1, 1981, setting up the project rate did not provide for the concluding March 1982 date and only provided for less 25 percent for Heavy Lift charges. It was provided further, (1) Bill of Lading to bear the following notation: "All above described materials are of a wholly proprietary nature and may not be sold or otherwise placed in commercial channels for re-sale."; (2) "The foregoing rates and charges are subject to any general rate increases, increased accessorial charges, or surcharges, subsequently established and in effect at the of shipment."

The change in the tariff from less 50 percent for Heavy Lift charges from 25 percent was made in 1st Rev. Page 130-0, effective May 11, 1981, and June 1, 1981. The rate was raised to $123.25 W/M in the 3rd Rev. Page 130-0, effective October 1, 1981. The date for rates to Spanish Base Ports thru March 31, 1982, was added in the 4th Rev. Page 130-0, effective January 1, 1982 and thru June 30, 1982, in the 5th Rev. Page 130-0, effective March 24, 1982.

From the material supplied herein, the Presiding Administrative Law Judge finds and concludes the project rate of $92.00 W/M with heavy lift items being discounted 50 percent, plus any applicable tariff charges was established, effective May 1, 1981, as published on Original Page 130-0 of U.S. North Atlantic Spanish Freight Agreement No. 10117, and was subsequently changed.

The involved shipments moved December 14, 1981. At that time the project rate tariff was up to $123.25 W/M and still in effect per 3rd Revised Page 130.0 effective October 1, 1981, was in effect with a rate base W/M 123.25. The commodity description was as to Automotive Components Manufacturing Factories. Also the 27th Revised Page 103 of the Freight Tariff No. 1, FMC-1, effective December 9, 1981, for the commodity Automobile Manufacturing, as indicated above under facts, with a Rate Basis of Lump Sum of $90,000.00. The Original Page 130-0 of the tariff had the commodity description of Automotive Component Manufacturing Factories. It is deemed that the involved shipments moved under the project rate status in effect at the time.

Upon consideration of the above, the Presiding Administrative Law Judge *finds* and *concludes* that the project rate—W/M 123.25 as shown in the 3rd Revised Page 130.0 of the North Atlantic Spanish Freight

Agreement No. 10117 was the applicable tariff herein. He also *finds* and *concludes* that General Motors Corporation is entitled under section 18(b)(3) of the Shipping Act, 1916, to reparation from the respondents, in the amount of $47,176.36 with interest as provided for in Rule 253 of the Commission's Rules of Practice and Procedure, 46 C.F.R. 502.253.

Wherefore, it is *ordered*, subject to review by the Commission as provided in the Commission's Rules of Practice and Procedure that:

(A) The respondents Costa Line Cargo Services, Inc., and Costa Armatori, S.p.A., shall make reparation to the complainant General Motors Corporation in the amount of $47,176.36 with interest as provided in Rule 253 of the Commission's Rules of Practice and Procedure, 46 C.F.R. 502.253.

(B) The parties shall inform the Commission how and when the above reparation is made.

(C) This proceeding is discontinued.

(S) WILLIAM BEASLEY HARRIS
Administrative Law Judge

FEDERAL MARITIME COMMISSION

DOCKET NO. 82-39

W. R. GRACE & CO., DAVISON CHEMICAL DIVISION

v.

C. N. LLOYD BRASILEIRO

DOCKET NO. 82-40

W. R. GRACE & CO., DAVISON CHEMICAL DIVISION

v.

COMPANHIA MARITIMA NACIONAL

DOCKET NO. 82-41

W. R. GRACE & CO., DAVISON CHEMICAL DIVISION

v.

DELTA STEAMSHIP LINES, INC.

NOTICE

March 4, 1983

Notice is given that no appeal has been taken to the January 25, 1983, withdrawal of complaints in these proceedings and that the time within which the Commission could determine to review has expired. No such determination has been made and, accordingly, the withdrawal has become administratively final.

(S) FRANCIS C. HURNEY
Secretary

FEDERAL MARITIME COMMISSION

DOCKET NO. 82-39

W. R. GRACE & CO., DAVISON CHEMICAL DIVISION

v.

C. N. LLOYD BRASILEIRO

DOCKET NO. 82-40

W. R. GRACE & CO., DAVISON CHEMICAL DIVISION

v.

COMPANHIA MARITIMA NACIONAL

DOCKET NO. 82-41

W. R. GRACE & CO., DAVISON CHEMICAL DIVISION

v.

DELTA STEAMSHIP LINES, INC.

WITHDRAWAL OF COMPLAINTS

Finalized March 4, 1983

W. R. Grace & Co., the complainant, after "receiving the arguments advanced by the several respondents [and] the entire file in this matter," has withdrawn the complaints in these proceedings. They are hereby dismissed.

(S) JOHN E. COGRAVE
Administrative Law Judge

FEDERAL MARITIME COMMISSION

DOCKET NO. 82-51

COMPANHIA SIDERURGICA NACIONAL
(BRAZILIAN NATIONAL STEEL CO.)

v.

MOORE-MCCORMACK LINES, INC.

DOCKET NO. 82-53

COMPANHIA SIDERURGICA NACIONAL
(BRAZILIAN NATIONAL STEEL CO.)

v.

NETUMAR LINES

NOTICE

March 4, 1983

Notice is given that no appeal has been taken to the January 28, 1983, dismissal of the complaints in these proceedings and that the time within which the Commission could determine to review has expired. No such determination has been made and, accordingly, the dismissal has become administratively final.

(S) FRANCIS C. HURNEY
Secretary

FEDERAL MARITIME COMMISSION

DOCKET NO. 82-51

COMPANHIA SIDERURGICA NACIONAL (BRAZILIAN NATIONAL STEEL CO.)

v.

MOORE MCCORMACK LINES, INC.

DOCKET NO. 82-53

COMPANHIA SIDERURGICA NACIONAL (BRAZILIAN NATIONAL STEEL CO.)

v.

NETUMAR LINES

COMPLAINTS DISMISSED

Finalized March 4, 1983

The two proceedings captioned above [1] began with the filing of two complaints by the same shipper, Companhia Siderurgica Nacional (Brazilian National Steel Co.) in which complainant alleged that the two carriers named above as respondents, Moore McCormack Lines, Inc. and Netumar Lines, had failed to grant complainant a project rate discount of 20 percent on various shipments of machinery and equipment destined for a project involving expansion of complainant's steel mills in Brazil. This conduct by respondents allegedly was contrary to respondents' tariffs and consequently would be in violation of section 18(b)(3) of the Shipping Act, 1916. The complaint in No. 82-51, which was filed on October 29, 1982, alleged that complainant was overcharged on seven shipments (actually on 14 bills of lading) in the total amount of $12,477.93. The complaint in No. 82-53, which was filed on November 2, 1982, alleged that complainant was overcharged on seven shipments in the total amount of $941.96. In support of the complaints, complainant attached to them itemized tables of alleged overcharges drawn from the relevant bills of lading, tariff pages relating to the

[1] Because the two proceedings involve the same shipper, the same tariff, and the same project rate discount, I am, by designation of the Chief Judge, consolidating the two proceedings for purposes of this ruling on the requests for dismissal. See Rule 148, 46 C.F.R. 502.148.

alleged project, and the relevant bills of lading with commercial invoices.

Although apparently it was not clear at the time of filing the complaints as to the status of the claims, it appeared later that both respondent carriers had honored the claims prior to the filing of the complaint and had satisfied the claims in Brazil. In No. 82-53, respondent Netumar Lines informed the Secretary's office eight days after service of the complaint that it had issued correction notices and would corroborate the fact that it had paid the claims in Brazil. On December 1, 1982, Netumar furnished corroboration showing payments in Brazil at various times during 1980 and 1981 in satisfaction of the claims. Accordingly, Netumar requested that the complaint be dismissed as having been satisfied, which request complainant has not opposed. In No. 82-51, respondent Moore McCormack filed no answer to the complaint although I granted additional time for it to do so on my own initiative in case it had a plausible explanation for its failure to file its answer.[2] It later developed that Moore McCormack filed no answer because it had, like Netumar, honored the claims apparently before the complaint was filed, a fact as to which complainant's New York counsel were unaware at the time of filing the complaint. Accordingly, on learning of this fact, complainant's counsel advised that the complaint had been satisfied and requested an order granting withdrawal of the complaint.[3]

Rule 93 of the Commission's Rules of Practice and Procedure, 46 C.F.R. 502.93, states that "[s]atisfied complaints will be dismissed in the discretion of the Commission." The rule usually comes into play when a complaint which was not satisfied before filing is satisfied after filing. In the instant case it seems that the two complaints were improvidently filed because of a lack of communication from Brazil which caused

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[2] See my ruling in No. 82-51, served November 30, 1982. At the time I issued this ruling I was not aware that the claims had been paid in Brazil before the complaint was filed. This fact probably explains why respondent Moore McCormack felt no need to file an answer and relied instead on complainant to advise me that the complaint had been satisfied.

[3] See letter addressed to me from complainant's counsel in No. 82-51, dated December 7, 1982. Complainant's counsel (Mr. Kirsch) has since orally advised that the complaints in both cases had indeed been satisfied in Brazil before the complaints were filed but that the events in Brazil had not been communicated to New York counsel prior to the filing of the complaints. I requested counsel to confirm this advice in writing for the record and was advised that a confirming letter was mailed from New York on January 24, 1983. I have deferred ruling on the requests for dismissal which were originally submitted in early December of 1982 because of the pendency of a third complaint (since dismissed) apparently involving the same project, this time filed against an agent of a third carrier known as Lloyd Brasileiro in Docket No. 82-55, and for other reasons relating to the statute of limitations in section 22 and arithmetic problems. However, since I have discovered that the complaints were satisfied before they were even filed, further pursuit of such matters seems unnecessary. Moreover, dismissal of these two complaints does not prejudice a respondent in any other case any more than settlements can be used as evidence of violations of law. *Cf. Broadway & Ninety-Sixth St. Realty Corp. v. Loew's, Inc.*, 23 F.R.D. 9 (S.D.N.Y. 1958); Annotation: 3 A.L.R. Fed. 569, 584-586 (1970). See also *Organic Chemicals v. Atlanttrafik Express*, 21 F.M.C. 1082 (1979) (settlement by shipper with one carrier did not determine merits of case against the other carrier); Federal Rule of Evidence 408, 28 U.S.C.A. (evidence of offer of compromise or offer to pay not admissible to prove validity of claim).

complainant's New York counsel to believe that the claims had not been honored in Brazil.

Although there may be occasions when a complainant's rights to withdraw a complaint voluntarily and terminate litigation may not be absolute as, for example, when respondent's rights are thereby adversely affected or when a proceeding has progressed into late stages and a decision on the merits is warranted,[4] such is not the case here. Nor do the present cases involve settlement agreements which the Commission treats somewhat differently, requiring certain supporting statements of *bona fides* and inability to acquire facts, such as those present in cases like *Organic Chemicals v. Atlanttrafik Express Service,* 18 S.R.R. 1536a (1979). Nor are these cases even similar to those in which complaints are satisfied in full rather than settled but which were not satisfied when the complaints were initially filed. See, e.g., *Ingersoll Rand Co. v. Waterman Steamship Corporation,* 21 S.R.R. 1372 (ALJ 1982); Docket No. 81-52, 81-53, *Abbott Hospitals, Inc. v. PRMSA, et al.,* 24 F.M.C. 1055 (1982).

The present cases, as noted, were apparently filed under a misunderstanding which has now been corrected and the parties desire the complaints to be dismissed. I see no reason to compound the initial misunderstanding with technical burdens and requirements and see nothing in the record thus far presented to me to cause me to question the propriety of the decision of the two respondents that these particular claims had merit.[5]

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[4] For a discussion of such cases, see 9 Wright and Miller, *Federal Practice and Procedure,* § 2364, pp. 165-172. Of course, if the complainant seeks dismissal with prejudice, it has been held that courts must grant the requests since a complainant cannot be forced to go to trial if complainant believes it has no valid case. 9 Wright and Miller, cited above, p. 163.

[5] Thus, in the normal case of a satisfaction, Rule 93 would require sworn statements giving detailed information as to the satisfaction and promises to make like adjustments with other persons similarly situated. However, the present cases involve unique project shipments to the shipper's steel mills in Brazil, no other shippers are involved and, as noted, the shipper's claims had been paid in Brazil before the complaints were filed. Moreover, the Commission has recently encouraged carriers to handle meritorious claims without involving the Commission needlessly and in this regard has stated that "[i]ndeed, the Commission has utmost confidence in carriers' ability to resolve overcharge claims satisfactorily. . . ." Docket No. 81-51, *Time Limit for Filing Overcharge Claims,* Order on Reconsideration, January 5, 1983, p. 7. Had it not been for a misunderstanding, these complaints would never have been filed and both carriers' decisions to honor the claims would not have been questioned. Finally, in Docket Nos. 81-52, 81-53, *Abbott Hospitals, Inc. v. PRMSA, et al.,* cited above, Chief Judge Cograve observed that fulfillment of all the literal requirements of Rule 93 was unnecessarily burdensome in that case and that the Commission could examine records required to be kept available if the Commission felt that a carrier's decision to satisfy a complaint was improper. Such records are available in the present record if the Commission is concerned but, as noted, the claims had been honored in Brazil before the complaints were filed, they do not appear to be frivolous, and the Commission has expressed confidence in carriers' judgments when they deal with overcharge claims.

Accordingly, both complaints are dismissed.

(S) NORMAN D. KLINE
Administrative Law Judge

FEDERAL MARITIME COMMISSION

DOCKET NO. 82-55

COMPANHIA SIDERURGICA NACIONAL
(BRAZILIAN NATIONAL STEEL CO.)

v.

LLOYD BRASILEIRO

NOTICE

March 4, 1983

Notice is given that no appeal has been taken to the January 24, 1983, dismissal of the complaint in this proceeding and that the time within which the Commission could determine to review has expired. No such determination has been made and accordingly, the dismissal has become administratively final.

(S) FRANCIS C. HURNEY
Secretary

FEDERAL MARITIME COMMISSION

DOCKET NO. 82-55

COMPANHIA SIDERURGICA NACIONAL
(BRAZILIAN NATIONAL STEEL CO.)

v.

LLOYD BRASILEIRO

COMPLAINT DISMISSED

Finalized March 4, 1983

This is a proceeding begun by the filing of a complaint with the Commission on November 29, 1982. Complainant, Companhia Siderurgica Nacional (Brazilian National Steel Co.), alleged that respondent Norton, Lilly & Co., Inc. (which apparently is an agent for a carrier known as Lloyd Brasileiro), had engaged in transportation between New York and Rio de Janeiro and had overcharged complainant on a number of shipments of machinery, parts, and other materials carried on respondent's vessels to Brazil contrary to the governing tariff. If so, such conduct would constitute a violation of section 18(b)(3) of the Shipping Act, 1916.

Since the complaint was served on December 1, 1982, an answer was due to be filed within 20 days, i.e., on or before December 21, 1982, as provided by Rule 64, 46 C.F.R. 502.64. Instead of an answer by the respondent named in the complaint, Norton, Lilly, a motion to dismiss the complaint was filed by attorneys for Lloyd Brasileiro on December 16, 1982, the attorneys entering a special appearance so as to limit their participation to the issue of the Commission's jurisdiction over the agent, Norton, Lilly. In its motion Lloyd contended that the complaint did not name Lloyd as a respondent and that it was served on Norton, Lilly, which is only an agent for carriers and does not carry cargo, publish its own tariff, or belong to conference agreements. Accordingly, Lloyd moved to dismiss the complaint on the ground that the Commission lacks jurisdiction over agents as opposed to common carriers and other persons subject to the Act.

Complainant filed no reply to Lloyd's motion. Instead, by letter dated January 13, 1983, complainant advised that it was withdrawing the complaint and submitting a new complaint in the interest of expedition rather than engaging in legal debates. Complainant also stated that counsel for Lloyd agreed to this procedure.[1]

The motion to dismiss filed by Lloyd raised a number of interesting legal questions pertaining to service of defective complaints and notice as well as the question of the Commission's jurisdiction over agents. In an earlier ruling, I discussed these problems in relation to the peculiar facts of the case and advised complainant that failure to reply to the motion to dismiss could result in dismissal of the complaint with prejudice. (See Order to Show Cause Why Complaint Should Not be Dismissed, January 10, 1983.) Complainant, as noted above, however, probably before receipt of the ruling, had decided not to spend time litigating the variety of legal questions presented by the motion and has preferred simply to withdraw the complaint and file a new complaint presumably in the hope of removing the legal problems presented by the original complaint. (In fact, a new complaint, this time naming Lloyd Brasileiro as the carrier-respondent, was filed on January 14, 1983, and served on January 18, 1983, in Docket No. 83-6 (25 F.M.C. 663 (1983)).

I am aware of no authority which does not permit a complainant to withdraw its complaint under the existing circumstances. Under the comparable federal rules of civil procedure, specifically, Rule 41(a)(1) 28 U.S.C.A., a plaintiff may have its complaint dismissed at any time before service of the adverse party's answer or motion for summary judgment without permission of the court and can do so merely by filing a timely notice of dismissal. Furthermore, unless otherwise stated in the plaintiff's notice, the dismissal is without prejudice. Rule 41(a)(1). Indeed, it has been held that a court has no authority to deny such dismissal or attach conditions, determine merits, or dismiss with prejudice provided that the plaintiff serves its notice before an answer or motion for summary judgment is filed. See, e.g., *Williams v. Ezell*, 531 F.2d 1261, 1263-1264 (5th Cir. 1976); *American Cyanamid Company v. McGhee*, 317 F.2d 295, 297 (5th Cir. 1963); *D.C. Electronics, Inc. v. Nartron Corp.*, 511 F.2d 294, 296-298 (6th Cir. 1975).

In the instant case complainant has, in effect, served a notice of withdrawal before an answer or motion for summary judgment has been filed.[2] There is no Commission rule of procedure identical to

[1] On January 17, 1983, counsel for Lloyd clarified its position. Counsel stated that it was Lloyd's position that Lloyd would not oppose dismissal of the complaint and that complainant could withdraw its complaint without the consent of Lloyd because Lloyd was not named as a respondent and was not served in the proceeding. (See letter of that date addressed to me from Peter J. King.)

[2] The filing of a motion to dismiss is not considered to be the same thing as filing an answer or motion for summary judgment. Therefore, under Federal Rule 41(a), the complainant would still possess the absolute right to withdraw its complaint. See 9 Wright and Miller, *Federal Practice and Procedure*, § 2363, p. 155. There is some authority which holds that a plaintiff loses the absolute right to withdraw its complaint if the merits of a controversy have in fact been reached without regard to the

Continued

federal rule 41(a).[3] In such circumstances the Commission has stated that it will follow the federal rules. See Docket No. 78-51, *Agreement No. 10394*, Order, April 19, 1979, p. 4, unreported but cited in *Rohm & Haas Co. v. Italian Line*, 24 F.M.C. 429, 431 n. 8, where the Commission stated:

> Where the Commission's Rules are not dispositive of a question of procedure, the Commission normally will look to the rules and practices applicable in civil proceedings in the District Courts of the United States.

Since complainant wishes to withdraw its complaint in this proceeding rather than argue over the matters raised in Lloyd's motion to dismiss, it has a right to do so. Accordingly, the complaint is dismissed and since no party has mentioned withdrawal with prejudice, under customary rules, the dismissal is without prejudice.[4]

(S) NORMAN D. KLINE
Administrative Law Judge

filing of answers or motions for summary judgment. 9 Wright and Miller, cited above, pp. 156-158. Under such authority it is possible that complainant's right to dismissal is no longer absolute but has become subject to approval of the Commission. Even if so, however, Lloyd, which is not even a party to the proceeding, according to its own contentions, has not objected to dismissal of the complaint and the named respondent, Norton, Lilly, has not filed anything.

[3] The closest Commission rule appears to be Rule 93, 46 C.F.R. 502.93. Rule 93 deals with dismissal of complaints which have been satisfied and states that such complaints "will be dismissed in the discretion of the Commission."

[4] In my earlier ruling of January 10, 1983, cited above, I discussed various legal matters which the motion to dismiss and the facts presented such as the peculiar way in which the complaint was served and in which Lloyd Brasileiro, which was not named as a respondent in the complaint, became involved in the proceeding and some cases dealing with service of defective complaints and corrections of such complaints, effect of the two-year statute of limitations (section 22 of the Act), lack of Commission jurisdiction over agents, etc. Since complainant has stated that it does not wish to argue these matters but prefers simply to withdraw the complaint and file a new one, I do not reach the merits of Lloyd's various contentions. In case any problem arises because of the dismissal without prejudice, however, I think I should point out that the courts hold that a dismissal without prejudice does not toll the running of the statute of limitations and the earlier complaint is treated as never having been filed for purposes of that statute. See *Moore v. St. Louis Music Supply Co., Inc.*, 539 F.2d 1191, 1194 (8th Cir. 1976); *Hall v. The Kroger Baking Company*, 520 F.2d 1204, 1205 (6th Cir. 1975); *Cleveland v. Douglas Aircraft Company*, 509 F.2d 1027, 1030 (9th Cir. 1975); 9 Wright and Miller, cited above, pp. 186-187.

FEDERAL MARITIME COMMISSION

DOCKET NO. 82-47

AGREEMENT NO. 10266 - AGREEMENT BETWEEN INTERCONTINENTAL TRANSPORT B.V. AND COMPAGNIE GENERALE MARITIME

ORDER GRANTING MOTION TO DISMISS

March 25, 1983

The Commission, pursuant to section 15 of the Shipping Act, 1916 (46 U.S.C. § 814), instituted this proceeding by Order served October 6, 1982. That Order directed the parties to Agreement No. 10266, as amended (Agreement), Intercontinental Transport B.V. (ICT) and Compagnie Generale Maritime (CGM) (Proponents), to show cause why their Agreement should not be modified to clarify the limits of its container cargo carrying authority. The Commission's Order to Show Cause limited the proceeding to the submissions of affidavits of fact and memoranda of law.

Proponents have filed a memorandum of law and the affidavit of an ICT official. Proponents have also filed a motion to dismiss the proceeding and offered a proposed amendment to Agreement No. 10266 which would allegedly remove the controversy at issue.[1] Reply memoranda and responses to Respondents' motion to dismiss have been submitted by Sea-Land Service, Inc. and the Commission's Bureau of Hearings and Field Operations (Hearing Counsel). Lykes Bros. Steamship Co., Inc. filed only a reply memorandum and United States Lines (USL) responded only to the dismissal request.

BACKGROUND

Agreement No. 10266-2 was conditionally approved by the Commission in its Order Partially Adopting Initial Decision issued in Docket No. 77-7, *Agreement No. 9929-2, et al. and Agreement Nos. 10266, et al.*, 21 F.M.C. 1030 (1979).[2] In that Order the Commission concluded, *inter alia*, that certain modifications, beyond those ordered by the Administrative Law Judge in his Initial Decision, were required before Agreement No. 10266-2 could be approved. Included among those modifications were: (1) a change in the title of the Agreement from "Joint Marketing Agreement" to "Joint Service Agreement"; and (2) an 800

[1] The amendment itself has not been filed and is not before the Commission.

[2] Agreement No. 10266 and 10266-1 were withdrawn during the course of the proceedings in Docket No. 77-7 and replaced by Agreement No. 10266-2.

TEU per week limitation on the carriage of containerized cargo. The modified version of Agreement No. 10266-2, required to be submitted to the Commission, was to be designated "FMC Agreement No. 10266-3." Agreement No. 10266-3 was filed within the prescribed time and approved on December 28, 1979.

Upon petition for review filed by Sea-Land, a protestant in Docket No. 77-7, the Court of Appeals for the District of Columbia Circuit found, *inter alia*, that the TEU limitation imposed by the Commission *appeared* "to have expanded Proponents' authority and, as such, should have been the subject of prior notice and opportunity for comment." *Sea-Land Service, Inc. v. F.M.C.*, 653 F.2d 544 (D.C. Cir. 1981). The Court recognized the Commission's statutory authority to modify proposed agreements, but determined that modifications which enlarge upon the anticompetitive authority contemplated by the parties to an agreement must be preceded by notice and hearing "through which interested parties can air their views as to the competitive implications of an agreement and the Commission can gain sufficient information to make a reasoned decision as to the competitive impact of that agreement." 653 F.2d 552. After noting that the actual "practical implications" of the TEU provision specifically at issue there "are not readily apparent," the Court remanded the proceeding in Docket No. 77-7 to the Commission for further hearings on that provision.

By Order on Remand served October 9, 1981, the Commission reopened the proceeding in Docket No. 77-7 and directed the parties to that proceeding to address, *inter alia*:

> Whether Agreement No. 10266 should include a provision limiting the amount of containerized cargo which may be carried by ICT and CGM under the Agreement should Agreement No. 10374 [3] be terminated, and, if so, the proper level of such a limitation.

The purpose of the Order on Remand was to ascertain the positions of the parties on the issues remanded by the Court and to determine the need for, and scope of, any further formal proceedings. Proponents, Sea-Land, Lykes, USL and Hearing Counsel responded to the order. Subsequently, the Commission, based on those responses and pursuant to the Court's remand, instituted this proceeding to limit Proponents' container cargo carrying authority under Agreement No. 10266 apart from Agreement No. 10374.

DISCUSSION

The Commission, after consideration of the record in this proceeding, has determined to grant Proponents' Motion to Dismiss on the basis of

[3] Agreement No. 10374, a container agreement between ICT, CGM and Hapag Lloyd A/G, was approved at the same time as Agreement No. 10266-2.

the modification to Agreement No. 10266, as amended, which they proposed to submit. That modification would delete the 800 TEU provision from Agreement No. 10266 and further modify that Agreement to require 120 days' advance notice of any termination of Agreement No. 10374 (except in cases of *force majeure*) at which time Proponents would propose an amendment to Agreement No. 10266 to limit the number of containers the parties may carry in the trade. During any interim between the termination of Agreement No. 10374 and a Commission determination on the amendment establishing the number of containers to be carried, Proponents would be authorized, under the proposal, to continue to operate their service subject to an 800 TEU per week limitation.[4]

We cannot say whether future events will justify the need for authority to operate if Agreement No. 10374 is terminated but Proponents have not demonstrated that there is any present need for authority in Agreement No. 10266 to operate apart from Agreement No. 10374. The Commission believes that the elimination of the 800 TEU provision in Agreement No. 10266 will clarify that the Agreement does not authorize Proponents to offer container service apart from Agreement No. 10374 for so long as Agreement No. 10374 continues in effect.

In the event that Agreement No. 10374 is terminated, the provision suggested by Proponents should provide adequate protection from any interruption in service. None of the other parties to the proceeding object to these contingency provisions. The proposed amendment offered by Proponents should not only serve to remove the controversy among the parties to the proceeding but also to satisfy the Court's concern regarding the Commission's enlargement of Proponents' authority under Agreement No. 10266. The Commission will therefore accept Proponents' offered amendment to Agreement No. 10266 and dismiss this proceeding on the basis thereof. The acceptance of this amendment, when actually filed, however, is without prejudice to the Commission's right and obligations under section 15 of the Act, to modify those provisions at any time, after notice and hearing, to accommodate changed conditions in the trade.

THEREFORE, IT IS ORDERED, That this proceeding is dismissed 30 days from the date of this Order if, within that time, Proponents file with the Secretary of the Commission an amendment revising Articles 1 and 9 of Agreement No. 10266 to read as follows:

> 1. Vessels and Sailings. The parties shall undertake the joint marketing of cargo space available on the container, break-

[4] Proponents' concern appears to be that if Agreement No. 10374 were cancelled, they might become embroiled in a lengthy proceeding in order to obtain authority to carry container cargo under Agreement No. 10266, apart from Agreement No. 10374. This, it is feared, would result in a lapse of service.

bulk, or combination breakbulk/containerships operated by or available to the parties in the trade described above, provided, that, the parties shall not furnish more than one conventional vessel call per week between any two ports covered by this Agreement and then only as part of a voyage which calls at least one U.S. port not otherwise receiving direct service from the parties.

9. Notice of Termination. The parties shall notify the Federal Maritime Commission of termination of FMC Agreement No. 10374 (or some similar agreement specifying their container carryings in the trade encompassed by this Agreement) 120 days prior to the effective date of such termination, provided, however, that the parties are excused from this notice requirement only to the extent that such termination is caused and such notice is precluded by reasons of force majeure, which, as used herein, shall mean and include strikes, accidents, lockouts, fire, marine disaster, acts of God or public enemy, embargoes, riots, civil commotions, laws, government request or any other causes beyond the control of either party. If such termination is due to reasons of force majeure, the parties shall give notice of termination as promptly as possible considering such force majeure. In the event that Agreement No. 10374 (or some similar agreement) is terminated within 120 days of the date it would expire by its own terms, the parties shall notify the Federal Maritime Commission thereof, provided that such notice shall not extend the effective terms of Agreement No. 10374 (or some similar agreement) beyond its scheduled expiration. The parties shall include in any such notice of termination an amendment to this agreement, based on trade conditions, setting forth the number of containers the parties may carry in this trade, provided, however, that nothing in this Agreement shall be construed to prevent the parties from carrying up to 800 TEU's per week, averaged quarterly, in each direction of containerized cargo during the pendency of consideration by the Federal Maritime Commission of any such amendment.

FURTHER, IT IS ORDERED, That the amendment to Agreement No. 10266 set forth above will stand approved under section 15 of the Shipping Act, 1916, on the date it is actually received by the Secretary.

By the Commission.

(S) FRANCIS C. HURNEY
Secretary

FEDERAL MARITIME COMMISSION

DOCKET NO. 83-6

COMPANHIA SIDERURGICA NACIONAL
(BRAZILIAN NATIONAL STEEL CO.)

v.

COMPANHIA DE NAVEGACAO LLOYD BRASILEIRO

NOTICE

March 28, 1983

Notice is given that no appeal has been taken to the February 18, 1983, dismissal of the complaint in this proceeding and that the time within which the Commission could determine to review has expired. No such determination has been made and accordingly, the dismissal has become administratively final.

(S) FRANCIS C. HURNEY
Secretary

FEDERAL MARITIME COMMISSION

DOCKET NO. 83-6

COMPANHIA SIDERURGICA NACIONAL (BRAZILIAN NATIONAL STEEL CO.)

v.

COMPANHIA DE NAVEGACAO LLOYD BRASILEIRO

COMPLAINT DISMISSED

March 28, 1983

This is a proceeding begun by the filing of a complaint with the Commission on January 14, 1983. Complainant, a Brazilian shipper, alleged that it had been overcharged on a number of shipments of machinery and parts destined for a project involving expansion of complainant's steel mills in Brazil. More specifically, complainant alleged that respondent, Companhia de Navegacao Lloyd Brasileiro, a common carrier by water subject to the provisions of the Shipping Act, 1916, had failed to accord complainant a 20-percent discount which was published in respondent's tariff for this project. Therefore such conduct would violate section 18(b)(3) of the Act. In support of its complaint, complainant submitted various documents consisting of relevant tariff pages, bills of lading for each shipment, commercial invoices, and an itemized table of the alleged overcharges.

Since the complaint was served on January 18, 1983, respondent was permitted to file an answer within 20 days, as provided by Rule 64, 46 C.F.R. 502.64. However, following service of the complaint, respondent determined that the claims were generally valid and, with some modifications, decided that the complaint merited satisfaction. Therefore, instead of filing an answer to the complaint, respondent, joined by complainant, filed a letter explaining that respondent wished to satisfy the complaint under Rule 93, 46 C.F.R. 502.93. In the letter, the parties stated that there was no dispute of material facts between the parties, that the shipments, with one exception, were carried by respondent, that freight was paid by complainant, that the shipments were destined for the project in question for which respondent's tariff provided the discount as complainant had alleged, and that the failure to grant the discount to complainant had occurred because complainant's freight forwarder had neglected to notate the project rate agreement number on the relevant bills of lading.

DISCUSSION AND CONCLUSIONS

This appears to be the last of a series of complaints which complainant has filed involving alleged overcharges on shipments to complainant's project in Brazil. Previously, complainant had filed complaints alleging similar overcharges against two other carriers. (See Docket No. 82-51, *Companhia Siderurgica Nacional (Brazilian National Steel Co.) v. Moore McCormack Lines, Inc.* and Docket No. 82-53, *Companhia Siderurgica Nacional (Brazilian National Steel Co.) v. Netumar Lines.*) In those two previous cases, the complaints were also satisfied by both respondents. (See 25 F.M.C. 650 (1983.)) [1]

Because the parties have submitted a joint statement explaining that there is no dispute regarding the merits of the claims and that respondent therefore decided that it wished to satisfy the complaint, the joint request for approval of the satisfaction and dismissal of the complaint is governed by the provisions of Rule 93, 46 C.F.R. 502.93. That rule, in substance, provides that the Commission may dismiss satisfied complaints in its discretion upon the filing of a verified statement, which may be by letter, explaining how the complaint has been satisfied and that similar adjustments will be made by respondent with other persons similarly situated. The parties have filed such a statement and have furnished proof of payment of the satisfaction.[2] The parties' request for approval of the satisfaction and for dismissal of the complaint would therefore appear to be valid. See, e.g., *Ingersoll Rand Co. v. Waterman Steamship Corporation*, 21 S.R.R. 1372 (ALJ 1982); Docket Nos. 81-52, 81-53, *Abbott Hospitals, Inc. v. PRMSA, et al.*, 24 F.M.C. 1055 (1982); Docket Nos. 82-51 and 82-53, cited above.

The only matter requiring further explanation concerns the amount of satisfaction, which is $17,606 already paid by respondent, instead of the amount originally demanded in the complaint, $19,392.32, plus interest. However, as the record shows, that amount is justified by the fact that of the 22 shipments and bills of lading mentioned in the complaint, one was apparently included by mistake since the bill of lading was not for a Lloyd vessel and three others appear to be so old as to fall outside the two-year period of limitations set forth in section 22 of the Act. Deduction of the alleged overcharges on these four

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[1] One other complaint was filed in this series but it named a carrier's agent, Norton Lilly & Co., Inc., as respondent instead of the carrier, Lloyd Brasileiro. This complaint ran into hot water as a result of the naming of the agent and was voluntarily withdrawn by complainant in favor of the present complaint. See Docket No. 82-55, *Companhia Siderurgica Nacional (Brazilian National Steel Co.) v. Lloyd Brasileiro*, 25 F.M.C. 655 (1983).

[2] Rule 93 also requires the submission of data on a special form "insofar as such said form is applicable." The form is not published in the rule. However, the data apparently required concerns specific details about each shipment together with an itemized list of overcharges. See Docket Nos. 81-52, 81-53, *Abbott Hospitals, Inc. v. PRMSA et al.*, 24 F.M.C. 1055 (1982). Such data were submitted with the complaint in this case and they show, together with the other materials submitted in support of the complaint, that the various claims generally appear to have merit.

shipments leaves a balance of $17,606, as satisfaction of the apparently valid and compensable claims.[8]

The record in this case shows that respondent has satisfied a complaint, which gave the appearance of validity generally, in a reasonable fashion and that the parties have complied with Rule 93 in seeking dismissal of the complaint. The satisfaction appears to corroborate the Commission's recent expression of confidence in carriers' abilities to deal with overcharge claims without needless Commission involvement. See Docket No. 81-51, *Time Limit for Filing Overcharge Claims*, Order on Reconsideration, January 5, 1983, 25 F.M.C. 554, 557 (". . . the Commission has utmost confidence in carriers' ability to resolve overcharge claims satisfactorily . . ."). Accordingly, the complaint is dismissed as requested.

(S) NORMAN D. KLINE
Administrative Law Judge

[8] The amount of alleged overcharges on the four bills of lading which are of doubtful validity totals $1,786.32. (See table attached to complaint, bills of lading Nos. 60, 23, 58, and 77.) This sum, subtracted from the original total of $19,392.32, leaves $17,606. The three Lloyd bills of lading which appear to fall outside the two-year period are Nos. 60, 58, and 77, and are dated in November and December of 1980. This complaint was filed on January 14, 1983. Thus, to establish a valid claim that could be subject to an award of reparation under section 22 of the Act, complainant would have had to establish that date of payment on these bills occurred on or after January 14, 1981. See *TDK Electronic Co., Ltd. v. Japan Lines, Ltd.*, 22 F.M.C. 769, 770 n. 4 (1980) (cause of action accrues at time of shipment or payment of freight, whichever is later). Complainant has not shown that the three bills were paid within the requisite time period. The Commission has held that the right to reparation as well as the remedy vanishes once the two-year statute has run. See *Aleutian Homes, Inc. v. Coastwise Line*, 5 F.M.B. 602, 612 (1959). Hence, if approval of the proffered satisfaction arrangement required a showing that every claim could be valid as a matter of law, that requirement has become irrelevant since the parties have dropped those claims affected by the statute from the list. In Docket Nos. 81-52, 81-53, Dismissal of Proceedings, cited above, there were also substantial downward adjustments to the original claims which were approved as part of the satisfaction arrangement.

FEDERAL MARITIME COMMISSION

DOCKET NO. 82-45

CUTTERS EXCHANGE, INC.

v.

CARGO INTERNATIONAL INC., ET AL.

NOTICE

March 31, 1983

Notice is given that no appeal has been taken to the February 22, 1983, dismissal of the complaint in this proceeding and that the time within which the Commission could determine to review has expired. No such determination has been made and accordingly, the dismissal has become administratively final.

(S) FRANCIS C. HURNEY
Secretary

FEDERAL MARITIME COMMISSION

DOCKET NO. 82-45

CUTTERS EXCHANGE, INC.

v.

CARGO INTERNATIONAL INC., ET AL.

COMPLAINT DISMISSED

Finalized March 31, 1983

This proceeding began with the filing of a complaint on September 10, 1982. Complainant, a shipper known as Cutters Exchange, Inc., located in Nashville, Tennessee, is seeking the sum of $3,922.33, which it alleges it paid to respondent, Cargo International, Inc., which had operated in Tennessee as a freight forwarder licensed by the Commission. Complainant alleges that Cargo International failed to pay this money to an ocean carrier for payment of transportation services and that complainant has not been able to recover this money despite making demands upon the three individual respondents who were officers, shareholders, or directors of Cargo International. Complainant alleges that the three individual respondents conspired to violate section 44 of the Shipping Act, 1916, by representing to the Commission that two of the individuals, Mr. Adams and Mrs. Harrison, would be personally responsible for any obligations of Cargo International when Cargo International lost its surety bond and that Cargo International was merely a sham corporation which each of the individual respondents had utilized to conduct his or her business transactions.[1]

The proceeding experienced considerable delay because of difficulty in obtaining correct addresses of certain individual respondents and obtaining service on the corporate respondent. The complaint had to be served on one or more respondents on September 14, October 13, December 1, and December 30, 1982, until the process was finally successful. However, only one respondent, Mr. Carl E. Adams, Jr.,

[1] In a letter dated November 26, 1982, complainant's counsel averred that two individual respondents, Mr. Adams and Mrs. Harrison, made themselves sureties for Cargo International, Inc., and that the Commission would have jurisdiction over these persons as sureties. Counsel also averred that even if they had not become sureties, they had made a contract with the Commission and Cargo International, Inc. so that complainant became a third-party beneficiary to that contract. In the same letter counsel also objected to certain observations I had made concerning the complex nature of the Shipping Act theory he was employing and suggested my recusal. In view of the present motion seeking dismissal, it is unnecessary for me to rule upon the matter.

filed an answer to the complaint, and Mr. Adams denied most of the material allegations in the complaint.

When service of the complaint was finally completed, the proceeding became ripe for establishment of a prehearing schedule under customary procedure. However, before any action could be taken in that direction, complainant filed a Motion for Voluntary Dismissal on January 31, 1983. In the motion, complainant moves for leave to dismiss its complaint without prejudice so that complainant can refile its claim in another forum. Complainant also advises that it has filed a similar action in the Chancery Court for Davidson County, Tennessee, in the interest of judicial economy and wishes to consolidate the present action in the Tennessee court. No respondent has filed a reply to the motion.

DISCUSSION AND CONCLUSIONS

There is no specific Commission rule of practice and procedure which governs motions by complainants for voluntary dismissal of their complaints. The closest rule seems to be Rule 93, 46 C.F.R. 502.93, which deals with dismissal of complaints which have been satisfied and states that such complaints "will be dismissed in the discretion of the Commission." Otherwise the motion appears to fall under Rule 73, 46 C.F.R. 502.73, the rule governing motions generally, and Rule 147, 46 C.F.R. 502.147, the rule setting forth the functions and powers of presiding officers including the power to "hear and rule upon motions."

In practice, the desire of a complainant to withdraw its complaint and discontinue bearing the cost and burden of litigation has been honored by presiding officers on the ground that the Commission cannot very well compel a complainant to put on a case but can, if it chooses, investigate any matter on its own authority under section 22(b) of the Shipping Act, 1916, 46 U.S.C. section 821(b). However, if problems arise in dealing with complainants' requests to withdraw their complaints, the Commission can draw guidance from the rules of civil procedure applicable in federal district courts as the Commission has done in the past. *See, e.g. Rohm & Haas Co. v. Italian Line,* 24 F.M.C. 429, 431 n. 8.[2]

The comparable federal rule concerning voluntary dismissal is Rule 41(a), 28 U.S.C.A. Under that rule, a plaintiff has virtually an absolute right to withdraw its complaint before an answer or motion for summary judgment has been filed by a defendant merely by filing a notice of dismissal with the court. However, if an answer or a motion for

[2] In the case cited, the Commission referred to an earlier case in which the Commission had stated: Where the Commission's Rules are not dispositive of a question of procedure, the Commission normally will look to the rules and practices applicable to civil proceedings in the District Courts of the United States. Docket No. 78-51, *Agreement No. 10394,* Order, April 19, 1979, p. 4, (unreported).

summary judgment has been filed, dismissal is subject to such terms and conditions as the court deems proper. If an answer has been filed, plaintiff's motion for voluntary dismissal may still be granted without prejudice unless the court finds that defendant's rights are seriously prejudiced or defendant has expended time and money on the case for which some reimbursement is warranted or other peculiar circumstances exist justifying the imposition of terms and conditions to protect defendants' rights. *See* 9 Wright and Miller, *Federal Practice and Procedure*, section 2364; 2366; *Therrien v. New England Tel. & Tel. Co.*, 102 F. Supp. 350 (D.C. N.H. 1951); *Colonial Oil Co. v. American Oil Co.*, 3 F.R.D. 29 (D.S.C. 1943). Under the cited rule, however, the fact that a plaintiff may bring a new action in the same or another court, may gain a tactical advantage, or may avoid an adverse statute of limitations does not preclude a plaintiff from having its complaint dismissed without prejudice. Such facts are not considered by the courts to be that type of prejudice or harm that warrants denial of plaintiff's motion. *See, e.g., Le Compte v. Mr. Chip, Inc.*, 528 F. 2d 601, 604 (5th Cir. 1976); *Holiday Queen Land Corporation v. Baker*, 489 F. 2d 1031 (5th Cir. 1974); *Klar v. Firestone Tire & Rubber Co.*, 14 F.R.D. 176 (S.D.N.Y. 1953). There are, moreover, numerous cases in which federal courts have permitted voluntary dismissals of complaints so that plaintiffs could file their cases in state courts. *See, e.g., Grivas v. Parmalee Transp. Co.*, 207 F. 2d 334 (7th Cir. 1953); *Burgess v. Atlantic Coast Line R. Co.*, 39 F.R.D. 588 (D.C.S.C. 1966); *Eaddy v. Little*, 234 F. Supp. 377 (D.C.S.C. 1964); cases collected in 9 Wright and Miller, *Federal Practice and Procedures*, cited above, section 2364, p. 168 n. 75.

As the court stated in *Harvey Aluminum, Inc. v. American Cyanamid Co.*, 15 F.R.D. 14, 18 (S.D.N.Y. 1953):

> But the mere fact that a party will be faced with another litigation does not of itself constitute prejudice; otherwise an initial error of judgment on the part of his counsel may preclude a determination of a claim upon its facts and merits. Undue vexatiousness, undue burden to a litigant in presenting his defense or claim in another jurisdiction, excessive and duplicitous expense of a second litigation, the extent to which any judgment in the new action would be conclusive as to issues and parties as contrasted to a final determination in the pending suit, the extent to which the current suit has progressed, are some of the factors to be considered in deciding whether prejudice will result to the opposing party.

In the instant case complainant has advised that it has already filed a complaint in the Chancery Court for Davidson County, Tennessee, against the various respondents in this case in the interest of judicial economy and the interest of the litigants themselves. The fact that all parties are located in the Nashville, Tennessee or surrounding area, the difficulty of service of the complaint experienced by the Commission's Secretary in this case, the lack of answer by three of the individual respondents, the complex nature of the case under the Shipping Act theory of recovery which probably would require costly hearings and briefing compared to the relatively small amount of the claim, all confirm complainant's determination that litigation in a state court would be more economical and convenient. The case essentially involves a claim for money which complainant alleges was unlawfully taken from complainant and misappropriated and has not progressed very far in this forum. Moreover, it would appear easier for all parties to make their claims and defenses before a state court in Tennessee, and one would expect that a judgment by that court having all the parties conveniently before it would be conclusive. If one applies the factors set forth by the court in *Harvey Aluminum, Inc. v. American Cyanamid Co.*, cited above, it appears obvious that ample grounds exist to grant complainant's request for voluntary dismissal of the complaint and, as provided by Rule 41(a)(2), the dismissal may be without prejudice, as complainant requests.

Accordingly, the complaint is dismissed without prejudice.

(S) NORMAN D. KLINE
Administrative Law Judge

FEDERAL MARITIME COMMISSION

DOCKET NO. 82-29

PHILLIPS-PARR, INC.

v.

EMPRESA LINEAS MARITIMAS ARGENTINAS, S.A.

NOTICE

April 8, 1983

Notice is given that no exceptions have been filed to the February 28, 1983, initial decision in this proceeding and the time within which the Commission could determine to review that decision has expired. No such determination has been made and accordingly, that decision has become administratively final.

(S) FRANCIS C. HURNEY
Secretary

FEDERAL MARITIME COMMISSION

DOCKET NO. 82-29

PHILLIPS-PARR, INC.

v.

EMPRESA LINEAS MARITIMAS ARGENTINAS, S.A.

Complainant, a carrier's agent, being sued by respondent E.L.M.A. in federal court for freight allegedly due in connection with a shipment of Chilean hardboard which E.L.M.A. carried from Tampico, Mexico to New Orleans to complete a voyage begun by complainant's principal in Chile, alleges that E.L.M.A. operated as a common carrier between Tampico and New Orleans without a tariff, violating sections 18(b), 16, and 17 of the Shipping Act, 1916. Complainant seeks a cease and desist order preventing E.L.M.A. from pursuing the court action and reparation for costs of defending the court suit as well as any freight for which complainant may be found liable to E.L.M.A. Respondent E.L.M.A. claims complainant is merely trying to avoid payment under a guaranty it executed for E.L.M.A.'s benefit. Complainant obtained a stay in court to allow the Commission to determine the Shipping Act issues. It is *held*:

(1) That the evidence of record utterly fails to show that E.L.M.A. operated as a common carrier by water between Mexican and U.S. Gulf ports before, during, and after the time E.L.M.A. lifted the Chilean hardboard out of Tampico, there being no evidence of regular routes, advertising, general holding out, etc. The record rather shows that E.L.M.A. carried the shipment out of Tampico as an isolated instance to enable the shipment to be delivered to New Orleans as originally intended.

(2) Since the record shows E.L.M.A. not to have operated as a common carrier in the relevant trade, the Commission lacks jurisdiction over the matter in question and the complaint must be dismissed, leaving the parties free to resume their litigation in the federal district court.

Edward S. Bagley for complainant.

David A. Brauner for respondent.

INITIAL DECISION [1] OF NORMAN D. KLINE, ADMINISTRATIVE LAW JUDGE

Finalized April 8, 1983

This proceeding began with the filing of a complaint on June 10, 1982. Complainant, Phillips-Parr, Inc., is an agent of a carrier known as Navimex Line and operates its business at the port of New Orleans, Louisiana. Allegedly Navimex had begun to carry a shipment of hardboard from Chile to New Orleans on June 29, 1979, but carried the

[1] This decision will become the decision of the Commission in the absence of review thereof by the Commission (Rule 227, Rules of Practice and Procedure, 46 C.F.R. 502.227).

shipment only as far as Tampico, Mexico when Navimex's charter on its ship expired. The shipment was thereafter placed on a vessel operated by another carrier, respondent Empresa Lineas Maritimas Argentinas, S.A. (E.L.M.A.) which carried it the remainder of the way to New Orleans under an E.L.M.A. bill of lading marked "prepaid" in Mexico allegedly under an E.L.M.A. tariff (No. 1 N.B. (F.M.C. No. 17)) which had been cancelled by the Commission on February 6, 1978. Allegedly E.L.M.A. delivered the cargo to the consignee, received payment of freight on the original Navimex bill of lading, and through E.L.M.A.'s agent, Strachan Shipping Company, Inc., made payment to Phillips-Parr, which remitted this money to Navimex. E.L.M.A. did this without notifying Phillips-Parr that any freight was due on the portion of the transportation between Tampico and New Orleans. However, on May 27, 1981, E.L.M.A. filed suit in the United States District Court for the Eastern District of Louisiana, seeking to recover freight allegedly due to E.L.M.A. on the Tampico to New Orleans leg, claiming that Phillips-Parr owed E.L.M.A. $16,186.86 in freight.[2] (Phillips-Parr's principal, Navimex, S.A., allegedly became insolvent and no longer served New Orleans.) On motion by Phillips-Parr, the district court stayed the suit on July 28, 1982, on the ground that the matter was within the primary jurisdiction of the Commission.

Phillips-Parr apparently because of its concern that it might suffer judgment against it in the court proceeding, in its complaint asks the Commission for "reparations for any amount which it may be adjudged liable to E.L.M.A.," together with costs, attorneys' fees and expenses incurred by it in defending against E.L.M.A.'s claims in court. Moreover, Phillips-Parr is asking the Commission to issue a cease and desist order against E.L.M.A. which would prevent E.L.M.A. from pursuing its action in the court seeking recovery of freight. Phillips-Parr alleges that it is entitled to such protection and compensation because E.L.M.A. is seeking to recover charges without having a tariff on file with the Commission, in violation of section 18(b)(1) of the Shipping Act, 1916, and in violation of sections 16 First and 17 of the Act.

In answer to the complaint, E.L.M.A. essentially admits that it carried the subject hardboard from Tampico to New Orleans under its own bill of lading, delivered it to the consignee named on the Navimex bill of lading, and remitted freight to Phillips-Parr as agent for Navimex. E.L.M.A. admits that its tariff had been cancelled but contends that it was not operating as a common carrier in the trade between Tampico, Mexico and New Orleans, a fact which would deprive the

[2] Actually, as some documents submitted in connection with discovery requests indicate, suit was begun by E.L.M.A. in a state court on May 11, 1981, and, upon motion of Phillips-Parr, was removed to the federal court on May 26 or 27, 1981. (See exhibit "E" attached to complainant's request for admissions, served July 28, 1982.)

Commission of jurisdiction over the subject matter of the proceeding. E.L.M.A. also contends that Phillips-Parr suffered no injury, that even if E.L.M.A. violated the Shipping Act, Phillips-Parr is not entitled to free transportation between Tampico and New Orleans, and finally, that Phillips-Parr did not file the complaint in good faith but is really collaterally attacking the court proceeding and attempting to avoid a guaranty it executed in order to obtain release of the cargo.

PREHEARING PROCEDURES AND DEVELOPMENT OF THE RECORD

The evidentiary record, as I note below, consists essentially of stipulated facts, an affidavit of an E.L.M.A. official, E.L.M.A. vessel manifests, bills of lading, answers to interrogatories, and assorted documents proffered with discovery requests. The parties agreed to develop the record in this fashion in lieu of conducting trial-type hearings in view of the nature of the central issue which concerns the question whether E.L.M.A. operated as a common carrier between Tampico, Mexico and New Orleans during the time of the shipment in question. Since determination of E.L.M.A.'s status depends upon a careful examination of its vessel operations, it was felt that examination of the manifests covering the vessel which was involved in the shipment in question as well as consideration of other evidence concerning E.L.M.A.'s holding out and service between the two ports would yield sufficient information on which its status could be determined. Because of the limited issue and size of the evidentiary record, furthermore, I ruled that no legal briefs need be filed. This procedure was adopted at a telephonic prehearing conference held on December 16, 1982, which itself was held to promote the interest of economy and reduce litigation costs. (See Notice of Schedule Established and Rulings Made at Prehearing Conference, December 17, 1982.) [3]

SUMMARY OF THE FACTS

As mentioned above, the record consists of a stipulation of facts, an affidavit of an E.L.M.A. official (Mr. Enrique Landa, General Delegate in the United States for E.L.M.A.), vessel manifests for voyage 22 of

[3] As a result of a series of prehearing rulings which I issued, the parties clarified their positions prior to the telephonic prehearing conference. (See Order to Show Cause why Complainant Should not be Dismissed Without Prejudice, September 23, 1982; Notice of Prehearing Conference; Ruling on Possible Dismissal of Complaint Deferred...November 24, 1982.) In response to my inquiries contained in these rulings, complainant explained that it had obtained a stay of the proceeding against it in the federal court to allow the Commission to determine the merits of its Shipping Act contentions and was seeking to recover injury resulting from costs of defending the suit brought by E.L.M.A. in court. Complainant also urged a speedy determination of its claim that E.L.M.A. had operated as a common carrier subject to Commission jurisdiction by means of documents, affidavits, answers to interrogatories, etc. E.L.M.A. explained its contention that Phillips-Parr was merely attempting to avoid payment of freight, that E.L.M.A. had merely engaged in a single shipping transaction, not common carriage between Tampico and New Orleans, and that the controversy should have remained with the court.

the *M/V Rio Neuquen*, answers to interrogatories, and assorted documents attached to discovery requests. Since the parties agree that it is necessary to concentrate on the jurisdictional issue concerning E.L.M.A.'s status when it handled the shipment of Chilean hardboard, the stipulation and evidence focus on E.L.M.A.'s operations on the critical voyage of the *M/V Rio Neuquen*. However, it is necessary to understand the background to the controversy so as to understand the context in which Phillips-Parr filed its complaint and why Phillips-Parr is asking the Commission to order E.L.M.A. to cease and desist from seeking to recover freight allegedly due and is seeking to recover certain costs arising out of Phillips-Parr's defense in the suit brought by E.L.M.A. in court. Therefore, the following summary is divided into two sections: first, a background and second, a detailed exploration of E.L.M.A.'s operations on voyage 22 of the *M/V Rio Neuquen*. It should be noted, however, that the background facts were not stipulated and were not fully proven in the traditional way although not necessarily disputed. They were, however, sworn to in the complaint, were supported to some extent by documents, were not necessarily disputed, and were the subject of a request for admissions. Since they are helpful for background purposes only and the decision hinges on the second section containing a detailed exploration of E.L.M.A.'s operations on voyage 22 of the *M/V Rio Neuquen*, I have made findings of fact as to these background facts although technically in some instances they rely upon documents attached to a request for admissions that E.L.M.A. did not specifically accept.[4]

[4] For purposes of making necessary background findings and findings regarding E.L.M.A.'s carrier operations on the critical voyage, I am admitting in evidence certain materials. These are: 1) a stipulation of facts and agreement of counsel signed by counsel for both parties (2 pp.); 2) an affidavit of Mr. Enrique Landa, General Delegate of E.L.M.A. (2 pp.); 3) manifests and summary sheets concerning voyage 22 of the *M/V Rio Neuquen* showing details of the voyage, including cargo carried between various South American, Mexican, and U.S. Gulf ports broken down by bills of lading; 4) discovery materials consisting of answers to interrogatories filed by E.L.M.A. and documents attached to complainant's Request for Admissions consisting of bills of lading issued by Navimex Line and E.L.M.A. covering the shipments of Chilean hardboard; Phillips-Parr's Petition in the U.S. District Court for the Eastern District of Louisiana seeking removal of the action from the state court; E.L.M.A.'s petition in the state court commencing action against Phillips-Parr; a letter from Phillips-Parr to Strachan Shipping Company styled as a "Guarantee" and dated 9/17/79. I have previously advised the parties that the E.L.M.A.'s answers to interrogatories and the bills of lading would be considered as part of the evidentiary record unless the parties made valid objections. (See Notice of Schedule Established and Rulings Made at Prehearing Conference, December 17, 1982, p. 2 n. 1.) As for the remaining court documents, I find them admissible under broad standards of admissibility prevailing in administrative law for the limited purpose of supporting certain background facts and not for the purpose of supporting any legal conclusions argued by the parties in the documents.

BACKGROUND

1. On June 29, 1979, a carrier known as Navimex Line received two shipments [5] of skids of Chilean hardboard for transportation from the port of Lirquen, Chile to New Orleans, Louisiana. Navimex issued two bills of lading for the shipments, freight collect in the United States.

2. Navimex carried the two shipments from Chile to Tampico, Mexico, on its vessel, the *M/V London Cavalier.* Navimex thereafter transshipped the shipments to the *M/V Rio Neuquen,* a vessel operated by E.L.M.A., which sailed from Tampico to New Orleans on September 3, 1979. The reason for the transshipment purportedly was the expiration of the Navimex charter on the *M/V London Cavalier.*

3. E.L.M.A. issued two bills of lading to Navimex, S.A., the owner and operator of Navimex Line, which were stamped or typed "freight prepaid." Both bills were consigned to the order of Phillips-Parr, Inc.

4. E.L.M.A. carried the shipments of hardboard from Tampico to New Orleans. E.L.M.A. did not file a tariff between the two ports, its previous tariff (No. 1 N.B. (FMC No. 17)) having been cancelled by the Commission on February 6, 1978.[6]

5. At the port of New Orleans, E.L.M.A. effectuated delivery of the cargo to the consignees through E.L.M.A.'s agent, Strachan Shipping Company, Inc. E.L.M.A., through Strachan, collected freight due under the Navimex bills of lading, and remitted the freight collected to Phillips-Parr, Navimex's agent in New Orleans.

6. On September 17, 1979, Phillips-Parr had executed a so-called "Guarantee" addressed to E.L.M.A.'s agent in New Orleans, Strachan Shipping. The document stated that in consideration of delivery of the hardboard to Phillips-Parr, Phillips-Parr would "undertake and agree to indemnify you and hold you and said vessel and owners harmless from all consequences and to pay on demand any claim, loss and/or expense that may arise, including attorneys [sic] fees."

7. On May 11, 1981, E.L.M.A. brought suit in the Civil District Court in and for the Parish of Orleans, State of Louisiana, seeking to recover the sum of $16,186.86, which E.L.M.A. alleged was freight due for the shipments which it had carried from Tampico to New Orleans. The suit was removed to the United States District Court, Eastern District of Louisiana, on motion of Phillips-Parr, on or about May 26

[5] Throughout the factual and legal discussion that follows, I have treated the subject shipments of Chilean hardboard as two rather than one shipment because two bills of lading were issued, although the shipper was the same and they were both consigned to the order of Phillips-Parr when they left Tampico. The parties discuss the cargo as one shipment, however. It is not critical whether they are considered as one or two shipments. The hardboard was carried on a total of 271 skids, 143 on one bill of lading and 128 on the other.

[6] This was done by the Commission in Docket No. 77-35, *Publication of Inactive Tariffs,* 20 F.M.C. 433 (1978). As that decision and the Order to Show Cause (July 11, 1977) which began that proceeding show, the tariff was cancelled because E.L.M.A. was not believed to be engaged in common carriage and the tariff was considered to be inoperative.

or 27, 1981. This suit was later stayed by court order issued on July 28, 1982, upon motion of Phillips-Parr, which had argued that the controversy lay within the primary jurisdiction of the Federal Maritime Commission.

E.L.M.A.'S CARRIER OPERATIONS IN THE GULF

8. E.L.M.A. is a carrier which engages in common carriage by water in certain foreign trades of the United States.

9. As far as the subject shipments of Chilean hardboard are concerned, E.L.M.A. operated only one voyage, voyage 22 of the *M/V Rio Neuquen*. From the period March 1, 1979 to and including December 31, 1982, E.L.M.A. carried no cargo between Mexican and U.S. Gulf ports except in the one instance on voyage 22 of the *M/V Rio Neuquen* which carried two shipments of hardboard from Tampico, Mexico to New Orleans on September 3, 1979.

10. Manifests of the *M/V Rio Neuquen* for voyage 22 show that E.L.M.A. carried a number of shipments for numerous shippers between South American and U.S. Gulf ports and between South American and two Mexican ports, Tampico and Vera Cruz. The voyage began on July 21, 1979 when the *M/V Rio Neuquen* sailed out of Buenos Aires, Argentina, northbound. She sailed out of various Brazilian ports (Rio Grande, Paranagua, Santos, Salvador) on July 25, 28, 30, and August 4, respectively. She sailed out of various U.S. Gulf ports (Tampa and Mobile) on August 15 and 17, respectively, and out of the Mexican ports of Vera Cruz and Tampico on August 30 and September 3. Finally she sailed out of Houston and New Orleans heading south on September 10 and 17, 1979.

11. A breakdown of the shipments carried both northbound and southbound on voyage 22 shows the following: northbound from Buenos Aires and various Brazilian ports to U.S. Gulf ports - 61 total shipments (bills of lading); northbound from Buenos Aires and Salvador, Brazil to Vera Cruz and Tampico, Mexico - 109 total shipments (bills of lading); southbound from U.S. Gulf ports to Buenos Aires - 290 total shipments (bills of lading); southbound from Vera Cruz and Tampico, Mexico to Buenos Aires - 52 total shipments (bills of lading). From Tampico, Mexico to New Orleans, Louisiana - 2 shipments (bills of lading) (the shipment of Chilean hardboard transshipped from the Navimex vessel).

12. E.L.M.A. published no advertisements or notices by which it offered vessels for the carriage of cargo between U.S. Gulf ports and East Coast Mexican ports for at least approximately six months before and after the particular carriage of the Chilean hardboard from Tampico to New Orleans, or a period running from March 1, 1979 through February 29, 1980.

DISCUSSION AND CONCLUSIONS

It is clear that continuation of the controversy before the Commission raised by the complaint depends entirely on the question of the Commission's jurisdiction over E.L.M.A. in connection with E.L.M.A.'s carriage of the Chilean hardboard from Tampico, Mexico to New Orleans. Thus, if the record does not establish that E.L.M.A. operated as a "common carrier by water" in its operations between Tampico and New Orleans, there is no point to further consideration of allegations that E.L.M.A. violated section 18(b)(1) of the Act by failing to file a tariff or section 16 First by subjecting anyone to undue or unreasonable disadvantage or section 17, second paragraph, by observing unreasonable practices.[7] All of these statutory provisions are applicable only to common carriers by water.

Very briefly, Phillips-Parr claims that E.L.M.A. had operated as a common carrier by water when it picked up the Chilean hardboard in Tampico and carried it to New Orleans. E.L.M.A. claims, on the other hand, that this was simply a single operation and that E.L.M.A. did not hold out or engage in common carrier operations between the two ports during that time.

Common carrier determinations can be made under a few critical principles which are discussed and explained in several leading Commission decisions such as *Activities, Tariff Filing Practices and Carrier Status of Containerships, Inc.*, 9 F.M.C. 56 (1965), and *Investigation of Tariff Filing Practices*, 7 F.M.C. 305 (1962). In *Containerships, Inc.*, the Commission found that a carrier which had engaged in the carriage of automobiles for leading automobile manufacturers under forward booking contracts was a common rather than a contract carrier. The Commission explained that the common carrier mentioned in the Shipping Act was the common carrier at common law. (7 F.M.C. at 62.) The essential characteristic of a common carrier is that such a carrier "by a course of conduct holds himself out to accept goods from whomever offered to the extent of his ability to carry." (7 F.M.C. at 62.) Or, as the Commission stated (7 F.M.C. at 62):

> The essential characteristics of the common carrier at common law are that he holds himself out to the world as such; that he

[7] Since the parties have concentrated on the threshold issue of jurisdiction, there has been no elaboration of complainant's allegations concerning the nature of the Shipping Act violations nor, even if they were proven, whether the Commission would award reparation, and the parties have not filed briefs addressing these matters. Thus, it is not clear whether Phillips-Parr would have to prove that a competitor received an advantage under section 16 First under applicable case law. Also, if section 17, second paragraph, is invoked by complainant, it appears that more than a single incident would have to be shown to constitute an unreasonable practice. Also, even if complainant showed a violation of section 18(b)(1) case law holds that a shipper must still pay reasonable freight charges to the carrier. These and other problems are unnecessary to resolve, however, since the record does not show that E.L.M.A. operated as a common carrier between the critical ports. (See discussion of these legal problems in my ruling of November 24, 1982, in this case.)

> undertakes generally and for all persons indifferently to carry goods for hire.

As the Commission noted, furthermore, included in the concept of the carrier's holding out are such factors as solicitation, advertising, tariff filing, and contractual limitations. (7 F.M.C. at 62 n. 7.) However, the Commission explained that common carrier status could not necessarily be determined by any one factor, such as solicitation, number of shippers served, regular schedules, or types of shipping contracts utilized since a carrier could be common even without advertisements, solicitation, or regular schedules. (7 F.M.C. at 63-64.) The Commission stated that "the question in final analysis requires *ad hoc* resolution . . . [A] carrier's status is determined by the nature of its service offered to the public and not upon its own declarations. A close look at its activities is necessary." (7 F.M.C. at 64.)

In summary, the Commission stated (7 F.M.C. at 65):

> The determination of a carrier's status cannot be made with reference to any particular aspect of its carriage. The regulatory significance of a carrier's operation may be determined by considering a variety of factors-the variety and type of cargo carried, number of shippers, type of solicitation utilized, regularity of service and port coverage, responsibility of the carrier towards the cargo, issuance of bills of lading or other standardized contracts of carriage, and method of establishing and charging rates. The absence of one or more of these factors does not render the carrier noncommon, and common carriers may partake of some or all of these enumerated characteristics in varying combinations. A carrier may be clothed with one or more of the characteristics mentioned and still not be classified a common carrier. It is important to consider all the factors present in each case to determine their combined effect.

If one applies the various factors and definitions discussed by the Commission above, it is apparent that this record fails utterly to show that E.L.M.A. was operating as a common carrier between Tampico, Mexico and New Orleans at the time E.L.M.A. lifted the Chilean hardboard at Tampico. Indeed, the record fails to show that E.L.M.A. operated as a common carrier between any Mexican port and U.S. Gulf Coast ports. Instead, examination of the only E.L.M.A. vessel involved in the Gulf, the *M/V Rio Neuquen*, indicates that E.L.M.A.'s common carrier operations were conducted between U.S. Gulf ports and ports in South America and perhaps between Mexican ports and ports in South America. All that the manifests of the *M/V Rio Neuquen* seem to show is that E.L.M.A. agreed to lift the Chilean hardboard at one time on or about September 3, 1979, since the *M/V Rio Neuquen* was in Tampico at the right time to assist Navimex and Phillips-Parr in completing the shipment of hardboard which had originated in Chile bound for New

Orleans. As the vessel manifests show, however, the *M/V Rio Neuquen* had called at Tampico as part of the itinerary of voyage 22 with numerous shipments carried in the Mexican-South American trade. There is no evidence in the record that any E.L.M.A. vessel carried any shipments between Mexican ports and U.S. Gulf ports during the period March 1, 1979 through December 31, 1982, except for the hardboard shipments carried for Phillips-Parr on September 3, 1979 out of Tampico. There is similarly no evidence of any notices or advertisements or other solicitation efforts by which E.L.M.A. offered to carry cargo between Mexican and U.S. Gulf ports during this period of time, and, as Phillips-Parr has alleged, E.L.M.A. does not publish and file a tariff applicable between such ports. Nor is there any evidence that E.L.M.A. maintained any regular route or schedules between Mexican and U.S. Gulf ports. Although the Commission indicated in *Containerships, Inc.* that no one factor could determine a carrier's status, it did recognize that maintenance of a regular schedule between fixed termini was "the initial and most important prerequisite of Commission jurisdiction: the one explicitly set forth in section 1 - 'on regular routes from port to port.' " 7 F.M.C. at 65.

It appears that E.L.M.A. carried the hardboard shipments out of Tampico under its own bills of lading as the manifests show. It may even be that E.L.M.A. assumed some sort of liability akin to common carriers under such bills of lading, although the record does not show this, nor does the record show how E.L.M.A. determined what rates it would charge. It is also true that a carrier may, by a course of conduct, be found to be holding itself out as a common carrier even though it maintains no regular schedules and does not advertise or solicit, as the Commission recognized in *Containerships, Inc.* However, this record does not establish, even under the lenient standard of proof prevailing in administrative law, namely, a preponderance of the evidence,[8] that E.L.M.A. had been operating as a common carrier between Tampico or Mexican ports and U.S. Gulf ports when it lifted the hardboard and the *M/V Rio Neuquen* sailed out of Tampico on September 3, 1979, bound for New Orleans. As E.L.M.A. has contended, it appears that E.L.M.A. carried the hardboard shipments between Tampico and New Orleans on only one occasion and had no ongoing cargo-carrying operations of any kind between Mexican and U.S. Gulf ports for at least six months prior to the Tampico incident and for over three years afterwards. There is simply no way in which the evidence in this record can enable anyone to conclude that E.L.M.A. was engaging in a course of conduct holding itself out to accept goods from whoever

[8] *See Steadman v. Securities and Exchange Commission*, 450 U.S. 91, 102 (1981); *Sea-Island Broadcasting Corp. of S.C. v. F.C.C.*, 627 F.2d 240, 243 (D.C. Cir. 1980), cert. den. 449 U.S. 834 (1980). The more stringent standards are, of course, clear and convincing evidence and beyond a reasonable doubt.

offered between Mexican and U.S. Gulf ports. On the contrary the preponderance of the evidence shows that E.L.M.A. lifted the hardboard out of Tampico for New Orleans delivery as a one-shot matter at a time when its vessel happened to be in port. Such a one-shot operation is insufficient to establish a course of common-carrier conduct even if E.L.M.A. were operating a common-carrier business in other trades. *See Ship's Overseas, Inc. v. Federal Maritime Commission*, 670 F.2d 304 (D.C. Cir. 1981).[9] Furthermore, as the Commission noted in *Publication of Inactive Tariffs*, cited above, 20 F.M.C. at 436, when it cancelled a number of inactive tariffs including E.L.M.A.'s, which had applied from Mexican to U.S. Gulf ports, a carrier is not engaged in common carriage with a proper tariff on file if it fails to demonstrate an intention to move cargo under a proffered tariff within a reasonable period of time subsequent to filing or if "there has been an extended period within which no common carrier service has been provided in the subject trades." Of course, as I have noted, the record in this case shows such an extended period of time in which no E.L.M.A. vessel carried cargo between Mexican and U.S. Gulf ports both before and after the time of the subject hardboard shipments.

ULTIMATE CONCLUSIONS

I conclude, therefore, that this record utterly fails to show that E.L.M.A. operated as a common carrier by water when it lifted a shipment or shipments of Chilean hardboard on one occasion on or about September 3, 1979, at the port of Tampico, Mexico and delivered the shipment at New Orleans, Louisiana. Consequently, the Commission has no jurisdiction over this one-shot operation and the complaint alleging violations of the Shipping Act, 1916, in connection with E.L.M.A.'s attempts to recover freight allegedly due on the shipment, must be dismissed.

(S) NORMAN D. KLINE
Administrative Law Judge

[9] In the case cited, the court set aside a Commission decision finding Ship's Overseas, Inc. to be a non-vessel operating common carrier because the record showed that Ship's Overseas, Inc. had served a shipper on a single occasion, i.e., had provided a "single shot" service and had not engaged in a course of conduct showing common carrier operations. The court so held even though Ship's Overseas, Inc. had otherwise been in the shipping business and had handled shipments for various customers as part of its lighterage and brokerage business. The court specifically noted that "[t]he cases characterizing entities as common carriers rely on a course of conduct rather than on a transportation service shown to have occurred only once." *Ship's Overseas, Inc. v. Federal Maritime Commission*, cited above, 670 F.2d at 308 n. 15. Had E.L.M.A. been calling at Tampico or other Mexican ports in order to pick up shipments bound for U.S. Gulf ports periodically so as to show a pattern of conduct resembling the holding out of a common carrier, for example, by customarily "topping off" at Mexican ports when it had space available on its ships, such conduct might qualify as common carriage. However, that is far from the one-shot operation that occurred in this case.

FEDERAL MARITIME COMMISSION

DOCKET NO. 82-59

GENERAL ELECTRIC COMPANY

v.

MOLLER STEAMSHIP COMPANY, INC.

NOTICE

April 8, 1983

Notice is given that no appeal has been taken to the February 28, 1983, dismissal of the complaint and approval of settlement in this proceeding and that the time within which the Commission could determine to review has expired. No such determination has been made and accordingly, the dismissal has become administratively final.

(S) FRANCIS C. HURNEY
Secretary

FEDERAL MARITIME COMMISSION

DOCKET NO. 82-59

GENERAL ELECTRIC COMPANY

v.

MOLLER STEAMSHIP COMPANY, INC.

DISMISSAL OF COMPLAINT AND APPROVAL OF SETTLEMENT

Finalized April 8, 1983

The complainant and the respondent jointly move that the complaint in this proceeding be dismissed with prejudice, and that the accompanying settlement agreement be approved.

By complaint filed December 8, and served on December 10, 1982, the complainant, General Electric Company, alleged that it was overcharged $62,132.47 on a number of shipments described on the bills of lading as "synthetic resin," shipped from New York to Singapore, from December 5, 1980, to June 12, 1981.

The respondent, Moller Steamship Company, Inc., charged the "synthetic resin N.O.S." rates of $172 and $191 per cubic meter, plus bunker surcharges.

GE by its complaint sought the rate of $122 (W) on polymerization and copolymerization resins, synthetic. Moller disputed this contention as to the proper identification of the shipments.

Neither side is prepared to concede the proper identification of the shipments. If the matters were fully litigated, it might require expert witnesses and substantial legal expenses. The parties have negotiated an arms-length settlement, representing a compromise amount of $31,066 to be paid by Moller to GE within 21 days after approval by the Commission of the proposed settlement.

The settlement figure approximates the so-called "general" synthetic resins rate, which is lower than the "N.O.S." rates charged, and which also is higher than the polymerization and copolymerization rate sought by the complainant.

Commission policy favors settlements. The proposed settlement appears to be a *bona fide* attempt to terminate the controversy and not a device to circumvent the law; and the facts critical to the resolution of the dispute apparently are not reasonably ascertainable without considerable expense and litigation. The proposed settlement figure appears to fall within a zone of reasonableness, and is a commercially justifiable compromise, considering the rates at issue.

Good cause appearing, the proposed settlement is approved, and the complaint in this proceeding is dismissed with prejudice.

(S) CHARLES E. MORGAN
Administrative Law Judge

FEDERAL MARITIME COMMISSION

DOCKET NO. 82-23

IN THE MATTER OF RATES APPLICABLE TO OCEAN SHIPMENTS VIA AMERICAN PRESIDENT LINES

NOTICE

April 20, 1983

Notice is given that no exceptions have been filed to the March 10, 1983 initial decision in this proceeding and the time within which the Commission could determine to review that decision has expired. No such determination has been made and accordingly, that decision has become administratively final.

(S) FRANCIS C. HURNEY
Secretary

FEDERAL MARITIME COMMISSION

DOCKET NO. 82-23

IN THE MATTER OF RATES APPLICABLE TO OCEAN SHIPMENTS VIA AMERICAN PRESIDENT LINES

Five shipments of boats properly classified as "Plastic Inflatable Boats".

R. J. Cinquegrana and *Paul J. Lambert* for American President Lines.

Frank L. Bridges for Norwood Industries, Inc.

INITIAL DECISION [1] OF JOHN E. COGRAVE, ADMINISTRATIVE LAW JUDGE

Finalized April 20, 1983

In October of 1981, Norwood Industries, Inc., filed a complaint against American President Lines, Ltd., in the Boston Municipal Court, Department of the Trial Court of the Commonwealth of Massachusetts. Norwood's complaint sought recovery of an alleged overcharge on five shipments of boats carried by APL for Norwood. APL, without objection from Norwood, removed Norwood's action to the U.S. District Court for the District of Massachusetts.

In April of 1982 APL filed this petition for declaratory order and in May the Court stayed its proceedings pending Commission action on the petition. In August 1982 the Commission referred the proceeding to the Office of Administrative Law Judges and at the same time restricted the initial proceedings to the filing of affidavits and memoranda. Subsequent to the filing by APL of its opening memorandum, Mr. Donald J. Orkin, Esq., then attorney for Norwood, withdrew his appearance in the case noting that any further representation of Norwood would be by the firm of Widdett & Glazier who had been appointed assignee of an Assignment for Benefit of Creditors. Following an extension of time to allow the new attorneys to familiarize themselves with the case, a Mr. Frank L. Bridges, by letter, informed that Norwood did not "intend to offer any evidence, by way of affidavit or otherwise to controvert the evidence introduced by American President Lines in this proceeding." Further, Norwood did not intend to file a memorandum of law in opposition to any assertions made by APL in its opening memorandum.

[1] This decision will become the decision of the Commission in the absence of review thereof by the Commission (Rule 227, Rules of Practice and Procedure, 46 C.F.R. 502.227).

The issue presented here is whether the "boats" comprising the five shipments in question were properly classified as "Plastic Inflatable Boats" under Item No. 9520 of the Trans-Pacific Freight Conference of Japan/Korea Tariff; or whether as Norwood contended, they should have been classified as "Sporting Goods (Synthetic Rubber Boats)" under Item 5920.

The documentary evidence submitted by APL in support of its opening memorandum clearly establishes that the shipments in question were properly rated under Item 9520 as Plastic Inflatable Boats. Norwood's own catalogue states that the boats are made of "Hydra-Lon PVC vinyl". PVC or polyvinyl chloride is a "thermoplastic resin" (*Webster's Third Int'l Dictionary*) or a "white water insoluble thermoplastic resin" (*Random House Dictionary*, 1978 ed.).[2] The five shipments in question were properly rated as "Plastic Inflatable Boats" under Item 9520 of the Transpacific Freight Conference of Japan/Korea Tariff. The proceeding is dismissed.

(S) JOHN E. COGRAVE
Administrative Law Judge

[2] See also *Chemical Technology: An Encyclopedic Treatment*, Vol. VI, pp. 534 *et seq.* for a discussion of the plastic PVC.

FEDERAL MARITIME COMMISSION

DOCKET NO. 83-5

WORLDWIDE TECHNICAL SERVICES CO., INC.

v.

MAERSK LINE

NOTICE

April 20, 1983

Notice is given that no appeal has been taken to the March 11, 1983, dismissal of the complaint in this proceeding and the time within which the Commission could determine to review has expired. No such determination has been made and accordingly, the dismissal has become administratively final.

(S) FRANCIS C. HURNEY
Secretary

FEDERAL MARITIME COMMISSION

DOCKET NO. 83-5

WORLDWIDE TECHNICAL SERVICES CO., INC.

v.

MAERSK LINE

COMPLAINT DISMISSED AS SATISFIED

Finalized April 20, 1983

The parties here have filed a "Notice of Satisfaction of Complaint Pursuant to Rule 93." The complaint was satisfied with the payment by respondent of $80,768.83 in overcharges which resulted from the complainant's freight forwarder's use of an incorrect measurement of the actual space utilized in respondent's containers.

Rule 93 provides for the satisfaction and dismissal of complaints in the discretion of the Commission, upon the filing of a statement explaining how the complaint was satisfied and that similar adjustments will be made for persons similarly situated. The Rule also requires the submission of details of each shipment on a special form "insofar as such form is applicable." [1]

The information called for is only that which would establish the validity of the particular claims and the amount of reparation sought. Apparently, the form was thought to be a convenient way of submitting the required data. In this case, the complainant requested the use of the shortened procedure under Subpart K of the Rules of Practice and Procedure (46 C.F.R. 181 *et seq.*). Consequently, complainant submitted its documentary evidence with its complaint. That evidence consisting of bills of lading, invoices from the freight forwarder, packing lists, export declarations and copies of checks showing payment of the freight charges establishes the validity of complainant's claim for reparation.

Complainant's Exhibit A is a recap of the 27 shipments involved. The exhibit shows the vessel and voyage number, the bill of lading number, description, incorrect measurement and the incorrect ocean freight, the correct measurement and the correct freight and the amount of the overcharge. This exhibit satisfies the requirements of Rule 93. The

[1] The form is actually incorrectly cited in Rule 93 and is not published in the current edition of the Commission's Rules of Practice and Procedure (46 C.F.R. 93). In *Abbott Hospitals v. PRMSA, et al.*, Dockets 81-52, 81-53, Dismissal of Proceedings, 24 F.M.C. 1055 (1982).

respondent has agreed to make a like adjustment for other persons, if any, similarly situated.

The requirements of Rule 93 have been met and the complaint is dismissed as satisfied.

(S) JOHN E. COGRAVE
Administrative Law Judge

FEDERAL MARITIME COMMISSION

DOCKET NO. 83-10

AGREEMENT NO. 10440

NOTICE

April 20, 1983

Notice is given that no appeal has been taken to the March 14, 1983, dismissal of the complaint in this proceeding and that the time within which the Commission could determine to review has expired. No such determination has been made and accordingly, the dismissal has become administratively final.

(S) FRANCIS C. HURNEY
Secretary

FEDERAL MARITIME COMMISSION

DOCKET NO. 83-10

AGREEMENT NO. 10440

ORDER OF DISMISSAL

Finalized April 20, 1983

By Order of Investigation and Hearing (Order) served February 22, 1983, the Commission instituted this proceeding to determine whether Agreement No. 10440 should be approved, disapproved or modified after consideration of the factual and legal issues enumerated in the Order.

Agreement No. 10440, between Lykes Brothers Steamship Co., Inc., and Lineas Navieras Bolivianas S.A.M. (Linabol) was filed for approval pursuant to section 15 of the Shipping Act, 1916, 46 U.S.C. 814. As paraphrased in the Order, the agreement provides for Linabol to charter space on Lykes' vessels serving the trade between United States ports in the Gulf of Mexico and Bolivia via the West Coast ports of South America. Each party would have associate line status (equal access authority) under Bolivia's cargo preference laws and would operate as Conference carriers. The Agreement permits Lykes and Linabol to determine itineraries, frequency and number of sailings and vessel capacity levels.

Lykes and Linabol were named proponents in the proceeding. The Conference referred to in the previous paragraph—the Atlantic and Gulf - West Coast of South America Conference—and one of its members, Compania Sud-Americana de Vapores (CSAV), were named protestants in the proceeding. Hearing Counsel was made a party to the proceeding.

A prehearing conference was scheduled for March 9, 1983. On March 8, 1983, I received a telex message from counsel for Lykes. As pertinent, the message read:

> This is to advise you that Lykes Bros. Steamship Co., Inc., and Lineas Navieras Bolivianas, the parties to Agreement 10440, jointly withdraw their application for approval of the Agreement pursuant to section 15 of the Shipping Act, 1916, and request that the proceeding in Docket 83-10 be dismissed at the prehearing conference. . . .

The request contained in the telex message was treated as a motion to dismiss the proceeding. At the prehearing conference, the motion was granted. This order, then, confirms that, the application having been withdrawn by the proponents, the motion to dismiss the proceeding is granted.

There is a further comment. At the prehearing conference, counsel for the Conference moved that the record reflect the following clarification of the Order instituting the proceeding, i.e., Lykes and Delta Steamship Lines, Inc., members of the Conference, have disassociated themselves from the protest in this proceeding. This motion is granted.

(S) SEYMOUR GLANZER
Administrative Law Judge

FEDERAL MARITIME COMMISSION

[46 C.F.R. PART 536]

GENERAL ORDER 13 REVISED; DOCKET NO. 82-13

EXEMPTION OF BULK CARGO MOVING IN THE FOREIGN COMMERCE OF THE UNITED STATES FROM THE TARIFF FILING REQUIREMENTS OF SECTION 18(B) OF THE SHIPPING ACT

April 22, 1983

ACTION: Discontinuance of Proceeding

SUMMARY: This discontinues the rulemaking instituted to consider the exemption of certain bulk commodities loaded and carried in containers, trailers, rail cars or similar intermodal equipment from the tariff filing requirements of the Shipping Act, 1916, and the alternative proposal to exempt other or all such bulk commodities from the tariff filing requirements.

DATE: Effective April 28, 1983

SUPPLEMENTARY INFORMATION:

In Docket 80-70; *Status of Bulk Commodities with Respect to the Tariff Filing Requirements of Section 18(b) of the Shipping Act, 1916*, the Commission issued an interpretative rule which provided that bulk cargo loaded into a container or similar intermodal equipment (except LASH or Seabee barges) is "loaded with mark or count" and, therefore, is subject to the tariff filing requirements of section 18(b)(1) of the Shipping Act, 1916 (46 U.S.C. § 817(b)(1)). It was further determined in that proceeding, however, to stay the effective date of the interpretative rule pending a consideration of the feasibility of exempting from the tariff filing requirements all or some of the bulk commodities found subject to those requirements.

Therefore, by notice published in the *Federal Register* (47 F.R. 10862), the Commission proposed to exempt from tariff filing under section 35 of the Act (46 U.S.C. § 833a) bulk cargo loaded in intermodal equipment. The proposed rule defined "bulk cargo" as "those commodities which are in a loose, unpackaged form, have homogeneous characteristics and are unprocessed or not further manufactured." The Commission further gave notice that, alternatively, it would consider the exemption of "other or all bulk cargo" carried in intermodal equipment.

The proposal prompted 30 replies from independent carriers, conferences and shippers. A majority of the commentators was opposed to both proposed rules, while the remaining commentators generally tended to favor the exemption of *all* bulk commodities from the tariff filing requirements.

Commentators which opposed the proposed rules argued that if an exemption were granted, whether for all or for specific bulk commodities, the result would substantially impair effective Commission regulation and could be unjustly discriminatory and detrimental to commerce. They further contended that the exemption would require *each* excepted commodity to be specifically identified for effective regulation. These commentators also argued that the Commission should not except the transportation of bulk cargoes simply for the purpose of achieving competitive parity between specialized, tramp or contract carriers because competition between these carriers for such cargoes has diminished. Further, it was alleged that shippers will be confused and possibly discriminated against if they are unable to verify liner cargo rates on exempt cargoes.

Most of the commentators who opposed the proposed interpretative rule generally favored the alternative of exempting *all* bulk commodities regardless of the method of transport. Because a tariff exemption could lead to discrimination and because it allegedly would be difficult to draw a clear line between bulk and non-bulk commodities, these commentators suggested that, in lieu of listing exempt commodities, a blanket exemption be adopted. This approach would allegedly eliminate the need to determine which bulk commodities would fall into an exempt status.

One commentator opposing the proposed rule maintained that, whether the cargo is processed or unprocessed, if it is loaded and carried in containers it assumes the characteristics of being marked and counted and thus should continue to be subject to the tariff filing requirements.

Those commentators favoring the proposed rule, as well as some of those opposed, would require that a list of exempt commodities be provided specifically identifying those exempted.*

Section 35 provides, in part, that the Commission may, upon application or on its own motion, exempt any specified activity from any requirement of the Shipping Act, 1916, where it finds that such exemption will not substantially impair effective regulation, be unjustly discriminatory, or be detrimental to commerce. Inherent in this section is the requirement that certain findings be made for an exemption to be granted, unless the Commission determines that a particular require-

*Obviously, this would be a formidable task in view of the number of separately described cargo items that might warrant exemption in various trades.

ment, on its face, serves such a minor regulatory purpose as to constitute an unjustified burden upon the regulated party.

No compelling reason has been presented or found for an exemption of all or a class of bulk commodities carried in containers from the tariff filing requirements of section 18(b). In fact, it is quite possible that any such exemption could operate in a discriminatory manner. Therefore, the Commission concludes that a waiver in the present filing regulations applicable to bulk cargo in containers is not warranted. This conclusion is without prejudice to the right of any party to apply to the Commission for exemption from the tariff filing requirements of a particular bulk commodity.

Therefore, this proceeding is hereby discontinued.

By the Commission.

(S) FRANCIS C. HURNEY
Secretary

FEDERAL MARITIME COMMISSION

DOCKET NO. 81-28

TRANSPORTACION MARITIMA MEXICANA, S.A.

v.

BOARD OF COMMISSIONERS OF THE PORT OF NEW ORLEANS

ORDER ON RECONSIDERATION

May 3, 1983

By Report and Order served January 28, 1983, the Commission found unlawful a provision in the tariff of the Board of Commissioners of the Port of New Orleans (the Port), which would assess charges on cargo left in transit areas beyond the expiration of the free time period on the basis of the length of the vessel which eventually calls for the cargo. The Commission, however, determined not to award Complainant Transportacion Maritima Mexicana, S.A. (TMM) reparations because TMM failed to establish that the charges it had paid were unreasonably high.

TMM has now filed a Petition for Reconsideration pursuant to Rule 261 of the Commission's Rules of Practice and Procedure (46 C.F.R. § 502.261), seeking a reversal of the determination not to award it reparations. The Port has replied in opposition. For the reasons set forth below, TMM's Petition will be denied.

One alleged ground for reconsideration is that the Commission's Order contains two substantive errors of material fact.[1] TMM cites as error the Commission's statement that an award of reparation in favor of TMM would be a "windfall." TMM also characterizes as "substantive error" the Commission's conclusion that "equitable considerations . . . militate against the award of reparations." [2]

[1] Rule 261(a)(2) provides that a petition for reconsideration will be subject to summary rejection unless it "identifies a substantive error in material fact contained in the decision or order."

[2] TMM claims it has incurred substantial expenses in litigating this proceeding and that it deserves reparations for bringing the matter of the Port's tariff to the Commission's attention. On the basis of the equities, TMM argues, it should receive reparations because the Port extracted payment from TMM under duress.

As noted by the Port in its Reply, TMM has not identified factual errors, but rather expresses disagreement with the Commission's ultimate conclusions.[3]

TMM's second ground for reconsideration is that the Commission's Report and Order contains findings and conclusions not addressed in the briefs or arguments of the parties.[4] Specifically, TMM argues that the "equities" were not addressed by either party. This argument is without merit. The "equities" of the situation are inherently in issue in determining the reasonableness of the tariff provision and the possibility of reparations. The parties could and in fact did address the equities without the Commission specifically inviting them to address what would be right and what would be wrong.

TMM also contends that the issue of a reasonable alternative charge was not previously addressed. Again, TMM's argument is not persuasive. If reparations were not specifically addressed in the course of this proceeding, it is because TMM and the Port chose not to inform the Commission that payment of the contested charges had been made. At any rate, the consideration of reparations is consistent with the relief generally sought by TMM in its Complaint: that the Commission "issue such other and further orders as the Commission shall deem appropriate." As the purpose of TMM's Complaint is to avoid paying the contested charge, and as payment turns out to have been made already, it is clearly appropriate for the Commission to consider relief in terms of reparation. That any relief would necessarily vary in form according to whether TMM made payment is immaterial, and the variance in the form of possible appropriate relief does not constitute a new matter within the meaning of Rule 261(a)(3). Moreover, TMM was specifically questioned at oral argument about what a "fair charge" would be.[5] Thus, TMM has had every opportunity to comment on actual relief and has in fact done so.[6]

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[3] Furthermore, these conclusions were and are well founded. Reparation, if awarded, would indeed result in a windfall to TMM because TMM would then have benefitted from a considerable amount of cargo storage in the Port's transit areas free of charge. Moreover, the Commission does not reward successful complainants with reparations solely to thank them for bringing illegal activities to its attention.

The payment of the charges "under protest" or "duress" is not a significant factor. Had no payment been made, as was represented by the parties until oral argument, the Commission might well have levied an alternative charge to compensate the Port. The fact that reimbursement has since been made in an amount not shown to be unreasonable obviated the need for any such levy. That the payment was made "under protest" is not, therefore, material.

[4] Rule 261(a)(3) prescribes as an alternative criterion for a petition for reconsideration that it "addresses a finding, conclusion or other matter upon which the party has not previously had the opportunity to comment or which was not addressed in the briefs or arguments of any party."

[5] Counsel responded: "I really am not prepared to give a figure." Tr., at 13. Later, counsel described the kind of charge TMM would be willing to pay.

[6] TMM errs in other aspects of its Petition. TMM characterizes the Commission's determination not to award reparations as a decision that the amount of the charge was a reasonable figure. TMM then

Continued

The Commission concludes that TMM has failed to meet the procedural requirements of Rule 261. TMM seeks merely to reargue points already fully addressed and considered by the Commission. There has been presented no reason for the Commission to amend its original determination in this proceeding. TMM's Petition will therefore be denied.

THEREFORE, IT IS ORDERED, That the Petition for Reconsideration of Transportacion Maritima Mexicana, S.A. is denied; and

IT IS FURTHER ORDERED, That this proceeding is discontinued.

By the Commission.*

(S) FRANCIS C. HURNEY
Secretary

argues that some lower alternative charge would be appropriate. However, the Commission did not determine that the amount of the charge paid by TMM was reasonable. Rather, it found that TMM failed to meet its burden of proving that the amount assessed was unreasonably high.

TMM also objects that the Order's observation that TMM had notice of and might have avoided the contested charge was irrelevant to the purpose of determining its validity. That observation, however, was made not in the context of determining the reasonableness of the contested charge, but in the context of determining whether to award reparations.

*Vice Chairman Moakley takes no position on this Petition since it pertains to an action of the majority from which he dissented.

FEDERAL MARITIME COMMISSION

DOCKET NO. 82-38

HERMANN LUDWIG, INC.

v.

THE SOUTH AFRICAN MARINE CORPORATION STEAMSHIP COMPANY

(1) Where a complainant seeks to have certain equipment designated as sugar cane and hay loaders so as to qualify for a lower rate under the tariff, the burden of proving what was shipped is on the complainant.

(2) Where the bills of lading did not contain any reference to the cargo as sugar cane or hay loaders, and where the cargo was originally designated as log loaders, and the export documents so indicated, the letter of the manufacturer's sales representative stating the cargo was used to load sugar cane and hay, coupled with inconclusive photos, is insufficient to sustain the burden of proving that the cargo was in fact sugar cane or hay loaders. There is no indication that, even assuming the statement was accurate, the equipment was used exclusively for the loading of sugar cane or hay, or even primarily for that purpose.

Kay Ahiskali and *Dieter Trautmann* for complainant.

David A. Brauner for respondent.

INITIAL DECISION [1] OF JOSEPH N. INGOLIA, ADMINISTRATIVE LAW JUDGE

Finalized May 11, 1983

PRELIMINARY MATTERS

On October 13, 1981, Hermann Ludwig, Inc. (Ludwig), sent a letter to the Commission's Secretary applying for a reduction in rates on two shipments of cargo by the South African Marine Corporation (N.Y.). It was advised by the Secretary in a letter dated November 13, 1981, that a formal complaint had to be filed, that Ludwig needed an assignment of the claim from the payor of the ocean freight, and that the respondent named might not be the actual carrier. By letter dated January 14, 1982, Magon Agencies (PTY) Ltd., ostensibly authorized Ludwig "to apply to the Federal Maritime Commission for a refund," which letters were transmitted to the Secretary on February 5, 1982.

On March 5, 1982, the Secretary returned the February 5, 1982, submissions noting that Ludwig had ignored the direction that it file a

[1] This decision will become the decision of the Commission in the absence of review thereof by the Commission (Rule 227, Rules of Practice and Procedure, 46 C.F.R. 502.227).

formal complaint, and again was advised to file such complaint. On April 30, 1982, Ludwig filed a complaint but was advised by the Secretary in a May 14, 1982, letter that since Magon Agencies appeared to be a true party in interest an assignment of that interest might be necessary. The Secretary provided a copy of a proper assignment. On July 7, 1982, Ludwig received an assignment from Magon Agencies (PTY) Ltd., of its rights, title, interest, claims and demands, "arising out of the assignor's shipment on the Safmarine 'Amphian' from the Port of New York to the Port of Durban on the 16 April 1981. . . ." Later, a complaint was filed and the facts set forth below ensued. Both parties relied on documents filed and there was no oral testimony or filing of briefs.

FINDINGS OF FACT

1. On August 9, 1982, Hermann Ludwig, Inc., filed a complaint with the Commission against The South African Marine Corporation Steamship Company. The complaint alleges that (1) the ocean freight was incorrectly applied to two shipments made from New York to Durban, in that the rate of $239.50M^3$ was applied rather than the rate of $110.00M^3$ and that as a result, (2) the complainant suffered damages of $13,866.34. (Complaint)

2. On April 16, 1981, a shipment of two "Barko Model 40" and four "Barko Model 80R" was made aboard the *Amphion* and on May 8, 1981, six "Model 80R Barko Loaders" were shipped aboard the *Lontue*. The cargo moved from New York to Durban and the vessels were operated by South African Marine Corporation Ltd. (Bills of Lading Nos. 165 and 180)

3. The parties agree that the cargo described in paragraph (2) above moved under a tariff duly filed with the Commission and that the rate charged was an N.O.S. rate of $239.50M^3, and that the same tariff contained a rate for Sugar Cane and Hay Loaders of $110.00M^3. (Entire Record)

4. Export Packing Lists describing the Barko Model 80R state, "complete with 22'4"boom and (2) 1/4 Cord log & pulp bypass grapples (P/N 154-00002) and all accessories." The Export Packing List for the Barko Model 40BC contains the language "AND ALL ACCESSORIES." (Export Packing Lists).

5. In letters dated June 24, 1981, and October 5, 1982, to Ludwig, the Sales Secretary of Barko Hydraulics, Inc., indicated that, "the machines that were shipped to Magon Agencies . . . are used as agricultural implements, and are used as cane or hay loaders."

DISCUSSION AND CONCLUSIONS

In its answer the respondent argues that, (1) the complaint is jurisdictionally defective because "The South African Marine Corporation" is not the proper respondent or a "common carrier by water," (2) the complainant lacks standing because it "is neither the shipper nor consignee of the subject shipments" and Magon is nothing more than one of two "notify parties," (3) the assignment from Magon to Ludwig is defective in that it only applies to the shipment aboard the *Amphion*.

As to the merits the respondent argues that when the shipment was delivered the claimant advised the carrier orally that the equipment was "log loaders" for use in the lumber industry. He urges that, "the carrier is not under any duty to go beyond the shipper's own description in rating the cargo. (*Ocean Freight Consultants v. Royal Netherlands SS Company*, 17 F.M.C. 143)." He further argues that there is a "heavy burden of proof" on the claimant "to establish the actual nature of the goods shipped . . . (*Johnson and Johnson International v. Venezuelan Lines*, 16 F.M.C. 84, *Ocean Freight Consultants, Inc. v. Italpacific Line*, 15 F.M.C. 314)." The respondent stresses that the record is devoid of any evidence that the equipment "is *principally utilized* for agricultural purposes" (emphasis supplied) and that the law requires such a holding citing *CSC International Inc. v. Lykes Brothers SS Co., Inc.*, 20 F.M.C. 560.

The parties in this case agree as to the date of the shipments, the tariff and rates involved and the amount of reparation due should the complainant be successful. The only real question involved is a narrow, factual one, i.e., what was actually shipped. It is well-settled that reparation overcharges are based on a determination of what is actually shipped and that the burden of proof is on the complainant. *Western Publishing Co. v. Hapag Lloyd A.G.*, 13 S.R.R. 16 (1972); *Ocean Freight Consultants, Inc. v. Italpacific, supra*. Here, the record shows that the bills of lading are silent as to the specific description of the cargo in terms of the tariff. Nowhere do they contain any reference to agricultural use or to the loading of cane or hay. The export declarations also do not contain any reference to agricultural use but they do indicate that there at least are "cord log and pulp bypass grapples and all accessories." The documents, therefore, do lead to the conclusion that the loaders were used for "logging" which is without the tariff description the complainant would have us apply. However, the record does contain a statement from the manufacturer's sales representative that the loaders were used as cane or hay loaders, and based on that statement and some photographs which are not sufficiently identified or related to the shipments in question, the complainant would have us hold the loaders were sugar cane and hay loaders. No other material evidence is presented.

Based on the record made in this case we must hold that the complainant has failed to sustain its burden. While admittedly it may be a "heavy burden" in that proof of what was shipped may be difficult to obtain after the shipment takes place, the Commission has recognized that difficulty and has nevertheless required such proof. *Sanrio Compa-*

ny Ltd. v. Maersk Line, 23 F.M.C. 150, 203 (1980) (Informal Docket No. 681(F)). Here, there is little question the loaders were designated as log loaders at the time the shipments took place. While they may have been used to load cane and hay, as the sales representative noted, even assuming her personal knowledge, there is no indication the use was exclusive or even primary. Further, the pictures submitted add little to the complainant's case. In short, the record is simply insufficient to establish that the loaders came under the heading of cane or hay loaders as required by the tariff.

The holding that the complainant has failed to sustain its burden makes it unnecessary to decide the issues relating to jurisdiction, standing and the effect of the assignment from Magon to Ludwig, and we do not do so here. However, it does appear that some of the points made by the respondent are not without merit.

In view of the above and the entire record, the reparations sought in the complaint by the complainant are hereby denied and this matter discontinued.

(S) JOSEPH N. INGOLIA
Administrative Law Judge

FEDERAL MARITIME COMMISSION

DOCKET NO. 82-52

DYNAMIC INTERNATIONAL FREIGHT FORWARDERS, INC.

ORDER DISCONTINUING PROCEEDING

May 12, 1983

By an Order of Investigation served on November 4, 1982, this proceeding was instituted to determine (1) whether respondent Dynamic International Freight Forwarders, Inc. (Dynamic) had violated section 44(a) of the Shipping Act, 1916 (the Act) (46 U.S.C. § 841b(a)) by engaging in ocean freight forwarding without having been licensed to do so by the Commission; and if so (2) whether civil penalties should be assessed against Dynamic for such violations; and (3) whether Dynamic should be ordered to cease and desist from carrying on the business of forwarding without a license. The proceeding was initially limited to the exchange of affidavits of fact and memoranda of law by Dynamic and the Commission's Bureau of Hearing Counsel.

On March 30, 1983, the Commission filed a complaint against Dynamic in U.S. District Court in Detroit, Michigan. The complaint requested the Court to enforce, pursuant to section 29 of the Act (46 U.S.C. § 828), the Commission's order in Docket No. 80-5 assessing a civil penalty of $2,500 against Dynamic for previous violations of section 44(a). *Dynamic International Freight Forwarder, Inc. - Independent Ocean Freight Forwarder License Application and Possible Violation of Section 44, Shipping Act, 1916*, 23 F.M.C. 537 (1981). By separate motion, the Commission also sought a preliminary injunction against Dynamic forbidding it from engaging in any further unlicensed forwarding. Such an injunction would have been in force during the pendency of Docket No. 82-52.

On April 14, 1983, a hearing was held in Detroit on the Commission's motion for a preliminary injunction. The Court proposed a settlement designed to bring to a swift and orderly conclusion all the pending actions against Dynamic. This settlement had three elements.

First, Dynamic would be obliged to pay within 30 days the $2,500 civil penalty assessed against it by the Commission in Docket No. 80-5. This penalty has been outstanding since January 1981.

Second, Dynamic would be *permanently* enjoined from engaging in any further unlicensed freight forwarding. This injunction would forbid Dynamic to complete any current forwarding contracts or to accept any new business. Dynamic would retain its right to apply to the

Commission for a forwarder license at some point in the future. If such an application was approved, the injunction would be dissolved.

Third, the Commission would discontinue Docket No. 82-52 without reaching a decision on the merits. Dynamic would therefore avoid further penalties for any illegal forwarding subsequent to the Commission's decision in Docket No. 80-5.

Counsel for both sides agreed to present this proposal to their respective clients. In the interim, the Commission asked that Dynamic be temporarily restrained from accepting any new forwarding business. This request was granted. The 10-day temporary restraining order took effect immediately. On April 22, 1983, the Court extended the order through May 4, 1983.

The Commission determined to accept the Court's proposal, on condition that Evelyn Gene, Dynamic's president, also be permanently restrained from unlicensed forwarding. This condition was accepted by Dynamic and Ms. Gene. Accordingly, a judgment and order was entered by the Court on April 27, 1983, implementing the settlement described above. The injunctions against Dynamic and Ms. Gene went into effect at 5 p.m. on Friday, April 29, 1983. To fulfill its obligation under the settlement, the Commission is issuing this order discontinuing Docket No. 82-52 and setting forth its reasons for accepting the Court's proposal.

The chief advantage of the settlement is that Dynamic and Ms. Gene are permanently enjoined from any further unlicensed freight forwarding. The injunction against Dynamic is broader than the temporary restraining order in that it covers *current* forwarding business as well as new business. Dynamic must inform its current clients that it cannot forward their shipments or accept payment in anticipation of services to be rendered.

If the Commission issued a decision in Docket No. 82-52, it could include its own cease and desist order against Dynamic. However, Dynamic's persistent illegal forwarding and its failure to pay the civil penalty assessed against it in Docket No. 80-5 indicate that a court order, with the accompanying threat of contempt, may be a more effective sanction.* The Commission would also have the option of returning to the District Court and asking for a permanent injunction. However, allowing for normal decision-making time in Docket No. 82-52 and for the 60-day appeal period under 28 U.S.C. § 2344, such a motion probably would not be filed until next September. This settlement gives the Commission the ultimate relief of permanently removing Dynamic and Ms. Gene from any illegal participation in ocean freight forwarding now, rather than several months from now.

* The inclusion of a separate injunction against Ms. Gene is a significant advantage of the settlement, since she is not a named respondent in this proceeding.

As noted above, the Order of Investigation in this proceeding included the issue whether further penalties should be assessed against Dynamic. The pleadings filed by the parties show that Dynamic concedes that it continued to forward without a license on at least 35 shipments after the issuance of the Commission's January 1981 order in Docket No. 80-5. The only matter in dispute is whether penalties should be assessed for those violations. Hearing Counsel request that a penalty of $10,000 be assessed although the maximum penalty would be considerably higher.

However, under the circumstances of this case, including the possibility that a second court action would be necessary to enforce an assessment order against Dynamic, the permanent injunctions obtained against Dynamic and Ms. Gene represent a more efficient method of enforcing Congress's intent that only persons duly licensed by the Commission may provide ocean freight forwarding services. It should be noted in the event of a future application for a forwarder's license filed by Dynamic, or by Ms. Gene personally, or by another corporation with Ms. Gene acting as qualifying officer, the record developed by Hearing Counsel in this proceeding will be available to the Commission in its consideration of such an application.

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

By the Commission.

(S) FRANCIS C. HURNEY
Secretary

FEDERAL MARITIME COMMISSION

DOCKET NO. 77-7

AGREEMENT NOS. 9929-6,

10266-3 AND 10374

ORDER OF APPROVAL OF AGREEMENT NO. 10374-4

May 16, 1983

This proceeding was remanded to the Commission by the United States Court of Appeals for the District of Columbia Circuit for hearings, *inter alia*, on the voting provision authorized by the Commission's Order approving Agreement No. 10374, which allows all parties to the Agreement [1] one vote each, rather than one single vote per service, in any conference or rate agreement. *Sea-Land Service, Inc. v. F.M.C.*, 353 F.2d 544 (D.C. Cir. 1981). By Order on Remand served October 9, 1981, the Commission, in response to the Court's decision, reopened the proceeding in Docket No. 77-7 and directed the parties to that proceeding to address, *inter alia*:

> Whether, in light of its own structure and the structure of Agreement Nos. 9929-6 and 10266-3, Agreement No. 10374 should provide that Hapag-Lloyd, on the one hand, and ICT/CGM, on the other hand, shall exercise separate votes in conferences or rate agreements with respect to their respective container services, and the impact on competition in the trades of such a provision.

The proceeding on remand was limited to the submission of affidavits of fact and memoranda of law on the impact on the voting provisions. The purpose of the Order on Remand was to ascertain the positions of the parties on the issues remanded by the Court and to determine the need for, and scope of, any further formal proceedings. After reviewing the submissions of the parties, the Commission concluded that further evidentiary hearings were required.

Accordingly, by Order of Further Investigation and Hearing served October 6, 1982 (25 F.M.C. 371), the Commission instituted the present proceeding in Docket No. 77-7 to determine, pursuant to section 15 of the Shipping Act, 1916 (46 U.S.C. § 814), whether Agreement No. 10374 should be modified to provide that its parties collectively can

[1] The parties to Agreement No. 10374 are Hapag-Lloyd, A.G. (Hapag-Lloyd), Intercontinental Transport (ICT) and Compagnie Generale Maritime (CGM), hereinafter referred to as "Proponents".

exercise only a single vote in any conference or rate agreement in the trades covered by that Agreement.

On December 15, 1982 Proponents moved to dismiss (discontinue) the proceeding on the basis of an amendment which they offered to eliminate the controversy at issue. The amendment, which upon filing was designated Agreement No. 10374-4, provides that whenever the votes of the two services of Hapag-Lloyd and of ICT/CGM are the same, their votes will be counted as only one vote. Sea-Land Service, Inc., United States Lines, Inc., and the Commission's Bureau of Hearing Counsel have agreed to the termination of the proceeding upon approval of the amendment. Lykes Bros. Steamship Co., Inc. opposes the amendment but believes that no further hearing is necessary.

On March 28, 1983 Administrative Law Judge Charles E. Morgan granted Proponents' Motion and discontinued the proceeding. No exceptions were filed to this ruling and the Commission determined not to review it *sua sponte.**

Notice of Agreement No. 10374-4 appeared in the *Federal Register* on February 28, 1983. The only party responding to the Notice was Sea-Land, which supports the amendment.

Agreement No. 10374 not only represents an appropriate settlement of this proceeding, which avoids the time and expense of further litigation, but it also adequately resolves the matter put at issue in this proceeding. Moreover, because there is nothing before the Commission that indicates that approval of Agreement No. 10374-4 would be contrary to the standards of section 15,

IT IS THEREFORE ORDERED, That Agreement No. 10374-4 is approved.

By the Commission.

(S) FRANCIS C. HURNEY
Secretary

* Editor's Note: Final Notice was served May 6, 1983.

FEDERAL MARITIME COMMISSION

DOCKET NO. 77-7

AGREEMENT NOS. 9929-6, 10266-3 AND 10374

MOTION TO DISMISS (DISCONTINUE) GRANTED

Finalized May 16, 1983

By ruling served January 19, 1983, the proponents' motion to dismiss (discontinue) the subject proceeding was granted tentatively, subject to later reconsideration, based upon any further facts and comments to be offered, and subject to the filing of a proposed amendment limiting voting.

The said amendment has been duly filed and noticed in the *Federal Register*. The proponents have filed further comments, as directed, regarding how to determine whether a quorum is present at conference meetings. Two of the Agreements (conferences) contain no quorum requirements, and the other three Agreements provide that a quorum is to consist of two-thirds or a simple majority of the members eligible or entitled to vote. The proponents state that the vote-*counting* compromise reflected in their proposed amendment to Article 12 can have no impact on quorum composition. No further comments or replies have been received relative to this matter of whether a quorum is present.

Regarding the tentative ruling on the motion to dismiss, United States Lines, Inc., adheres to its position supporting the motion, and Lykes Bros. Steamship Co., Inc., adheres to its prior position, opposing the proposed amendment to Agreement No. 10374, insofar as it would accord the proponents only one vote when their positions coincided.

Essentially, nothing new has bean offered concerning the motion to dismiss, since the tentative ruling was made granting such motion. Accordingly, for good cause shown, for the reasons as stated in the tentative ruling served January 19, 1983, the motion of proponents to dismiss (discontinue) the proceeding hereby is granted, with the understanding that the approval of an amended voting rights provision in Agreement No. 10374, limiting such rights, is applicable only to the present proceeding, and is not to be considered as precedent in other proceedings, consistent with the statement of the Commission regarding the indicia of single carrier status in *Johnson Scanstar Service Voting Provision*, 21 F.M.C. 218, 226.

(S) CHARLES E. MORGAN
Administrative Law Judge

FEDERAL MARITIME COMMISSION

DOCKET NO. 83-3

ARCO INTERNATIONAL OIL & GAS COMPANY

v.

MAERSK LINE

NOTICE

May 16, 1983

Notice is given that no appeal has been taken to the April 7, 1983, dismissal of the complaint in this proceeding and that the time within which the Commission could determine to review has expired. No such determination has been made and accordingly, the dismissal has become administratively final.

(S) FRANCIS C. HURNEY
Secretary

FEDERAL MARITIME COMMISSION

DOCKET NO. 83-3

ARCO INTERNATIONAL OIL & GAS COMPANY

v.

MAERSK LINE

COMPLAINT DISMISSED AS SATISFIED

Finalized May 16, 1983

The parties have filed a "Notice of Satisfaction of Complaint Pursuant to Rule 93." The complaint was satisfied with the payment by respondent of $13,981.20 in overcharges which resulted from the complainant's freight forwarder's use of an incorrect measurement of the actual space utilized in respondent's containers.

Rule 93 provides for the satisfaction and dismissal of complaints in the Commission's discretion, upon the filing of a statement explaining how the complaint was satisfied and that similar adjustments will be made for persons similarly situated. The Rule also requires the submission of the details of each shipment on a special form "insofar as such form is applicable." [1]

The information called for by Rule 93 is that which would establish the validity of the particular claims and the amount of reparation sought. Apparently the form was thought to be a convenient way of submitting the required information. The complainant here requested the use of the shortened procedure under Subpart K of the Rules of Practice and Procedure and, consequently, the complainant submitted its documentary evidence with its complaint. That evidence, consisted of bills of lading, invoices from the freight forwarder, packing lists, export declarations and copies of checks showing payment of the freight charges.

Complainant's Exhibit A is a recap of the shipments involved. The exhibit shows the vessel and voyage number, the bill of lading number, description, incorrect measurement and ocean freight and the correct measurement and ocean freight, and the amount of the overcharge. This exhibit satisfies the requirements of Rule 93. The respondent has

[1] The form is actually incorrectly cited in Rule 93 and is not published in the current edition of the Commission's Rules of Practice and Procedure (46 C.F.R. 93). See *Abbott Hospitals v. PRMSA, et al.*, Dockets 81-52, 81-53, Dismissal of Proceedings, 24 F.M.C. 1055 (1982).

agreed to make a like adjustment for other persons, if any, similarly situated.

The requirements of Rule 93 have been met, and the complaint is dismissed as satisfied.

(S) JOHN E. COGRAVE
Administrative Law Judge

FEDERAL MARITIME COMMISSION

DOCKET NO. 81-64

MIDLAND PACIFIC SHIPPING CO., INC. - INDEPENDENT OCEAN FREIGHT FORWARDER LICENSE NO. 1299

LEYDEN SHIPPING CORPORATION - INDEPENDENT OCEAN FREIGHT FORWARDER LICENSE NO. 829

PERSON & WEIDHORN, INC. - INDEPENDENT OCEAN FREIGHT FORWARDER LICENSE NO. 112

Edward Schmeltzer and *George J. Weiner* for Respondents.

Janet F. Katz for the Commission's Bureau of Hearing Counsel.

REPORT AND ORDER

May 25, 1983

BY THE COMMISSION: (ALAN GREEN, *Chairman*; THOMAS F. MOAKLEY, *Vice Chairman*; JAMES JOSEPH CAREY and JAMES V. DAY, *Commissioners*)

This proceeding was instituted by an October 8, 1981 Order of Investigation and Hearing, to determine (1) whether Midland Pacific Shipping Co., Inc. (Midland), Leyden Shipping Corp. (Leyden Shipping), and Person & Weidhorn, Inc. (P&W) (collectively, Respondents) violated section 44(e) of the Shipping Act, 1916 (46 U.S.C. § 841b) and the Commission's General Order 4 (46 C.F.R. Part 510 (1980)) in the course of their forwarding practices; (2) whether Respondents are fit to retain their forwarding licenses; and (3) whether civil penalties should be assessed.

The proceeding is now before the Commission upon the Exceptions of Respondents and the Commission's Bureau of Hearing Counsel to the Initial Decision of Administrative Law Judge William Beasley Harris which finds Respondents fit but assesses civil penalties in the total amount of $60,000. A proposed settlement agreement between Hearing Counsel and Respondents which, *inter alia*, provided for penalties in a lesser amount was rejected by the Presiding Officer.

Oral argument before the Commission was heard on April 7, 1983.

FACTUAL BACKGROUND

The parties agreed that over a two-year period, Midland collected compensation on 1,074 shipments which were moved by an NVO, Transocean Shipping Co., Inc., and procured by Traffic Routing International (TRI), without Midland having performed any of the freight forwarder services on those shipments. Midland retained $47,700 of the $116,755 it received as compensation, the rest going to TRI.

Over a several month period, Leyden Shipping used the name Brisley Ocean Transport, Ltd. in place of the shipper on the bills of lading for which Leyden Shipping performed the ocean freight forwarding services. Brisley, an NVO owned by Brian Leyden, was not actually involved in any of these shipments. Leyden Shipping collected $8,278.72 on a total of 84 shipments for which the name of the client/shipper did not appear.

Midland, Leyden Shipping and P&W failed to notify the Commission of facts called for in their Form FMC-18 (freight forwarder license application). Respondents have since submitted revised forms indicating space-sharing arrangements and corporate relationships.

Since the date Brisley filed an NVO tariff, Respondents failed to certify on the "line copy" of the bill of lading that Brisley did not act as an NVO on those shipments on which Respondents collected freight forwarder compensation. Respondents did not receive compensation from underlying ocean carriers on shipments on which Brisley did act as an NVO.

The three Respondents are largely or wholly owned by Brian Leyden and his father, Bernard Leyden.[1] Brisley, Midland, Leyden Shipping and P&W all occupy the same suite of offices in the World Trade Center in New York. Midland's net assets as of October 31, 1981, consisted of its retained earnings in the amount of $8,637.

THE PROPOSED SETTLEMENT

Under the terms of the Proposed Settlement the Commission would receive $8,500 from Midland, $17,500 from Leyden Shipping, and $1,000 from P&W. Midland would surrender its forwarder license, and Leyden Shipping and P&W would submit to four audits over the next two years. As part of the Proposed Settlement, Respondents admitted they engaged in conduct which "may be violative" of section 44(e) and Commission General Order 4 (G.O. 4.)

The Presiding Officer withheld consent to the stipulations and refused to approve the settlement, on the grounds that there were some

[1] Brian Leyden owns 45 percent of Leyden Shipping. Leyden Shipping in turn owns all of the stock of Midland. Bernard Leyden owns 55 percent of the stock of Leyden Shipping and 50 percent of the stock of Leyden Customs Expediters, Inc. The other half of the stock of Leyden Customs Expediters, Inc. is owned by Harold Dichter. Leyden Customs Expediters, Inc. in turn owns all of the stock of P&W. Harold Dichter is President and Bernard Leyden is Vice President of P&W.

factual matters not addressed to his satisfaction and that the settlement was too lenient. Over the parties' objections, the Presiding Officer then proceeded to conduct a full evidentiary hearing, and issued his Initial Decision based thereon.

INITIAL DECISION

In his Initial Decision, the Presiding Officer found that:

1) Leyden Shipping violated 46 C.F.R. 510.24(a) and 510.23(d) by listing "Brisley as Agent" in lieu of the actual shippers on bills of lading and collecting compensation on said shipments;

2) All three Respondents violated 46 C.F.R. 510.22(c) in not certifying that no related person acted as common carrier on shipments for which they collected forwarder compensation;

3) All three Respondents violated 46 C.F.R. 510.5(c) in not informing the Commission of changes in space-sharing arrangements;

4) Midland violated section 44(e) in collecting compensation on shipments on which it did not perform forwarder services.

The Presiding Officer imposed civil penalties in the amounts of $30,000 on Midland, $25,000 on Leyden Shipping, and $5,000 on P&W. However, he found all Respondents to be fit and did not revoke any licenses. He ordered that a certified audit of each Respondent as well as a certified financial net worth statement of each shareholder be submitted to the Commission. He also announced that he was piercing Respondents' corporate veil.

EXCEPTIONS TO THE INITIAL DECISION

Respondents' Exceptions relate to nearly every aspect of the proceeding and of the Initial Decision. They object to the Presiding Officer's rejection of the stipulations and settlement, claiming that he was bound by those stipulations once he agreed to the parties' use of stipulations, and that he had no valid reason to deny approval of the settlement. Respondents argue that the Presiding Officer's ultimate conclusions that Respondents violated G.O. 4 were not adequately supported or explained, and specifically object to his findings that Leyden Shipping provided false information to carriers in connection with the "Brisley as Agent" shipments [2] and that all three Respondents were required to file the related NVO certification.[3] They contend that the Presiding Officer's decision to "pierce the corporate veil" was insupportable but a harmless error.

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[2] Respondents' position here is that listing Brisley as agent was not inaccurate and does not constitute knowingly imparting false information. Thus, Respondents defend against the allegation of a section 510.23(d) violation (imparting false information) but not the section 510.24(a) violation (not disclosing the shipper).

[3] Respondents argue that there is no evidence indicating that they are sufficiently related to Brisley to require the filing of a certificate.

Respondents argue that the Presiding Officer imposed excessive civil penalties ($60,000 altogether) without consideration of such factors as ability to pay, furtherance of agency enforcement policy, degree of culpability, history of prior offenses, and presence of accidental or technical violations. They also object to his requiring audits and net worth statements from Respondents and their shareholders, and to his threat to suspend all three licenses absent submission of these statements. Respondents request that the stipulated record and Proposed Settlement be approved, but that the $27,000 total penalty amount prescribed in the settlement would be excessive because of the expenses Respondents have been put through subsequent to rejection of the settlement.[4] Midland reiterates its willingness to surrender its license.

Hearing Counsel's Exceptions are much more limited in scope. They agree with Respondents that piercing their corporate veil was inappropriate. Hearing Counsel supports the Presiding Officer's findings as to violations by Respondents but disagrees with his conclusion that Midland is fit to retain its license. It further argues that the rejection of the Proposed Settlement was erroneous and that the Commission should approve the settlement, including the $27,000 total penalties and the surrender of Midland's license.

DISCUSSION AND CONCLUSIONS

Upon full consideration of the record, it appears that the Presiding Officer's dissatisfaction with the parties' factual stipulations was unwarranted. The stipulations of fact, which the Presiding Officer found inadequate, are not materially different from the facts which emerged from the hearings. Moreover, this proceeding has not turned on any controversy in factual matters. The Commission has determined to accept and rely upon the stipulations of fact as the factual record in this proceeding.

Both Hearing Counsel and Respondents urge that the terms of the Proposed Settlement be reinstated by the Commission, except that Respondents argue for the reduction or elimination of the civil penalty amounts. The Commission considers that the surrender of Midland's license and the submission to audits by Leyden Shipping and P&W, as prescribed in the Proposed Settlement, are appropriate. The remaining issue is what civil penalty amounts should be assessed on each of the Respondents. The Commission concludes that the seriousness of the offenses and the furtherance of the Commission's enforcement policy

[4] Respondents state:

> [I]t is unnecessary here to impose any further penalties. In any event, imposition of the penalty amounts previously agreed upon would now be inequitable, and . . . Respondents submit that if any penalties are assessed they should not exceed $8,637 for Midland [*i.e.*, Midland's total assets], $3,000 for Leyden and $1,000 for P&W.

justify the imposition of penalties in the amounts prescribed in the Proposed Settlement.

The Commission is not persuaded by Respondents that a lesser amount would be appropriate at this stage of the proceeding in recognition of Respondents' post-settlement litigation expenses. The prescription of fair penalty amounts is not an exact science. There is a relatively broad range within which a reasonable penalty might lie.

The Commission declines to adopt the suggestion that a fair penalty assessment at this time can be calculated by subtracting what Respondents represent to be their legal fees from the originally proposed penalties. This suggestion presupposes not only that the $27,000 settlement was a reasonable settlement but that it constituted the *only* reasonable penalty. Moreover, such action would, in the Commission's opinion, place undue emphasis on a variable and potentially arbitrary factor—the particular legal fees a party claims it has been or will be billed. The Commission's action herein is not an attempt to leave the parties where they would be had the Presiding Officer approved the Proposed Settlement, but is, rather, a determination that the terms of that agreement provide an appropriate resolution to the proceeding at present. It is unnecessary, therefore, to address the remaining Exceptions of the parties relating to the specific findings, conclusions and sanctions in the Initial Decision, and those Exceptions are denied as moot.

THEREFORE, IT IS ORDERED, That the Exceptions of Midland Pacific Shipping Co., Inc., Leyden Shipping Corporation, Person & Weidhorn, Inc., and the Bureau of Hearing Counsel are granted to the extent indicated above and denied in all other respects; and

IT IS FURTHER ORDERED, That Midland Pacific Shipping Co., Inc. shall, within 30 days of the date of this Order, pay to the Federal Maritime Commission the monetary amount of $8,500 and return its ocean freight forwarder license (No. 1299) to the Commission; and

IT IS FURTHER ORDERED, That Leyden Shipping Corporation and Person & Weidhorn, Inc. shall, within 30 days of the date of this Order, pay to the Federal Maritime Commission the monetary amounts of $17,500 and $1,000, respectively; and

IT IS FURTHER ORDERED, That Leyden Shipping Corporation and Person & Weidhorn, Inc. shall *each* submit four semi-annual reports to the Commission identifying freight forwarding clients who are non-vessel operating common carriers or who are shippers known not to have a beneficial interest existing in the goods at the time of shipment. As to each such client, the report will show the kinds of freight forwarding services performed, where they are performed, whether fees are received from such shippers in accordance with itemized invoices, special contract or some other arrangement for shipper payment, and whether compensation is claimed on the shipments of that customer. Each report will be submitted according to the following schedule:

Report	Submission Date	Period Covered
No. 1	7 months after date of Order	First six months after date of Order
No. 2	13 months after date of Order	Second six months after date of Order
No. 3	19 months after date of Order	Third six months after date of Order
No. 4	25 months after date of Order	Fourth six months after date of Order

and

IT IS FURTHER ORDERED, That this proceeding is discontinued.

By the Commission.

(S) FRANCIS C. HURNEY
Secretary

FEDERAL MARITIME COMMISSION

DOCKET NO. 77-7

AGREEMENT NOS. 9929-6, 10266-3, AND 10374

ORDER OF CLARIFICATION

June 3, 1983

By Order of Approval served May 16, 1983 (May Order) (25 F.M.C. 709), the Commission approved the voting provisions contained in Article 12 of Agreement No. 10374-4 which provide that in any conference or rate agreement whenever the votes of Hapag-Lloyd A.G. and Intercontinental Transport/Compagnie General Maritime are the same, their votes will be counted as a single vote.

Agreement No. 10374-4 contains various other provisions unrelated to the voting issue that were ordered deleted by the Commission's Order of April 25, 1983 (April Order)*, which addressed several amendments to Agreement Nos. 10266 and 10374. The Commission's May Order should not be construed to in any way modify the Commission's April Order or to extend approval to those provisions of Agreement No. 10374-4 which do not relate to the voting issue.

By the Commission.

(S) FRANCIS C. HURNEY
Secretary

* Editor's Note: The April Order was not made part of the record in this proceeding but is included in the files of the Secretary.

FEDERAL MARITIME COMMISSION

46 C.F.R. PARTS 542, 543 AND 544

FINANCIAL RESPONSIBILITY FOR WATER POLLUTION

(GENERAL ORDERS 40, 37 AND 41; DOCKET NO. 83-13)

June 8, 1983

ACTION: Discontinuance of Proceeding

SUMMARY: The Commission instituted this proceeding by Notice of Proposed Rulemaking published March 7, 1983 (48 FR 9543). The purpose of the rule was to delete from appropriate Commission General Orders reference to the Panama Canal as being within the navigable waters of the United States. Since publication of the notice, responsibility for establishment of financial responsibility for water pollution has been transferred to the United States Coast Guard, Department of Transportation by the President. (See Executive Order 12418 signed May 5, 1983.) Accordingly, the Commission no longer has the authority to issue rules concerning financial responsibility for water pollution and, therefore, this proceeding is discontinued.

SUPPLEMENTARY INFORMATION: None.

By the Commission.

(S) FRANCIS C. HURNEY
Secretary

FEDERAL MARITIME COMMISSION

DOCKET NO. 83-17

PETITION OF PACIFIC WESTBOUND CONFERENCE AND OOCL-SEAPAC SERVICE FOR DECLARATORY ORDER

ORDER

June 21, 1983

The Pacific Westbound Conference (PWC) and OOCL-Seapac Service (OOCL), a member line, have filed a Petition for Declaratory Order pursuant to Rule 68 of the Commission's Rules of Practice and Procedure (46 C.F.R. § 502.68).

At issue is the cancellation of certain tariff items by OOCL which unintentionally and without notice resulted in an immediate increase in rates on 17 of 20 affected shipments, in contravention of the notice requirements of section 18(b)(2) of the Shipping Act, 1916 (46 U.S.C. § 817(b)(2)). Petitioners seek a Commission order excusing them from adherence to the rate increases published in their tariffs. A Petition for Leave to Intervene and an accompanying Reply have been submitted by the Commission's Bureau of Hearing Counsel.

BACKGROUND

In 1981, OOCL established, by independent action, special per container rates for certain resins to Japan Base Ports and Manila. In February, 1982, OOCL discontinued and deleted these special rates without prior notice to shippers.[1] Petitioners had erroneously believed that the substitution of PWC per ton rates on resins would result in a reduction of freight rates. However, the effect of the rate discontinuances was a rate increase on 17 of the 20 affected shipments on less than 30 days' notice, in contravention of section 18(b)(2).[2] Petitioners' attempt to remedy the situation through the Commission's special docket procedures was unsuccessful.[3]

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[1] The Japan Base Ports rate was deleted on February 1, 1982. The Manila rate was deleted February 22, 1982.

[2] Section 18(b)(2) reads in pertinent part:

> No change shall be made in rates . . . which result in an increase in cost to the shipper . . . except by the publication, and filing, . . . of a new tariff or tariffs which shall become effective not earlier than thirty days after the date of publication. . . .

[3] Petitioners' Special Docket Application (Special Docket No. 958) was withdrawn and the proceeding terminated when the presiding administrative law judge found the application to be jurisdictionally defective.

In the instant Petition, the parties argue that relief is necessary to protect the shippers involved from this unfair and "potentially" unlawful situation, and note their own dilemma of choosing between adherence to their tariff and compliance with section 18(b)(2). Absent the requested relief, Petitioners argue, the affected shippers would have no recourse but to file a multiplicity of reparations complaints before the Commission. Petitioners seek an order stating that OOCL's original per container rates were the lawful and effective rates during the 30 days following their discontinuance and deletion.[4]

Hearing Counsel seeks to intervene in the interest of all the affected shippers. Hearing Counsel generally concurs with the Petition with respect to those shipments in which the rates were increased, but argues that a problem remains regarding the three shipments in which OOCL's action resulted in a rate reduction. Section 18(b)(2) permits rate reductions to become effective immediately upon publication.[5] The relief now sought by Petitioners, Hearing Counsel asserts, would nevertheless counteract the rate reductions experienced by the three shippers. Thus, Hearing Counsel suggests that the Commission issue a declaratory order establishing that during the 30-day notice period, the lawful and applicable rate was OOCL's original per container rate *or* the PWC per ton rate, "whichever results in the lowest cost to the shipper." [6]

DISCUSSION

The Commission has determined to grant Hearing Counsel's Petition for Leave to Intervene in the interest of the shippers affected by OOCL's rate action. The Commission has also concluded that the instant situation is appropriately resolved by way of declaratory order procedures. Declaratory relief would enable Petitioners to resolve their problem and to "act without peril upon their view" within the meaning of Rule 68. It should also serve to provide relief for the shippers involved without the necessity of their instituting complaint proceedings.

A short-notice rate increase can be given no effect for thirty days. *E.I. du Pont de Nemours and Co. v. Sea-Land Service, Inc.*, 22 F.M.C. 525, 540-541 (1980). *See also Chicago, M. St. P. & P. R. Co. v. Alouette Peat Products*, 253 F.2d 449 (9th Cir. 1957). During that period, the previous rate in effect must be applied to affected shipments. A complicating factor in the instant situation, however, is that the short-notice rate change resulted in a rate increase for some shipments and a rate

[4] *I.e.*, until March 3, 1982 for the Japan Base Ports rate and until March 24, 1982 for the Manila rate.

[5] "Any changes in the rates . . . which results [sic] in a decreased cost to the shipper may become effective upon the publication and filing with the Commission."

[6] In their Reply to Petition of Hearing Counsel for Leave to Intervene, Petitioners express their full concurrence with Hearing Counsel's position.

reduction for others. The question then arises whether section 18(b)(2)'s prohibition of short-notice rate increases entirely invalidates OOCL's cancellation of per container rates (*i.e.*, as to all 20 shipments) because it resulted in some rate increases, or whether it invalidates the rate change only to the extent that rate increases were brought about (*i.e.*, only as to 17 of the shipments).

The Commission concludes that section 18(b)(2) proscribes short-notice rate changes only to the extent that they result in increased rates. Thus, OOCL's rate cancellations should be considered ineffective as to those shipments during the 30-day period for which there resulted a rate increase. For these 17 shipments, OOCL's per container rate would apply. However, the rate cancellations are effective as to those shipments for which the cancellations resulted in rate reductions. For these three shipments, the PWC per ton rate applies.

THEREFORE, IT IS ORDERED, That the Petition of Pacific Westbound Conference and OOCL-Seapac Service for Declaratory Order is granted to the extent indicated herein; and

IT IS FURTHER ORDERED, That this proceeding is discontinued.

By the Commission.*

(S) FRANCIS C. HURNEY
Secretary

* Commissioner Setrakian did not participate.

FEDERAL MARITIME COMMISSION

DOCKET NO. 83-4

WESTINGHOUSE ELECTRIC CORPORATION

v.

DELTA STEAMSHIP LINES, INC.

NOTICE

June 27, 1983

Notice is given that the time within which the Commission could determine to review the May 19, 1983 discontinuance of the complaint in this proceeding has expired. No such determination has been made and accordingly, the discontinuance has become administratively final.

(S) FRANCIS C. HURNEY
Secretary

FEDERAL MARITIME COMMISSION

DOCKET NO. 83-4
WESTINGHOUSE ELECTRIC CORPORATION

v.

DELTA STEAMSHIP LINES, INC.

SETTLEMENT OF COMPLAINT

Finalized June 27, 1983

By complaint filed February 28, 1983, the complainant alleged that it had been overcharged $34,970 on a shipment of 378 packages of electrical devices, equipment and materials from Baltimore, Md., to Rio Hania, the Dominican Republic, shipped on or about December 6, 1980.

The respondent demanded and collected $61,115.78 of freight charges based on the class 55 rate of $167 per 40 cubic feet, on Electrical Apparatus, N.O.S. The complainant sought to be assessed freight charges of $26,145.78 based on the commodity rate of $64.50 per 40 cubic feet, on Electrical Devices, Equipment and Materials in minimum lots of 1600 cubic feet. The $167 rate was reduced on the Delta invoice paid by the complainant to $160.50 based on a project rate discount of $6.50; and pursuant to the same tariff item the sought rate of $64.50 would be reduced to $60.50.

The complainant sought reparation of $34,970, plus interest from December 29, 1980.

The parties have agreed to settlement of their dispute. Delta will refund a total sum of $23,500, which includes an allowance for interest, to be paid within 30 days after an order discontinuing this proceeding becomes administratively final.

This settlement is a bona fide effort to terminate the controversy, and not a device to obtain transportation at other than applicable rates and charges. Certain facts remain genuinely in dispute, particularly relating to the exact description and true nature of the cargoes shipped. Commission policy favors settlement of disputes to avoid costly litigation.

On its face the proposed settlement appears reasonable under the circumstances.

The proposed settlement agreement of the parties hereby is approved. The complaint is dismissed, and the proceeding is discontinued.

(S) CHARLES E. MORGAN
Administrative Law Judge

FEDERAL MARITIME COMMISSION

DOCKET NO. 83-19

FARRELL LINES INCORPORATED

v.

SEA-LAND SERVICE, INC.

NOTICE

June 28, 1983

Notice is given that the time within which the Commission could determine to review the May 23, 1983, discontinuance of the complaint in this proceeding has expired. No such determination has been made and accordingly, the discontinuance has become administratively final.

(S) FRANCIS C. HURNEY
Secretary

FEDERAL MARITIME COMMISSION

DOCKET NO. 83-19
FARRELL LINES INCORPORATED

v.

SEA-LAND SERVICE, INC.

MOTION TO WITHDRAW COMPLAINT GRANTED; PROCEEDING DISCONTINUED

Finalized June 28, 1983

Complainant Farrell Lines Incorporated has filed a Motion to Withdraw Complaint. Farrell states that it "hereby requests leave to withdraw its complaint in this proceeding" and furthermore states that counsel for respondent Sea-Land Service, Inc. has advised that Sea-Land does not oppose the motion.

In its complaint Farrell had alleged that Sea-Land had submitted bids for carriage of military rate cargo to Mediterranean ports where Sea-Land's vessels do not call, quoting rates which Sea-Land uses for North European ports with a substitute service overland to points in Italy. Farrell further alleged that such rates were below Sea-Land's fully distributed costs and that the overland charges were also below costs, that the ocean rates were much lower than any commercial rate, and that Sea-Land would carry up to 75 percent of all military cargo to the subject Mediterranean ports under such rates. Farrell alleged that such conduct violated sections 16 First, 17, 18(b)(3), and 18(b)(5) of the Shipping Act, 1916, as well as a Commission regulation forbidding duplicating or conflicting tariffs, 46 C.F.R. 536.6(k). Farrell sought full reparation for alleged injury in an unspecified amount and a cease and desist order.

Respondent Sea-Land filed an answer to the complaint, denying any violations of law and, among things, specifically denying that its rates were below costs, and raised several affirmative defenses concerning the Commission's jurisdiction over the matters in issue. The Military Sealift Command petitioned for leave to intervene, which petition was granted.[1]

[1] After the time for replies had expired, Sea-Land filed a motion seeking leave to file a late reply in which Sea-Land asked that the petition be denied or, alternatively, that MSC's participation in the proceeding be limited to certain issues. In view of Farrell's decision to withdraw its complaint, ruling on Sea-Land's motion becomes unnecessary. MSC has, furthermore, advised me orally that it does not oppose Farrell's motion.

DISCUSSION AND CONCLUSIONS

The Commission has no specific rule dealing with voluntary dismissals of complaints such as Federal Rule of Civil Procedure 41(a), 28 U.S.C.A. However, complainants' motions seeking leave to withdraw their complaints can be handled under Rule 73, 46 C.F.R. 502.73, the rule governing motions generally, and Rule 147, 46 C.F.R. 502.147, the rule setting forth the functions and powers of presiding officers including the power to "hear and rule upon motions."

In practice the desire of a complainant to withdraw its complaint has been honored since the Commission cannot compel a complainant to put on a case but can, if it chooses, investigate any matter on its own authority under section 22(b) of the Shipping Act, 1916, 46 U.S.C. section 821(b). Under the federal rule cited, once an answer has been filed, as in this case, a complainant may nevertheless withdraw its complaint subject only to such terms and conditions as the court deems proper. These terms and conditions, however, usually concern situations in which a defendant's rights would be prejudiced or a defendant is entitled to some reimbursement because of the time and money spent on the case or some other peculiar circumstance exists. See 9 Wright and Miller, *Federal Practice and Procedure*, sections 2364, 2366. However, even under the federal rules a court does not compel a complainant to litigate a case if complainant does not choose to do so. *See, e.g., Smoot v. Fox*, 340 F.2d 301 (6th Cir. 1964). Furthermore, courts can permit voluntary dismissals of complaints even if there has been an answer filed and some discovery has commenced, as in this case. *Tyco Laboratories, Inc. v. Koppers Co.*, 627 F.2d 54 (7th Cir. 1980); 9 Wright and Miller, *Federal Practice and Procedure*, section 2364, p. 169 ("If the motion is made at an early stage of the case, before much happened, it is more likely to be granted.")

In the instant case, which is in its very early stages, Farrell simply wishes to withdraw its complaint, and respondent Sea-Land has no objection to such withdrawal. Under such circumstances the motion should be granted and the proceeding discontinued. It is so ordered.

(S) NORMAN D. KLINE
Administrative Law Judge