

**DECISIONS OF THE
FEDERAL MARITIME COMMISSION**

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FEDERAL MARITIME COMMISSION
WASHINGTON, D.C.

June 30, 1972

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CONTENTS

	Page
Tables of cases reported.....	V
Docket numbers of cases reported.....	VII
Table of cases cited.....	IX
Decisions of the Federal Maritime Commission.....	1
Table of Commodities.....	320
Index digest.....	321

TABLE OF CASES REPORTED

	Page
Agreement No. T-2386—New York Shipping Assn. Cooperative Working Arrangement	259
A.I.D.—U.S. Department of Agriculture v. Sterling Navigation Co., Ltd.	105, 145
Amber Maritime Corp., U.S.D.A. v.....	108
American Export Isbrandtsen Lines, Inc., Commodity Credit Corp. v.....	171
Associated Latin American Freight Conference—Wharfage and Handling Charges	151
Bekaert Steel Wire Corp. v. Hapag-Lloyd AG.....	239
Blue Sea Line, United Nations Children's Fund v.....	206
Bolton & Mitchell, Inc.—Freight Forwarder License.....	248
Boston Shipping Assn., United Stevedoring Assn. v.....	33
Brazil/United States Trade Malpractices.....	55
Chicago Bridge & Iron Co. v. States Marine Lines.....	1
Commodity Credit Corp. v. American Export Isbrandtsen Lines, Inc.....	171
Commodity Credit Corp. v. Isthmian Lines, Inc.....	25
Commodity Credit Corp. v. Mini Carriers Systems, Inc.....	89
Commodity Credit Corp. v. San Rocco Line.....	111, 148
Dillingham Lines, Inc.—Increase in Freight Charges in the U.S. Pacific Coast/Hawaii Trade.....	161
Far Express Co. (Fabio A. Ruiz)—Freight Forwarder License.....	242
Hamburg-America Line-North German Lloyd, Polychrome Corp v.....	220
Hapag-Lloyd AG, Bekaert Steel Wire Corp. v.....	239
Isthmian Lines, Inc., Commodity Credit Corp. v.....	25
Italpac Line, Ocean Freight Consultants, Inc. v.....	314
Lykes Bros. Steamship Co., Inc., Tyler Pipe Industries, Inc. v.....	28
Malpractices—Brazil/United States Trade.....	55
Maritime Fruit Carriers Co., Ltd. ad Refrigerated Express Lines.....	223
Midland Metals Corp. v. Mitsui O.S.K. Line.....	193
Mid-Pacific Freight Forwarders—Increases in Freight, All Kinds Rate in the U.S. Pacific Coast/Hawaii Trade.....	200
Mini Carriers Systems, Inc., Commodity Credit Corp. v.....	89
Mitsui O.S.K. Line, Midland Metals Corp. v.....	193
Moore-McCormack Lines, Inc., Oppenheimer Intercontinental Corp v.....	49
New York Shipping Assn., Inc., Transamerican Trailer Transport, Inc. v.....	259
Ocean Freight Consultants, Inc. v. Itapacific Line.....	314
Oppenheimer Intercontinental Corp. v. Moore-McCormack Lines, Inc.....	49
Oppenheimer Intercontinental Corp. v. South African Marine Corp.....	49
Pacific Coast European Conference, Sacramento-Yolo Port District v.....	15
Pacific Hawaiian Terminals, Inc.—Increases in Freight, All Kinds Rate in the U.S. Pacific Coast/Hawaii Trade.....	213
Parties to Japan/Great Lakes Memorandum, Yamaha Motor Co., Ltd. v.....	86
Polychrome Corp. v. Hamburg-America Line-North German Lloyd.....	220
Sacramento-Yolo Port District v. Pacific Coast European Conference.....	15

	Page
San Rocco Line, Commodity Credit Corp. v.....	111, 148
Sea-Land Service, Inc.—Increases in Rates in the U.S. Pacific Coast/ Puerto Rico Trade.....	4
Sorrentino, Guy G.—Freight Forwarder License.....	127
South African Marine Corp., Oppenheimer Intercontinental Corp. v.....	49
States Marine Lines, Inc., Chicago Bridge & Iron Co. v.....	1
Sterling Navigation Co., Ltd., A.I.D.-Department of Agriculture v.....	105, 145
Transamerican Trailer Transport, Inc. et al. v. New York Shipping Assn., Inc	259
Tyler Pipe Industries, Inc. v. Lykes Bros. Steamship Co., Inc.....	28
United Nations Children's Fund v. Blue Sea Line.....	206
United Stevedoring Corp. v. Boston Shipping Assn.....	88
U.S.D.A. v. Amber Maritime Corp.....	108
Violations of Sections 14 Fourth, 16 First and 17—Nonassessment of Fuel Surcharges on MSC Rates.....	92
Wall Street Cruises, Inc.....	140
Yamaha Motor Co., Ltd. v. Parties to Japan/Great Lakes Memorandum..	86
York Forwarding Corp., J. B. Wood Shipping Co., Inc., and Edwards Fuge Corp	114

DOCKET NUMBERS OF CASES REPORTED

		Page
428	Chicago Bridge & Iron Co. v. States Marine Lines.....	1
429	Oppenheimer Intercontinental Corp. v. Moore-McCormack Lines, Inc.....	49
430	Oppenheimer Intercontinental Corp. v. South African Marine Corp.....	49
431	Yamaha Motor Co., Ltd. v. Parties to Japan/Great Lakes Memorandum.....	86
432	Commodity Credit Corp., Dept. of Agriculture v. Isthmian Lines, Inc.....	25
433	Commodity Credit Corp., as Agent for A.I.D. v. Mini Carriers Systems, Inc.....	89
434	A.I.D.-U.S. Dept. of Agriculture v. Sterling Navigation Co., Ltd.....	105
435, 436	U.S.D.A. v. Amber Maritime Corp.....	108
438, 439	Commodity Credit Corp., as Agents for World Food Program v. San Rocco Line (Anchor Shipping Corp.-General Agents).....	111
440	A.I.D.-U.S. Dept. of Agriculture v. Sterling Navigation Co., Ltd.....	145
441	Commodity Credit Corp. v. San Rocco Line (Anchor Shipping Corp.-General Agents).....	148
442	Bekaert Steel Wire Corp. v. Hapag-Lloyd AG.....	239
68-44	Malpractices—Brazil/United States Trade.....	55
69-57	Agreement No. T-2336—New York Shipping Association Cooperative Working Arrangement.....	259
70-1	Sea-Land Service, Inc.—Increases in Rates in the U.S. Pacific Coast/Puerto Rico Trade.....	4
70-3	United Stevedoring Corp. v. Boston Shipping Association.....	33
70-4	York Forwarding Corp., J. B. Wood Shipping Co., Inc., and Edwards Fuge Corp.....	114
70-9	Bolton & Mitchell, Inc.—Independent Ocean Freight For- warder License No. 516.....	248
70-12	Commodity Credit Corp. and United States Agency for International Development v. American Export Isbrandtsen Lines, Inc., et al.....	171
70-18	Sacramento-Yolo Port District v. Pacific Coast European Conference, et al.....	15
70-21	Dillingham Lines, Inc.—Increase in Freight Charges in the U.S. Pacific Coast/Hawaii Trade.....	161
71-2, 71-8, 71-26, 71-34	Transamerican Trailer Transport, Inc., Seatrain Lines, Inc., Daniels & Kennedy, Inc., Chandres America Lines, Inc., Greek Line, Inc., Home Line Agency, Inc., Ingres Line v. The New York Shipping Association, Inc.....	259
71-11	Midland Metals Corp., N.Y. v. Mitsui O.S.K. Line, N.Y. and Its Subcontractor, The Luckenbach Steamship Co., Phila., Pa.....	193

	Page	
71-17	Violations of Sections 14 Fourth, 16 First and 17, Shipping Act, 1916, in the Nonassessment of Fuel Surcharges on MSC Rates Under the MSC Request for Rate Proposals.....	92
71-23	Pacific Hawaiian Terminals, Inc.—Increases in Freight, All Kinds Rate in the U.S. Pacific Coast/Hawaii Trade.....	213
71-24	Mid-Pacific Freight Forwarders—Increases in Freight, All Kinds Rate in the U.S. Pacific Coast/Hawaii Trade.....	200
71-25	United Nations Children's Fund v. Blue Sea Line.....	206
71-48	Independent Ocean Freight Forwarder License Application—Guy G. Sorrentino.....	127
71-51	Tyler Pipe Industries, Inc. v. Lykes Bros. Steamship Co., Inc.	28
71-72	Wall Street Cruises, Inc.—Failure to Qualify for Performance Certificate.....	140
71-80	Maritime Fruit Carriers Co., Ltd., and Refrigerated Express Lines (A/Asia) Pty., Ltd.....	223
71-81	Ocean Freight Consultants, Inc. v. Itaipacific Line.....	314
71-87	Associated Latin American Freight Conference and the Association of West Coast Steamship Companies, Amended Tariff Rules Regarding Wharfage and Handling Charges...	151
71-91	Independent Ocean Freight Forwarder Application—Fabio A. Ruiz D./B./A. Far Express Co.....	242
72-9	Polychrome Corp. v. Hamburg-America Line-North German Lloyd.....	220

TABLE OF CASES CITED

	Page
Agreement No. 9905, 11 SRR 1090.....	228
Agreement No. T-4: Terminal Lease Agreement at Long Beach, Calif., 8 FMC 521	42
Agreement No. T-2336—New York Shipping Assn., 14 FMC 94.....	44, 282
Alaska Livestock v. Aleutian Marine, 7 FMC 387.....	182
Alcoa Steamship Co., Inc.—General Increase in Rates, 9 FMC 220... 10, 169, 204	101
American Export Isbrandtsen Lines, 10 FMC 70.....	122
American Export Isbrandtsen Lines, Inc., 14 FMC 82.....	97, 100, 101
American Export Isbrandtsen Lines v. FMC, 380 F2d 609.....	182
American Export Isbrandtsen Lines v. FMC, 409 F2d 1258.....	68
American Rubber Products Corp. v. NLRB, 214 F2d 47.....	99, 187
American Tobacco Co. v. Cie. Generale Transatlantique, 1 USSB 53.....	204
Atlantic & Gulf-Puerto Rico General Increase, 7 FMC 87.....	102
Atlantic and Gulf/West Coast of South America Conference, 14 FMC 166...	191
Boston Shipping Assn. v. Port of Boston Marine Terminal, 11 FMC 1.....	246
Cabezas, Carlos H., 8 FMC 130.....	41
California v. U.S., 320 US 577.....	100
Carriage of Military Cargo, 10 FMC 69.....	156
City of Portland v. Pacific Westbound Conference, 4 FMB 664.....	69
Cohen v. Perales, 412 F2d 44.....	317
Colgate Palmolive Co. v. United Fruit Co., Dkt. 115(I) (FMC).....	58
Consolidated Edison Co. v. NLRB, 305 US 230.....	121
Delmar Shipping Corp., 8 FMC 493.....	135
Dixie Forwarding Co., 8 FMC 109.....	182
East Tenn. etc. Ry Co. v. I.C.C., 181 US 1.....	187, 188
Eden Mining Co. v. Bluefields Fruit & S.S. Co., 1 USSB 41.....	57, 69, 84
Edison v. Labor Board, 305 US 197.....	19, 21, 22, 154
Encinal Terminals v. Pacific Westbound Conference, 5 FMB 316... 19, 21, 22, 154	157
Fairport P. and E. R. Co. v. Meredith, 292 US 589.....	198
F. D. Croces R. Co., Inc. v. N.Y. Central R.R. Co., 272 ICC 1.....	190
FMC v. Caragher, 364 F2d 709.....	238
FMC v. Svenska Amerika Linien, 390 US 238.....	210
Foster Wheeler Corp. v. U.S., 290 F. Supp 375.....	196
Free Time and Demurrage Charges at New York, 3 USMC 89.....	98, 189
Free Time Practices—Port of San Diego, 9 FMC 525.....	135
Freight Forwarder Investigation, 6 FMB 327.....	183
Fine Coal to Eau Claire and Chippewa Falls, Wis., 309 ICC 583.....	68
G and C Merriman & Co. v. Syndicate Publishing Co., 207 F2d 515.....	169
General Increases in Rates (1961), 7 FMC 260.....	188
Gillen's Sons Lighterage v. American Stevedores, 12 FMC 328.....	154
Grays Harbor Pulp & Paper Co. v. A. F. Klaveness & Co., 2 USMC 366.....	188
I.C.C. v. U.S., 289 US 385.....	10
Increased Rates on Sugar, 1962, 7FMC 404.....	14
Intercoastal Cancellations and Restrictions, 2 USMC 397.....	

	Page
International Assn. of Machinists v. NLRB, 110 F2d 29, 311 US 72.....	72
Isbrandtsen Co. v. U.S., 211 F2d 51.....	156
Jacobowitz v. U.S. 424 F2d 555.....	68
James J. Boyle & Co., 10 FMC 121.....	128, 246
John Bene & Sons, Inc. v. FTC, 299 Fed 468.....	68
Kimbrell-Lawrence Trans., Inc.—Increase in Rates, 12 FMC 15.....	11
Messrs. DaPrato-Florence v. Med-Gulf Conference, 18 FMC 135.....	53
Misclassification and Misbilling of Glass Articles, 6 FMB 155.....	129
Nashville Ry. v. Tennessee, 262 US 318.....	102
New York Foreign Freight F. & B. Assn. v. FMC, 337 F2d 289.....	189
NLRB v. Remington Rand, 94 F2d 862.....	72
NLRB v. Remington Rand, 94 F2d 878.....	67
North Atlantic Mediterranean Freight Conference, 11 FMC 202.....	182
Louisville Cement Co. v. I.C.C., 246 US 638.....	317
L.T.C. Air Cargo, Inc., 18 FMC 287.....	246
Oklahoma Corp. Comm. v. Kansas, O. & G. Ry. Co., 266 ICC 495.....	183
Outward Continental North Pacific Freight Conference, 10 FMC 349, 385 F2d 981.....	238
Overland/OCP Rates and Absorptions, 12 FMC 184.....	156
Overland Rates Affecting Export High-Pressure Boilers, 9 FMC 441.....	181
Pacific Coast European Conference, 8 FMB 11.....	227
Pacific Coast European Conference—Rules 10 and 12, Tariff No. FMC 14, 14 FMC 266.....	17, 18, 155
Pacific Far East Lines—Alleged Rebates, 11 FMC 357.....	122
Parsons & Whitmore, Inc. v. Johnson Line, 7 FMC 720.....	188
Penn. R.R. Co. v. Moore-McCormack Lines, Inc., 370 F2d 430.....	197
Peter Brattl Associates, Inc. v. Prudential Lines, Inc., 8 FMC 375.....	209
Phila. Ocean Traffic Bureau v. Export S.S. Corp., 1 USSBB 538.....	182, 187
Port of New York Authority v. FMC, 429 F2d 663.....	20
Practices, etc., of San Francisco Bay Area Terminals, 2 USMC 588.....	98
Prince Line v. American Paper Export, 55 F2d 1053.....	129
Proposed Rule Covering Time Limit on the Filing of Overcharge Claims, 12 FMC 298.....	80
Rate Agreement Exclusive Patronage Agreement, 11 FMC 513.....	229
Rates of Inter-Island Steam Navigation Co., Ltd., 2 USMC 253.....	204
Rates on U.S. Government Cargoes, 11 FMC 263.....	191
Reduced Rates on Machinery and Tractors to Puerto Rico, 9 FMC 465.....	156
Reduced Rates on Machinery from U.S. to Puerto Rico, 10 FMC 248.....	12
Richardson v. Perales, 39 LW 4497.....	58
Royal Netherlands Steamship Co. v. FMB, 304 F2d 933.....	129
Rubin, Rubin & Rubin Corp., 6 FMB 235.....	129
Sacramento-Yolo Port District v. Pacific Coast European Conference, 15 FMC 15.....	155
Sacramento-Yolo Port District v. Pacific Coast European Conference, 8 SRR 20, 569 [N.D., Calif.].....	19, 155
Sharp Paper & Specialty Co., Inc. v. Dollar Steamship Line, 2 USMC 91.....	187
Sorrentino, Guy G., 15 FMC 127.....	243, 246, 247
Southern Ry. Co. v. Aluminum Co. of America, 119 F. Supp 889.....	196
Standard Oil Co. v. Moore. 215 F2d 218.....	74
St. Louis, Southwestern Ry. Co. v. Mays, 177 F. Supp 182.....	196
Stockton Port District v. Pacific Westbound Conference, 9 FMC 12.....	19, 155, 156
Sun-Mald Raisin Growers Assn. v. Blue Star Line, Ltd., 2 USMC 31.....	14, 19, 21, 154

TABLE OF CASES

XI

	Page
Surcharge of North Atlantic Westbound Freight Assn., 14 FMC 292.....	100
Transconex, Inc.—Consollated Express, Inc., 14 FMC 35.....	204, 218
Unapproved Section 15 Agreements—South African Trade, 7 FMC 159.....	71, 84
Unapproved Section 15 Agreements—Spanish/Portuguese Trade, 8 FMC 596	84
United Mineworkers of America v. Pennington, 381 US 657.....	44
United States v. M.K. & T. R.R. Co., 194 F2d 777.....	208
United States v. Shaughnessey, 116 F. Supp 745.....	68
United States v. Strickland Transp. Co., Inc., 200 F2d 234.....	208
Universal Camera Corp. v. NLRB, 340 US 474.....	72, 84
U.S. v. Wescoat, 49 F2d 193.....	74
Volkswagonwerk v. FMC, 371 F2d 747.....	277
Volkswagonwerk v. FMC, 390 US 261.....	42, 44, 46, 122, 277, 292
Volkswagonwerk v. Marine Terminals Corp., 9 FMC 77.....	277
Westbound Intercoastal Rates to Vancouver, 1 USMC 770.....	14
West Indies Fruit Co. v. Flota Mercante, 7 FMC 66.....	189
Willapoint Oysters v. Ewing, 174 F2d 676.....	57, 69, 84
York Shipping Corp., 9 FMC 72.....	121

FEDERAL MARITIME COMMISSION

WASHINGTON, D.C.

SPECIAL DOCKET No. 428
CHICAGO BRIDGE & IRON Co.

v.

STATES MARINE LINES

July 28, 1971

NOTICE OF ADOPTION OF INITIAL DECISION AND ORDER PERMITTING REFUND OF CHARGES

No exceptions having been taken to the initial decision of the Examiner in this proceeding and the Commission having determined not to review same, notice is hereby given that the initial decision became the decision of the Commission on July 28, 1971.

It is ordered, That applicant is authorized to refund \$1,978.91 of the charge previously assessed Chicago Bridge and Iron Co.

It is further ordered, That applicant publish promptly in its appropriate tariff the following notice.

"Notice is hereby given that as required by the decision of the Federal Maritime Commission in Special Docket No. 428, that effective April 30, 1971, the rate on Item No. 757 Slag, Ground (Grit) for purposes of refunds or waiver of freight charges on any shipments which may have been shipped during the period April 30, 1971 to June 24, 1971, is \$34.00 W (not subject to Rule 26), but subject to all other applicable rules, regulations, terms, and conditions of said rate and this tariff."

It is further ordered, That refund of the charges shall be effectuated within 30 days of this notice and applicant shall within five (5) days thereafter notify the Commission of the date and manner of effectuating the refund.

By the Commission.

[SEAL]

(S) FRANCIS C. HURNEY,
Secretary.

FEDERAL MARITIME COMMISSION

SPECIAL DOCKET No. 428
CHICAGO BRIDGE & IRON Co.

v.

STATES MARINE LINES

Application to refund a portion of freight charges granted.

INITIAL DECISION OF HERBERT K. GREER, PRESIDING EXAMINER¹

States Marine Lines (applicant), a common carrier by water in the foreign commerce of the United States, has applied to the Commission for authority to refund to Chicago Bridge & Iron Company (shipper) the sum of \$1,978.91, a portion of the freight charged and collected on a shipment of 167 pallets of ground slag (grit) from New York to Dubai, Arabian Gulf, pursuant to a bill of lading dated April 30, 1971.

It appears that on April 15, 1971, the shipper requested the "8900" Lines, an organization of carriers established for rate making purposes (organization), to conduct a telephone poll to establish a rate of \$34.00 per long ton on ground slag (grit) as that rate was needed for it to be competitive with European and Japanese suppliers. Applicant evinced a willingness to lift the cargo at \$34.00 per long ton if approved by the organization, and if the organization failed to meet the shipper's request, applicant intended to exercise independent rate action under the 48 hour provision of the agreement to which it was subject. The organization failed to conduct the telephone poll as requested but at a meeting held on April 28, 1971, agreed to offer the shipper a rate of \$37.00 per 2,400 pounds plus the differential arbitrary charges applicable to Dubai, provided the shipper accepted the offer prior to May 5, 1971. The shipper misunderstood the offer, which was made by telephone, as the offeror failed to stress the tariff provision that the arbitrary charges would not apply when the ship-

¹ This decision became the decision of the Commission July 28, 1971.

ment exceeded 200 revenue tons. The organization did not consider the offer accepted and so failed to change the existing rate. Subsequently, when the matters were clarified, the organization filed the \$34.00 rate per long ton, with pallet allowance and a waiver of the arbitrary charges.

During the time the above events transpired, applicant's officials were unaware of the circumstances and so failed to file the \$34.00 rate, as it could have done under the 48 hour provision of the agreement to which it was subject, and as it intended to do if the organization did not act appropriately. Due to the failure to carry out its intention, applicant was required to charge the tariff rate then effective of \$45.50 W/M, or \$1,978.91 more than the charge would have been had it carried out its commitment to the shipper.

Under the authority granted to the Commission by Public Law 90-928, 75 Stat. 764, a common carrier by water in foreign commerce may be permitted to refund a portion of the freight charges collected from a shipper where there has been an error due to inadvertance in failing to file a new tariff. The facts here appearing warrant the conclusion that applicant intended to file the new rate of \$34.00 per long ton prior to the shipment if the organization failed to do so; but, that through administrative inadvertance, it was not informed that the organization would not file such rate and being unaware of the existing situation, failed to give 48 hour notice to other members of the organization of its intent to file the lower rate in accordance with its commitment to the shipper. It further appears that the organization later filed the \$34.00 rate. The application involves a situation within the purview of Public Law 90-298.

The application was filed within 180 days of the date of the shipment; no other shipments of the same or similar commodity moved on conference vessels during approximately the same time as the shipment here involved; and no other proceedings involving the same rate situation are pending. Good cause appearing, applicant is permitted to refund to the shipper the sum of \$1,978.91. The notice referred to in the statute shall be published in the conference tariff and the refund shall be effectuated within 30 days thereafter. Within 5 days after making refund, applicant shall notify the Commission of the date of the refund and the manner in which payment was made.

(S) HERBERT K. GREER,
Presiding Examiner.

WASHINGTON, D.C., July 2, 1971.

FEDERAL MARITIME COMMISSION

DOCKET No. 70-1

SEA-LAND SERVICE, INC.—INCREASES IN RATES IN THE
U.S. PACIFIC COAST/PUERTO RICO TRADE

August 2, 1971

Increased rates of Sea-Land Service, Inc. in the West Coast/Puerto Rico trade found just and reasonable. The arbitrary charge on shipments at Seattle not shown to be unlawful.

Warren Price, Jr. and R. I. Dausend for Sea-Land Service, Inc.
Mario Escudero, Frederick Morning and Edward Schmeltzer for
Commonwealth of Puerto Rico, protestant.

R. L. Henry for Boise Cascade Corporation, intervenor.

Donald J. Brunner and Ronald D. Lee, Hearing Counsel.

REPORT

BY THE COMMISSION: (HELEN DELICH BENTLEY, *Chairman*; ASHTON C. BARRETT, *Vice Chairman*; JAMES V. DAY, GEORGE H. HEARN and JAMES F. FANSEEN, *Commissioners*)

This proceeding was instituted by the Commission to investigate the lawfulness of arbitrary charges on shipments moving to and from Seattle, Washington, and proposed increases in rates for the carriage of about one-fourth of the commodities in the U.S. Pacific Coast/Puerto Rico trade of Sea-Land Service, Inc. (Sea-Land). The proposed increases were suspended, and any changes made therein during suspension with Commission authorization or after expiration of the suspension period, as well as any changes in the arbitrary, were also placed under investigation. The Commonwealth of Puerto Rico (Puerto Rico) is a party protestant in the proceeding. Boise Cascade Corp., a shipper in the subject trade, intervened. Hearings were held before Examiner Herbert K. Greer pursuant to which briefs were filed. The Examiner thereafter issued an Initial Decision, in which he found the arbitrary charges and increases lawful in all respects.

Exceptions to the decision have been filed by Puerto Rico and Hearing Counsel,¹ to which Sea-Land has replied. There was no oral argument.

FACTS

Sea-Land provides a regular scheduled common carrier service by water between the ports of Oakland and Long Beach, Calif., and San Juan, P.R., via Balboa, Canal Zone.

Since 1963, respondent has been the only common carrier by water serving the West Coast-Puerto Rico trade. It competes with a chartered vessel for the carriage of rice, a major moving commodity in the trade. There is also competition from water service to and from Gulf ports and rail movement beyond. Respondent's service is valuable to shippers since it constitutes the only complete water service offered between the West Coast and Puerto Rico.

The service provided by respondent to this trade has varied over the years. Prior to 1962, three breakbulk vessels were deployed, calling at California ports on a 21-day frequency. Calls were also made at Portland, Oreg., once every 60 days, or more frequently if service was required. In September of 1962, respondent began phasing out the breakbulk service and phasing in a trailership service. Two trailerships were deployed and in early 1963, a third trailership was added which increased the sailing frequency from once every 21 days to once every 14 days. Also provided was a non-self-propelled barge service between Oakland and Portland. Shipments originating at or destined to Portland were relayed at Oakland on a vessel engaged in the Puerto Rican trade. In 1964, a fourth vessel was added and the sailing frequency increased to every 10 days. Respondent was forced to discontinue the barge shuttle service in 1966, but it instituted a motor carrier service.

In compliance with the request of the Government for vessels to transport supplies from the Pacific Coast to Southeast Asia, respondent has found it necessary to redeploy vessels which had been operating in the domestic and offshore trades, including the four vessels which had been operating in the Atlantic/Pacific service via Puerto Rico. In 1967, two C2-X vessels were deployed and the new service was limited to San Juan, P.R., on the one hand, and Oakland and Long Beach, Calif., on the other hand. All eastbound intercoastal traffic from Pacific Coast ports to Atlantic Coast ports which moved under rates regulated by the Interstate Commerce Commission was discontinued.

¹ Intervenor, Boise Cascade Corp., did not except to the Initial Decision, although it had originally taken a position similar to that voiced by Hearing Counsel in their exceptions.

To provide additional capacity for the Puerto Rico/West Coast trade, respondent added two additional C2-X vessels in early 1969, giving a weekly service in each direction. Each C2-X vessel has a capacity of 225 trailers, the additions increasing total trailer capacity from 450 to 900. In early 1970, two C2-X vessels were withdrawn and two C2-L vessels added, each with a capacity of 274 trailers, which increased total trailer capacity to 998. In April of 1970, a T2-M vessel was added with a capacity of 332 trailers. The vessels deployed in the trade at the time of the hearing had a total capacity of 1,330 trailers.²

The Pacific Coast/Puerto Rico trade is not balanced with respect to direction of movement. In 1969, respondent carried 112,613 tons eastbound and 26,162 tons westbound.

In addition to the direct service provided in the trade, respondent's vessels deployed to the Pacific Coast/Southeast Asia trade follow an itinerary on the homebound voyage which provides a call at Seattle, Washington, thence to Oakland, Calif. The cargo loaded at Seattle is unloaded at Oakland and transferred to vessels regularly operating in the trade. This southbound service from Seattle is subject to an arbitrary charge of 4¢ per cubic foot or 16¢ per hundredweight.

Respondent maintains terminal facilities in Puerto Rico and the California ports of Long Beach and Oakland. These facilities are also used by respondent in trades other than the Puerto Rico/West Coast trade. Respondent also serves Puerto Rico from Atlantic ports. From Pacific ports, it also serves trades with Japan and Southeast Asia. In determining costs, allocation is made on the basis of revenue tons carried in a trade.

Respondent has not filed a general rate increase in this trade since 1960. Since July 1, 1967, and prior to the increases here at issue, respondent increased the rates on 53 specific commodities of the 277 commodity rates set forth in the tariff. Of the 53 increases, 13 commodities are subject to additional increases here at issue. Generally, the former increases on the 13 items were LTL cargo only. Rate changes have been based on such factors as the individual needs of shippers and consignees and conditions relating to certain movements, some of which changes were negotiated with shippers.

Respondent released its G.O. 11 report for 1968 on June 13, 1969. This report, together with knowledge of rising costs, was the basis for respondent's decision to review its rate structure in this trade. A

² It appears that as of November 1970, the trade was being served by two C2-L's and two T2-M's with a total trailer capacity of 1,212. (See Ex. 1, page 3, in Docket No. 70-1 (Sub. 1).)

general rate increase was considered but rejected in favor of a selective commodity rate review. Respondent began an examination of its tariff, page by page, and the increased rates here at issue are the first to be filed.³

The G.O. 11 report for 1968, as originally submitted to the Commission, showed a loss of \$185,000, but was not accepted by the Commission's Bureau of Financial Analysis. Discussions resulted in the filing of two revised reports, the second revised report showing a profit of \$42,000, a rate of return of 0.73 percent. The 1969 G.O. 11 report filed by respondent shows a rate of return of 2.43 percent. These reports have not been accepted as fully accurate by the Commission's Bureau of Financial Analysis. There is a wide area of dispute between respondent's accountants and the Commission's Bureau regarding the items properly included in a G.O. 11 report, respondent contending that the report does not permit full disclosure of all related costs.

Respondent has experienced substantial increases in the cost of operating its terminals. At San Juan, Terminal marine expenses in 1969 increased by \$225,989 over 1968; terminal operating expenses during this period increased \$237,305, and terminal overhead increased \$1,173,303. Similar increases at Oakland were terminal marine expense by \$356,161, terminal operating expense by \$966,895 and terminal overhead by \$617,101. At Long Beach the increases were terminal marine, \$208,129, terminal operations, \$314,409, and terminal overhead, \$139,475.

In 1965, when the basic rates on the commodities here under consideration were filed, hourly wages of longshoremen were \$4.03. These wages steadily increased; from 1968 to 1970, the increase was from \$4.64 to \$5.37 per hour.

Clerical wages have also steadily increased since 1965. From 1968 to 1971, the following increases were made in weekly rates:

- Grade 1 employees from the \$78-\$117.69 range to the \$104-\$149.61 range;
- Grade 3 employees from the \$92.54-\$130.32 range to the \$134.05-\$177.10 range;
- Grade 6 employees from the \$124.04-\$175.03 range to the \$179.12-\$228.84 range.

Crew wages on C2-X vessels have increased steadily since 1965; the increase from 1968 to 1969 was from \$1,366.89 to \$1,503.56.

Vessel operating expense covering respondent's entire intercoastal operations increased approximately \$439,000 from 1968 to 1969.

Based on the tonnage of the commodities here at issue carried in this trade in 1969, had the increased rates been in effect, they would have produced an additional \$74,348 revenue. Rice, the major moving com-

³ Later increases on other commodities were placed under investigation in the Commission's Docket No. 70-1 (Sub. 1), which was instituted by order served August 28, 1970.

modity, would have accounted for \$38,796 of this revenue; beans, \$9,731; and plywood, \$6,559.

The increased rate on rice is from \$1.10 to \$1.20 per 100 pounds on trailerloads and from \$1.54 to \$1.70 per 100 pounds on LTL shipments. LTL shipments are minor. During 1969, 19,904 tons of semimilled rice moved from California ports to Puerto Rico in respondent's trailers. Respondent's movement of rice in trailers began in 1965. The rate was then \$1.20 per 100 pounds. In December 1966, however, competition from an unregulated carrier forced a rate reduction to \$1.10. The increase on trailerloads would, therefore, reestablish the 1965 rate. The increase is 0.75 percent of the commodity price in Puerto Rico.

The percentage increase to commodity price on powdered milk is 0.049; on beans, 0.44; on cleaning compound, 0.15; on table salt, 0.48; and on onions, 0.81. The rate increases thus would appear to have only a very slight impact on consumer prices in Puerto Rico.

Rates on many of the commodities here involved are less than the rates on similar commodities carried in bulk to Santo Domingo and Panama.

Respondent's 1969 total revenue on the commodities here at issue, if the increased rates had been in effect, would have been \$1,230,058, less approximately \$7,800 paid for trucking costs on cargo which moved to and from Ponce and Mayaguez. 39,196 tons were carried. Revenue under the increased rates would have been \$31.18 per ton. During 1968, expenses per ton for the West Coast/Puerto Rico trade were:

Vessel operating expenses.....	\$82.88
A & G expenses.....	6.58
Inactive vessel expense.....	.18
Amortization and depreciation.....	8.02
Interest expense.....	1.48
Total expenses.....	44.50
Less credit for related company profit.....	.51
Net cost per ton.....	\$44.08

Thus, had the increased rates been in effect during 1969, and costs of handling been the same in 1969 as in 1968, the cost of handling would have been approximately 38 percent greater than the revenue derived from these commodities.

During 1968, when operating two C2-X vessels in this trade, respondent's carriage of all commodities was 148,088 tons. During 1969, with the addition of two vessels and an increase in trailer capacity from 450 to 900, total carriage was 155,738 tons.

THE EXAMINER'S DECISION

The Examiner found the rate increases here under examination just and reasonable based upon his conclusions that Sea-Land had a marginal overall rate of return in the subject trade, that costs are rising, that a loss would be incurred in handling the specific commodities here involved in spite of the increased rates, that respondent's service is valuable to shippers, and that in performing such service respondent must face competition. The Examiner also concluded that the Seattle arbitrary had not been shown to be unjust or unreasonable; the manner in which it was computed, he found, had not been demonstrated to be improper, and such computation revealed that the arbitrary would recoup only 89.73 percent of the additional expense incurred by Sea-Land in calling at Seattle.

DISCUSSION AND CONCLUSIONS

We agree with the Examiner that the record in this proceeding shows the increased rates here under investigation to be just and reasonable, and that the arbitrary at Seattle has not been shown to be unlawful.

The Rate Increases

Puerto Rico and Hearing Counsel except to the Examiner's determination with respect to the increases, alleging basically that the data of record are not sufficient to justify them. Specifically, they maintain that the record lacks material, either actual or projected, relating to Sea-Land's financial performance in 1970 or the future, and that the carrier's method of operation has changed radically since 1969, which change entails concomitant changes in expenses, revenues, rate base, and rate of return. Additionally, Puerto Rico asserts that the Examiner erred in treating this proceeding as one involving individual commodities rather than a general revenue investigation in which cost and revenue data for the trade as a whole would and should have been considered, and that the Examiner improperly failed to consider whether the rates on other commodities are sufficiently high to offset any losses incurred in connection with the carriage of rice, beans, and plywood, commodities upon which increases have been imposed and which are basic to the Puerto Rican economy. Finally, Hearing Counsel maintain that the Examiner improperly applied average per ton costs for 1968 of all commodities carried in the trade against 1969 revenues per ton for the particular commodities on which the rate increases were imposed.

As we have often observed, ratemaking is not an exact science, and it is enough if the results obtained with respect to determining the

reasonableness of rates and in making the underlying cost and revenue computations represent a reasonable approximation to what must be assumed to be the reality. See e.g., *Alooa Steamship Co., Inc.—General Increase in Rates*, 9 F.M.C. 220, 231 (1966); *Increased Rates on Sugar, 1962*, 7 F.M.C. 404, 411 (1962). Of course, the degree of approximation adequate to satisfy the requirement with respect to the propriety of rates will vary from case to case, depending upon the nature of the operations involved and the data submitted.

We believe that the evidence of record in this proceeding is sufficient to support a finding that respondent's rate increases are just and reasonable. Respondent's financial reports to the Commission (G.O. 11 reports) for the years 1968 and 1969 show that Sea-Land's rate of return in the subject trade for those years was 0.73 percent as per the second revised report for 1968, and 2.43 percent as per the report for 1969. Although the reports cannot be said to be absolutely accurate in all respects, they cannot on the basis of the record herein be treated as other than accurate; Hearing Counsel in fact acknowledge that the factual data must be presumed correct for the purpose of this proceeding, while Puerto Rico admits that "there is no record basis to contradict the results" of the reports. Such rate of return can, as the Examiner found, only be said to be marginal, and such conclusion is not contested by any of the parties.

A carrier's operations are always subject to change, and one can never know with certainty that the method of operation employed in the past will be used in the future. We agree with the Examiner, however, that, for the purposes of this proceeding, it is more reasonable to base determinations with respect to the probable results of future operations more heavily upon the results shown in the G.O. 11 reports than upon projections based upon changes in operation which may or may not occur. It is true that as of April 1970, the subject trade was served with five vessels, rather than four, as had been the case in 1969 and the first quarter of 1970, and that the carrying capacity was increased by this change by some 882 trailers. It is also true, however, as the Examiner found, that "the history of respondent's operations in this trade shows that frequent changes in vessel deployment have been made, sometimes due to undertonnage and also because of the necessity to deploy vessels at the request of the Defense Department."⁴ Further, respondent's witness testified that no changes are planned for 1970 which "will materially affect the profitability in this trade."

⁴ We note in this regard that testimony in Docket No. 70-1 (Sub. 1), an investigation of additional increases on other commodities by respondent herein, shows that as of November 1970, the trade was again being served by four vessels with a total trailer capacity of about one hundred trailers less than had been the case with respect to the five vessel service. (See Ex. 1, page 8.)

Similar results should thus obtain in the near future with respect to operating costs, administrative and general expenses, depreciation, amortization and the terminal expenses attributable to the trade.⁵

When the operations for 1968 and 1969 are considered together with the projection respondent has made with respect to wage increases and the rising trend revealed by the record with respect to terminal costs, vessel operating expenses, and clerical, crew, and longshoremen's wages, it is clear that the record will support a finding that the increases here under examination are just and reasonable. Based upon the tonnage of the commodities here involved carried in this trade in 1969, which, in light of the history of the trade and the testimony of record, we treat as reasonably representative of respondent's activities in the near future, had the increased rates been in effect, they would have produced an additional \$74,348 revenue, for a total of \$31.18 per ton, while had the costs of handling been the same in 1969 as in 1968 (\$44.08 per ton), the cost of handling such commodities would have been approximately one-third greater than the revenue derived.

The criticisms of the use by the Examiner of average costs for 1968 as the basis for a comparison with the revenue which would have been derived from the carriage of the specific commodities here under examination based upon 1969 tonnages are not well founded. The Examiner was fully justified in using average per ton costs since the average cost per ton was one-third greater than the revenue to be recovered under the increased rates. If the average cost per ton had been at all close to the revenues to be derived from the increased rates, a more refined individual cost study might have been in order. But there appeared to be no need for such refined analysis where the spread between revenues and costs based on cost averages was as great as here. Similarly, the fact that 1968 costs rather than 1969 costs were used as a basis for the comparison, if anything, should have resulted in an understatement of costs in light of the increases in costs in 1969 and projected (wages) for 1970. Finally, even if one were to assume that costs of handling the specific commodities for which rate increases were imposed would decrease in the near future, the total additional revenue derived from the increases (\$74,348) would not significantly affect Sea-Land's profitability in the trade. Since the 1969 rate base shown in the G.O. 11 report was \$6,896,458, the increase, if totally accruing to the carrier without any offsetting expenses, would result in only about 1 percent on a rate of return which is marginal.

⁵ A different conclusion would, of course, be required with respect to the use of past experience as a guide to determining the reasonableness of rate increases where the change in carrying capacity was of a degree and type unprecedented for the carrier in the subject trade and the subject of a possible change in manner of operation had not been considered when the increase was proposed. Cf. *Kimball-Lawrence Trans., Inc.—Increase in Rates*, 12 F.M.C. 15, 17-18 (1968).

We also agree with the Examiner's treatment of this proceeding as one involving individual commodity increases rather than a general revenue investigation. Although about one-fourth of the commodities carried in the trade are affected by the subject increases, the increases are the result, not of a decision to establish a general revenue increase, but a "step-by-step" revision of respondent's tariff, which, as the Examiner found, was the result of careful consideration by the carrier, sometimes after consultation with shippers, giving weight to such factors as whether a shipper might lose his market if the rate on certain commodities is increased.⁶ Further, contrary to Puerto Rico's assertions, there is nothing relating to the subject proceeding to indicate that the carriage of commodities basic to its economy has in any way been materially affected by the rate increases here involved, or even that there is a need for other commodities to subsidize the carriage of beans, rice, and plywood as Puerto Rico contends. As Puerto Rico itself has pointed out, the requirement that the Commission act with respect to the public interest as it relates to the needs of the Puerto Rican economy must appear from the record in a particular proceeding, and must be based upon a demonstration that carriers need a revenue "cushion" from the movement of nonessential commodities and that such cushion would increase their carriage of commodities essential to Puerto Rico. See *Reduced Rates on Machinery from U.S. to Puerto Rico*, 10 F.M.C. 248, 253 (1967). Such demonstration does not appear on this record. The rice increase merely restored the rice rate to its 1965 level, from which it had been reduced because of competition from an unregulated carrier, while the plywood increase merely brought the rates from California ports up to the level already in effect from Seattle to remove any market disadvantage which might be created for the shipper utilizing Seattle. Furthermore, as the Examiner found, the ratio of percentage increase to commodity price on beans is 0.44 percent and on rice, 0.75 percent. It is thus extremely unlikely that carryings of beans, rice, and plywood will be affected by the increases here under examination.

We conclude in light of the minimal rate of return shown by the 1968 and 1969 G.O. 11 statements, the increased expenses for 1969 and 1970, both actual and projected, and the rising trend for expenses shown by the record, the demonstration that the revenue accruing

⁶ That the increases involved here are not those of a "general revenue proceeding" is further corroborated by testimony in Docket No. 70-1 (Sub. 1) that no new individual rate increases will be made beyond those involved in that proceeding until Dockets No. 70-1 and 70-1 (Sub. 1) are finally disposed of and by Sea-Land's action, now under investigation in Docket No. 71-58—*Sea-Land Service, Inc.—General Increases in Rates in the U.S. Pacific/Puerto Rico Trade*, of instituting an overall general rate increase in the subject trade.

from the increased rates should, at most, cover only about one-third of the costs of handling the commodities to which they relate, the lack of a showing of an adverse effect of the increase on commodities basic to the Puerto Rican economy, the value of respondent's service and the competition with which it is faced, that the subject increases are just and reasonable.

The Seattle Arbitrary

Hearing Counsel alone except to the Examiner's finding that the Seattle arbitrary has not been shown to be unlawful. They contend that the arbitrary can lawfully be based only on the costs of service which are in excess of those which would be applicable if Seattle were served directly, i.e., by ships serving only the Puerto Rican trade. This would require Sea-Land to limit its arbitrary charges to the cost of transshipping Seattle cargo to the trade vessels at Oakland. All other expenses which Sea-Land attempts to use as a justification for the arbitrary (i.e., Seattle stevedoring, vessel port expenses in Seattle and Oakland, and the steaming expense between these two ports) should be excluded, they maintain.

Sea-Land had computed the additional cost of handling traffic at Seattle and the compensation for such service provided by the arbitrary as follows:

Additional cost per loaded container :

Stevedoring—Seattle	\$17. 50
Stevedoring—Oakland	11. 35
Vessel expense in port—Seattle.....	10. 88
Vessel expense in port—Oakland.....	3. 74
Vessel expense steaming.....	31. 26
Total additional cost.....	\$74. 73
Additional cost per cwt.....	\$0. 1783
Arbitrary charge per cwt.....	0. 1600
Ratio, rate to cost.....	89. 73%

Hearing Counsel do not contest the dollar amounts contained in the above computation but maintain that the arbitrary should be limited to \$0.0271 per cwt (i.e., \$11.35 per container).

While we agree with Hearing Counsel that the costs of service at Seattle to which Sea-Land is entitled in the computation of the expenses relating to the arbitrary should be limited to those which actually reflect the additional expense of serving Seattle, we agree with Sea-Land that, in the absence of a showing of a duty in law or in fact to serve Seattle directly, all of the additional costs contained

in Sea-Land's computation are properly allocable to the additional expense incurred in serving that port. Since there has been no demonstration on the record in this proceeding that a duty to serve Seattle directly exists,⁷ and since, moreover, the additional cost of service at Seattle exceeds the arbitrary charged, we agree with the Examiner that the Seattle arbitrary has not been shown to be unjust or unreasonable.

All contentions of the parties to this proceeding not specifically dealt with herein have been considered and found without merit or unnecessary for the decision.

This proceeding is discontinued.

[SEAL]

(S) FRANCIS C. HURNEY,
Secretary.

⁷ Such a duty could perhaps arise if the record in a particular proceeding reflects a clear and convincing showing of undue preference or prejudice resulting from a failure to provide a certain service at a port. See e.g., *Westbound Interoceanic Rates to Vancouver*, 1 U.S.M.C. 770, 773-774 (1938); *Sun-Maid Raisin Growers Assn. v. Blue Star Line, Ltd.*, 2 U.S.M.C. 81, 88 (1939); and *Interoceanic Cancellations and Restrictions*, 2 U.S.M.C. 397, 398-399 (1940).

FEDERAL MARITIME COMMISSION

DOCKET No. 70-18

SACRAMENTO-YOLO PORT DISTRICT

v.

PACIFIC COAST EUROPEAN CONFERENCE, ET AL.

The nonabsorption provisions of the Pacific Coast European Conference Freight Tariff No. FMC 14, Rule 10 and amended Rule 10 are unlawful since they prevent or attempt to prevent carriers from serving a federally-improved port in contravention of section 205, Merchant Marine Act, 1936.

Clarence Morse and John J. Hamlyn for complainant.

F. Conger Fawcett for respondents.

August 9, 1971

REPORT

BY THE COMMISSION: (Helen Delich Bentley, Chairman; Ashton C. Barrett, Vice Chairman; James V. Day, George H. Hearn, Commissioners) *

This proceeding results from a complaint by Sacramento-Yolo Port District, the complainant, against the Pacific Coast European Conference, the respondent, alleging that the Conference has violated sections 15, 16 and 17 of the Shipping Act, 1916. The allegations of the complainant were based on provisions of the respondent's basic agreement and tariff rules which prevent absorption, thus allegedly preventing member lines from serving a federally-improved port in contravention of section 205, Merchant Marine Act, 1936, which complainant contends renders such activity unlawful per se. Presiding Examiner Herbert K. Greer issued an Initial Decision in which he found that the type of service offered by the complainant did not prevent the member lines from serving a federally-improved port in con-

*Commissioner James F. Fanseen did not participate.

travention of section 205. He also found that the prohibitions against absorption were not shown to be unjustly discriminatory or unfair, or to operate to the detriment of the commerce of the United States, or to be contrary to the public interest in violation of section 15 of the Act. He found no violations of section 16 First of the Act or section 17 of the Act. Exceptions to the Initial Decision have been filed by the complainant and a reply thereto was filed by the respondent. We have heard oral argument.

FACTS

Sacramento owns and operates a public terminal at West Sacramento, located on navigable waters of the United States and on a waterway improvement project authorized by Public Law 525, 79th Congress, 2nd Sess., approved July 24, 1946. Federal funds were expended for development of the ship channel and the turning basin at the Port.¹ The Port is 79 nautical miles from the Golden Gate Bridge on San Francisco Bay.

Approximately 25 percent of the Port's facilities can be used for handling containers. Five berths are provided for deep-sea vessels. The area served by the Port produces pencil slats, peaches, almonds, prunes, vegetables, cereals and other agriculture products. A substantial portion of these products are exported, approximately two-thirds of the exports moving to the United Kingdom and Europe. The preponderance of cargo moved through the Port of Sacramento is outbound.

In January of 1970, Sacramento inaugurated a barge service with the C/B Sacramento. The service is limited to containers. The Port receives the cargo (if breakbulk, the Port puts the cargo in containers), will store it if necessary, handles it and loads it on the barge and hauls the containers to the ocean line's terminal in San Francisco Bay. The line is responsible for lifting the container onto the ship or the wharf. The Port's charge to the vessel of \$3.55 per short ton is less than the vessel cost of a direct call to the Port. Sacramento acts as the carrier's agent when providing the barge service. The service is offered to carriers, not shippers.

Shippers in the Sacramento area now using Conference lines ship their produce to the Bay area by truck. Since Sacramento is closer to the origin of the shipments than the Bay area ports, a shipper's costs for overland transportation would be reduced if they could ship out of Sacramento. Conference carriers using the barge service would

¹ The Port is located on a dredged channel which connects with the Sacramento River 25 miles to the south.

have to absorb the cost in order to maintain equal rates from Sacramento and the Bay area ports to the foreign ports served. Sacramento's barge holds 56 20-foot containers and can accommodate containers of different sizes.

The Conference operates under Agreement 5200, approved by the Commission under section 15 of the Shipping Act. The agreement covers commerce from ports in the States of Alaska, Washington, Oregon and California to ports in the United Kingdom of Great Britain and Northern Ireland, the Scandinavian Peninsula, Continental Europe, including ports on and in the Baltic and Mediterranean Seas, as well as seas bordering thereon, and Morocco and to the Atlantic islands of the Azores, Madeira, Canary and Cape Verdes and by transshipment at the aforementioned to ports in Ireland and West, South and East Africa. Section 3 of Agreement 5200 provides:

There shall be no payment or refund of freight or compensation received and no absorption at loading and discharging ports of rail, truck or coastal steamer freights or other charges directly or indirectly, by any of the parties hereto, except as may be agreed to by three-fourths of the parties hereto at any regular meeting of the conference.

The Conference Freight Tariff No. FMC-14 provided at the time of hearing:

(N)10. Shifting of Vessels. Shifting of vessels is permitted within loading ports but, except as otherwise provided, there shall be no absorptions for bringing cargo to, from or within such ports. Vessels loading in the San Francisco Bay area shall be limited to two loading berths, except that vessels may shift to additional berths for military cargo and cargo loaded in bulk. Calls at additional berths may be made to load a minimum quantity of 750 short tons from one shipper.

The provisions of this rule apply separately to each call into the San Francisco Bay area from another port. A modification which was scheduled to become effective June 30, 1971, would have limited the conference vessels to one loading berth but not altering the nonabsorption provision. However, all limitations on loading berths were declared unlawful in our Docket No. 70-11, *Pacific Coast European Conference—Rules 10 and 12, Tariff No. FMC 14*, served June 14, 1971, and Rule 10, in both its proposed and modified form, including the nonabsorption provisions here in issue, has been cancelled.

The Conference tariff places discharge ports into six groups: (1) United Kingdom; (2) Continent—Belgium, France, Holland; (3) Continent—Denmark and Germany; (4) Scandinavian; (5) Mediterranean—France, Italy, Portugal, Spain and Yugoslavia; and (6) Mediterranean—Greece, Israel and Lebanon. Unless otherwise specified, rates quoted are for direct calls. Absorptions are permitted be-

tween Group (1) ports, between Group (2) ports, between Group (3) ports, between Group (4) ports and between Group (5) ports.

If Conference lines were to use Sacramento's barge service, the Port would receive substantial revenue. Only a portion of the cost of the container facilities is represented by the investment in the barge service. Since the service was instituted, it has been used only once by a carrier not a respondent in the proceeding. There are carriers other than respondents here who are not prohibited from using the Port's service by their rules and regulations. A number of carrier respondents here are members of conferences other than the PCEC.

Sacramento asserts that Rule 10 of the Conference's tariff contains three unlawful barriers to the use of its barge service by Conference lines, the two berth or single berth provision, the 750-ton minimum provision and the nonabsorption and transshipment provisions.² However, since the first two issues were under consideration in Docket No. 70-11, *Pacific Coast European Conference—Rules 10 and 12, Tariff No. FMC 14*, this proceeding was restricted to the "lawfulness of the non-absorption and transshipment provisions of the organic agreement and rule 10." Sacramento's position is that:

Contrary to the principles enunciated in Section 205, Merchant Marine Act, 1936,³ and in clear violation of Sections 15, 16 First and 17, Shipping Act, 1916, respondents, by the provisions of Article 3, FMC Agreement No. 5200, and the anti-absorption and anti-transshipment provisions of their Freight Tariff Rule 10 and amended Rule 10, effectively prevent a member line serving the Port of Sacramento by exercising its managerial discretion to use the Port's Container Barge Service.

Prohibiting transshipments and absorptions in the San Francisco Bay area but permitting such activities between group terminal discharge ports violates Sections 15, 16 First and 17 of the Shipping Act, 1916.

While the Examiner conceded the indirect jurisdiction of the Commission over section 205, he ruled that the complainant did not meet its burden of proof to establish a violation of section 205 as required by the Commission's interpretation. Using these cases as guidelines, the Examiner concluded that the key words in section 205, as far as this proceeding is concerned, are "prevent and serve". He concluded

² Sacramento also alleges that section 3 of Agreement 5200 is unlawful insofar as its restrictions on absorptions and transshipments preclude the use of its barge service.

³ Section 205 provides:

Without limiting the power and authority otherwise vested in the Commission, it shall be unlawful for any common carrier by water, either directly or indirectly, through the medium of an agreement, conference, association, understanding, or otherwise, to prevent or attempt to prevent any other such carrier from serving any port designated for the accommodation of ocean-going vessels located on any improvement project authorized by the Congress or through it by any other agency of the Federal Government, lying within the continental limits of the United States, at the same rates which it charges at the nearest port already served by it.

that Commission precedent required that in order for a violation of section 205 to be found, the complainant had to proffer "substantial evidence" that someone had either "directly or indirectly prevented" another from "serving" a port within the meaning of section 205. Such "service", the Examiner concluded, means direct service, not the type of service the complainant offers. As he, at page 9 of his decision concluded:

If the provisions here at issue, when standing alone, do not prevent a conference member from providing *direct service*, they are not contrary to the meaning and intent of the section.⁴ (Emphasis supplied)

In reply to the complainant's section 15, 16 and 17 allegations, the Examiner concluded that the section 15 charges did not show how the public interest was detrimentally affected by the nonabsorption rule. As for sections 16 and 17, the Examiner concluded that the Conference's nonabsorption rule applied to outbound cargo and that it was not unreasonable for the Conference to allow absorption when the cargo reached its destination.⁵ In conclusion, the Examiner found no evidence to support a section 17 violation, noting that not all prejudice is unjust and unreasonable and therefore unlawful.

DISCUSSION AND CONCLUSIONS

As Sacramento urges, and the Examiner agreed, the Commission, though not vested with jurisdiction over section 205 of the Merchant Marine Act, 1936 (the Act), must consider the impact and policy of section 205 in deciding whether to approve section 15 (Shipping Act, 1916) agreements.⁶ Though not specifically granted jurisdiction over section 205 under Reorganization Plan No. 7 of 1961, the Plan did not repeal section 205, and so long as it continues to be a part of "the law of the land . . . [it] must be considered by the Commission in exercising its delegated function." *Stockton Port District v. Pacific Westbound Con.*, *supra*.

The Federal District Court for the Northern District of California, in *Sacramento-Yolo Port District v. Pacific Coast European Conference*, No. C-70-499 RFP, in its order filed May 15, 1970, took the same view of section 205, pointing out that:

⁴ Such a conclusion is squarely contrary to the legislative history and wording of section 205.

⁵ The Examiner did not feel that it was controlling that many, if not all, of the members of this conference belonged to another conference that allowed absorptions outbound from Europe.

⁶ See *Stockton Port District v. Pacific Westbound Con.*, 9 F.M.C. 12 (1965); *Sun-Mold Raisin Growers Asso. v. Blue Star Line, Ltd.*, 2 U.S.M.C. 81 (1989); *Encinal Terminals v. Pacific Westbound Conference*, 5 F.M.B. 316 (1957).

Even if FMC does not have responsibility for § 205, it must take account of it in its deliberations . . . that which would contravene § 205 of the Act would surely be grounds for disapproval under § 15 of the Shipping Act.⁷

That activity which contravenes the prohibitions of section 205 may not continue to be approved under section 15 is made clear by the legislative history of section 205, which shows that the purpose of the Act was to remove the agency's power to make determinations with respect to the lawfulness of a conference's restrictions against federally-improved ports on a case-by-case basis under sections 15 and 16 of the Shipping Act, 1916, and to make all such restrictions illegal, per se. See e.g., Hearings Before the Committee on Commerce, U.S. Senate, Pursuant to S. 5035, 72nd Cong., 2nd Sess. (1933), 87-90, 114.

The legislative history of section 205, and the established principles of statutory construction,⁸ indicate that the position and arguments of the complainant are more in accord with the purposes of Congress than those of the respondents which were adopted by the Examiner. The language of the statute speaks of "preventing or attempting to prevent, directly or indirectly any . . . [common carrier by water] from serving any [federally-improved] port . . . at the same rates which it charges at the nearest port already served by it." (Emphasis supplied.) Thus, if as the respondents contend the statute was intended to relate only to direct service, one wonders why the word "direct" was removed in an amendment offered by Mr. Gant in hearings on the legislation.⁹ Finally, the vast bulk of the legislative history of section 205 shows that its purpose was designed to forbid conferences from imposing restrictions on their member lines which would interfere with the free exercise of the line's discretion in the determination of which ports they choose to serve. The hearings on the so-called Allin Amendment, which became section 205 of the Act,

⁷ There is nothing unusual or unique about such an approach. For a similar treatment of section 8 of the Merchant Marine Act, 1920, yet another provision of law not specifically administered by the Commission, see *Port of New York Authority v. Federal Maritime Commission*, 429 F. 2d 663 (CA. 5, 1970), cert. den. February 22, 1971.

⁸ See e.g., Sutherland, *Statutory Construction*, 3rd Ed., Vol. 2, § 4705, Vol. 3, § 5505.

⁹ The word "direct" was omitted from the final version. See Report No. 1136 to accompany S. 5035, 72nd Cong., 2nd Sess. (1933). Although the report gives no reason for such deletion, it appears to have been made pursuant to the following comment at the hearings:

Mr. Gant [Manager and Secretary, Board of Harbor Commissioners, Port of Wilmington, Marine Terminal]. I think that in line 7, on page 1, that the word "direct" before the word "service" might very properly be omitted, because of ambiguity. What is direct service? If another port of call intervenes, as for example, going to the Pacific coast, if a stop was made at San Diego, then perhaps a stop at Los Angeles or San Francisco, or up the coast might not be considered "direct service". I think just for the purpose of clarity that the word "direct" should be omitted.

The Chairman. All right. [Hearings Before the Committee on Commerce, U.S. Senate, pursuant to S. 5035, 72nd Cong., 2nd Sess. (1933) at page 27.]

showed the intent of Congress to outlaw conference regulations designed to impose limitations on the free choice of their members with respect to the ports they may serve. Colonel Allin, the chief proponent of the legislation, testified :

It is our desire that this legislation be enacted which is purely permissive, simply enabling any steamship company which desires to go to any port which has been approved by Congress without hindrance of any other steamship company or combination of steamship companies.¹⁰

. . . We believe that a steamship company, if it so desires of its own free will and accord should have the right to go there [any federally-improved port] and pick it [a shipment] up without being hindered.¹¹

. . . We merely desire a line, if it so desires, to *extend* its service and make use of the Government waterway.¹²

. . . We do not believe in compelling a ship to go anywhere. We would like the ship to have the right to go there without hindrance of competing steamship lines, if that particular steamship line desires to do so.¹³

. . . And all that we ask is that if the shipper has a shipment a boat be allowed to come in and get it; this is all.¹⁴

The Committee Chairman, in interpreting what became section 205, stated :

It simply says that a steamship company may, notwithstanding any conference agreement, if it desires—it is purely permissive in character—may go to a port and attend to the business of that port.¹⁵

. . . What I am driving at is this . . . We start, then, there with what you might term a prohibition, that is, that the steamship company shall not be denied the right, that is all, the inherent right that the carrier has to go to a particular place.¹⁶

Therefore, the conclusion must be reached that Congress intended to *include* indirect service as well as direct service. The Examiner, relying on the *Encinal* case, *supra*, concluded that even if section 205 included indirect service, the complainant had not met the burden of proof imposed by this case in producing convincing evidence that a conference provision prevents a member from serving a port which a member desires to serve. But this burden applies only when the conference agreement does not expressly prevent a member from serving a port.¹⁷ Here, however, the complainant has shown that were it not for

¹⁰ Hearings before the Committee on Commerce, U.S. Senate, pursuant to S. 5035, 72nd Cong., 2nd Sess. (1933), at page 6.

¹¹ *Ibid*, page 7.

¹² *Ibid*, page 8.

¹³ *Ibid*, page 10.

¹⁴ *Ibid*, page 13.

¹⁵ *Ibid*, page 88.

¹⁶ *Ibid*, page 89.

¹⁷ This was in fact in the holding of the Commission in the *Sun-Maid* case, *supra*. As the Commission stated in the *Encinal* case, *supra*, at 321 :

The *Sun-Maid* decision in no way conflicts with our findings herein. If the conference tariff here involved contained any provision which would allow a member line to extend overland rates to complainant ports, we could find no violation of section 205.

the existence of this limitation on absorptions, each member line of the Conference would be free to serve particular ports in the Bay area or not as it chose in the exercise of its managerial discretion. The limitation, however, prevents the exercise of such discretion, and it was just such a limitation on the exercise of the discretion of individual lines that convinced the Federal Maritime Board of the illegality under section 205 of the restrictions imposed in the *Encinal* case, *supra*.¹⁸

In any event, the complainant's evidence did indicate that some member lines were desirous of using the direct service. The record indicates that some carriers operating inbound to the Bay area were willing to use Sacramento's service, but were somewhat reluctant to since the PCEC does not recognize the service and, therefore, there would only be a "one-way" utilization of containers. The inbound carriers would then have to return (outbound) with the containers empty. Sacramento then points out that all the members of the two inbound conferences which cover the trading range of the PCEC are also members of the PCEC, thereby inferring a desire on the part of members of the PCEC to use the barge service if they were allowed to do so.

In conclusion, the decision has to be reached that the nonabsorption provisions formerly contained in Rule 10 and proposed Rule 10 of respondent's tariff are in direct contravention of section 205 as clearly established by the complainant and, therefore, are contrary to the public interest within the meaning of section 15 of the Shipping Act, 1916. Similarly, the absorption in section 3 of the conference agreement may not be construed to authorize absorptions which prevent service at any federally-improved port. This is not to be construed as a requirement that any particular line utilize the barge service. Although the Examiner found that it would not be uneconomical for a carrier to utilize this service in opposition to making a direct call, it is not to be

¹⁸ The fact that the restriction might have been unanimously approved is immaterial in light of the legislative history of section 205:

Mr. Sinclair [Chairman, Transatlantic Associated Freight Conference]. The crux of the situation, as you [the Chairman] put it, is the conference's denial of the right of one of its members to certain things. *The conferences do not deny the right of their members to serve ports. But, let us take a situation where, for the good of the transportation companies as a whole and the stability of the rate, the transportation companies, as a whole, in conference unanimously agree to such a thing. Under this bill would that be considered as a conference action preventing a member the freedom of action that you seek for?*

The Chairman. *If they unanimously agree, I cannot see that any question would ever arise. But suppose one member of your conference desired to do a specific thing. He can be precluded, can he not?*

Mr. Sinclair. *But the conference agreement and rules would show he is prevented from doing it by his own action?*

The Chairman. Yes.

Mr. Sinclair. *Yes, that would still be a violation of this bill.* [Emphasis supplied.] Hearings before the Committee on Commerce, U.S. Senate, Pursuant to S. 5035, 72d Cong., 2d Sess. (1932), at page 91.]

required that a carrier utilize the service or make a direct call, but rather the member lines are to be free to exercise their business judgment with respect to service absent conference-imposed restrictions. In view of the foregoing, it is unnecessary for us to consider other challenges to the legality of the nonabsorption rule.

We hold that, on the basis of the record before us, the nonabsorption provisions of Rule 10 and proposed Rule 10 of the Conference Freight Tariff No. FMC 14, are unlawful.

All exceptions to the Initial Decision or request for findings not specifically ruled upon herein have been found to be improper or immaterial, cumulative, or otherwise unnecessary to the decision.

An appropriate order will be entered requiring the Conference to cease and desist from utilizing nonabsorption provisions in any way to restrict the member lines from serving a United States port.

[SEAL]

(S) FRANCIS C. HURNEY,
Secretary.

15 F.M.C.

FEDERAL MARITIME COMMISSION

DOCKET No. 70-18

SACRAMENTO-YOLO PORT DISTRICT

v.

PACIFIC COAST EUROPEAN CONFERENCE, ET AL.

ORDER

The Federal Maritime Commission has this day served its Report in the subject proceeding, which we hereby incorporate herein, in which it found unlawful all regulations imposed by the Pacific Coast European Conference with respect to absorptions which restrict in any way the United States ports or terminals served by its member lines.

Therefore, for the reasons enunciated in said Report,

It is ordered, That the Pacific Coast European Conference cease and desist from in any way restricting the United States ports or terminals at which its member lines may call by means of regulations with respect to absorptions.

By the Commission.

[SEAL]

(S) FRANCIS C. HURNEY,
Secretary.

15 F.M.C.

FEDERAL MARITIME COMMISSION

SPECIAL DOCKET No. 432

COMMODITY CREDIT CORP., DEPT. OF AGRICULTURE

v.

ISTHMIAN LINES, INC.

NOTICE OF ADOPTION OF INITIAL DECISION AND ORDER PERMITTING WAIVER OF CHARGES

September 8, 1971

No exceptions having been taken to the initial decision of the Examiner in this proceeding and the Commission having determined not to review same, notice is hereby given that the initial decision became the decision of the Commission on September 8, 1971.

It is ordered, That applicant is authorized to waive collection of \$9,628.29 of the charge previously assessed Commodity Credit Corp., Department of Agriculture.

It is further ordered, That applicant shall publish promptly in its appropriate tariff the following notice:

Notice is hereby given, as required by the decision of the Federal Maritime Commission in Special Docket No. 432, that effective May 15, 1971, the rate on bulgur for purposes of refunds or waiver of freight charges on any shipments which may have been shipped during the period from May 15, 1971, through June 14, 1971, is \$51.80 W subject to all other applicable rules, regulations, terms, and conditions of said rate and this tariff.

IT IS FURTHER ORDERED, That waiver of the charges shall be effectuated within 30 days of service of this notice and applicant shall within five (5) days thereafter notify the Commission of the date and manner of effectuating the waiver.

By the Commission.

[SEAL]

(Signed) FRANCIS C. HURNEY,
Secretary.

FEDERAL MARITIME COMMISSION

SPECIAL DOCKET No. 432

COMMODITY CREDIT CORP., DEPT. OF AGRICULTURE

v.

ISTHMIAN LINES, INC.

Permission granted to waive a portion of freight charges.

INITIAL DECISION OF HERBERT K. GREER, PRESIDING EXAMINER¹

Isthmian Lines, Inc., a common carrier by water in the foreign commerce of the United States, has applied for permission to waive collection of a portion of the freight charges on shipments of bulgur (wheat flour) carried for the Commodity Credit Corporation, United States Department of Agriculture (complainant), from United States Gulf ports to Surabaya, Indonesia, and consigned to Dr. W. O. Napitupulu, Project Manager, Djakarta, Indonesia. The shipments were loaded at four Gulf ports and on the same vessel, applicant's *Aloha State*. Four bills of lading were issued by applicant for loadings at Galveston and Houston, Texas, and Baton Rouge and New Orleans, Louisiana, dated respectively May 28 and 29 and June 4 and 6, 1971.

Bulgur is an open-rated item under the tariff of the Atlantic and Gulf-Indonesia Conference of which applicant is a member. Prior to the shipments and on April 30, 1971, applicant contracted with complainant for the carriage of the commodity at a rate of \$51.80 per 2240 pounds. Applicant filed a rate under the open-rate section of the conference tariff of \$53.80 per 2240 pounds, effective May 15, 1971 and expiring June 14, 1971, to cover the isolated shipments. However, the \$53.80 rate was inadvertently filed due to an incorrect rate given to the tariff clerk by the Far East Services Tariffic Manager and the error was not discovered until after the shipments had been loaded and the vessel had sailed. Upon detection of the error, manifest corrections were issued for the bills of lading issued at Galveston and Houston

¹ This decision became the decision of the Commission September 8, 1971.

and the \$53.80 tariff rate applied. Corrections were not issued on the bills of lading issued at Baton Rouge and New Orleans as the manifest when last issued, set forth the \$53.80 rate.

On June 7, 1971, complainant was billed at the contract rate of \$51.80; however, on June 18, 1971, the billing was changed to reflect the \$53.80 rate in accordance with the filed rate. Upon receipt of the second billing, complainant refused payment on the ground that the contract rate of \$51.80 should be applied.

Public Law 90-298 authorizes this Commission, for good cause shown, to permit a common carrier by water in the foreign commerce of the United States to waive collection of a portion of the charges "Where there is an error in a tariff of a clerical or administrative nature." The facts set forth in the application demonstrate that the \$53.80 rate was filed with the Commission due to incorrect information given to the tariff clerk and that the rate intended was the \$51.80 rate set forth in the freight contract dated April 30, 1971. It further appears that the rate set forth in the tariff was for these isolated shipments and expired on June 14, 1971. The application involves a situation within the purview of Public Law 90-298. It was filed within 180 days of the date of the shipments. No other shipments of the same or a similar commodity moved on applicant's vessels during approximately the same time as the shipments here involved and no other proceeding involving the same rate situation are now pending. Prior to submission of this application, the applicant has filed a new rate with the Commission which sets forth the rate on which the waiver is based.

Good cause appearing and applicant having complied with the provisions of Public Law 90-298, permission to waive collection of \$9,628.29 and to apply the contract rate of \$51.80 per 2240 pounds is granted. The notice referred to in the statute shall be published in the conference tariff and the applicant shall notify the Commission of the manner in which the waiver was effected and of the amount collected for the shipments within 5 days of payment by complainant of the reduced freight charges.

HERBERT F. GREER,
Presiding Examiner.

FEDERAL MARITIME COMMISSION

No. 71-51

TYLER PIPE INDUSTRIES, INC.

v.

LYKES BROTHERS STEAMSHIP COMPANY, INC.

NOTICE OF ADOPTION OF INITIAL DECISION

September 30, 1971

No exceptions having been taken to the initial decision of the Examiner in this proceeding and the Commission having determined not to review same, notice is hereby given that the initial decision became the decision of the Commission on September 30, 1971.

It is ordered, That reparation in the amount of \$69.85 is awarded claimant with interest at 6 percent per annum if not paid within 30 days from the date of this notice.

It is further ordered, That respondent, within 5 days from the date of payment of reparation, notify the Commission of the date and manner of payment.

By the Commission.

[SEAL]

(Signed) FRANCIS C. HURNEY,
Secretary.

15 F.M.C.

FEDERAL MARITIME COMMISSION

No. 71-51

TYLER PIPE INDUSTRIES, INC.

v.

LYKES BROTHERS STEAMSHIP COMPANY, INC.

Reparation awarded in part.

Dale Thurston for complainant.

John Cunningham for respondent.

INITIAL DECISION OF STANLEY M. LEVY, PRESIDING EXAMINER ¹

Complainant seeks reparation totalling \$2,277.12 arising out of nine shipments of cast iron soil pipe and fittings from Galveston, Texas, to San Juan, Puerto Rico, aboard respondent's vessels during the period August 9, 1968-February 13, 1970.

Hearing in this matter was held on July 27, 1971, in Washington, D.C. At the hearing a preliminary issue was raised whether that part of the claim for reparation based on five of the shipments covering the period August 9, 1968-December 14, 1968, was time barred. Subsequently each party filed a brief on the issue of whether part of the claim was barred by reason of the statutory requirement that a complaint must be filed within two years after the cause of action accrued.

In its brief, complainant asserts that although its complaint was dated April 21, 1971,² the claim did not accrue until January 12, 1971, when respondent declined the claims previously submitted to it in July 1970, by Tyler Pipe. Complainant asserts, therefore, that the complaint having been filed less than 2 years after it submitted its claims to Lykes and Lykes declined payment it is not barred by Section 22 of the Shipping Act, 1916. In effect, claimant's position is that the statute is tolled during the pendency of its claim before the carrier.

¹ This decision became the decision of the Commission September 30, 1971.

² The complaint was not received by the Commission's Secretary until April 30, 1971, and April 30, 1971, is thereby the date on which the complaint is deemed filed.

Claimant's argument is without legal basis. Section 22 provides:

That any person may file with the board [Commission] a sworn complaint . . . The board [Commission], if the complaint is filed within two years after the cause of action accrued, may direct the payment . . . of . . . reparation. . .

The question of whether the statute is tolled during the period of negotiations between the shipper and carrier was discussed by the Commission in *Proposed Rule Covering Time Limit on the Filing of Overcharge Claims*, 12 F.M.C. 298, 309 wherein it said, in pertinent part:

In maintaining that carriers use their time limitation provisions so as not to promptly hear and consider their requests and complaints, shippers maintain that claims are often not acknowledged and that delays in settlement are encountered. . . .

There is, however, no relationship between failures to acknowledge claims and a limitation rule. Neither is there a necessary relationship between delays in settlement of a claim, once it has been presented to the carrier, and a rule prescribing the time during which a claim must be so presented.

* * * * *

There is nothing . . . which would prevent a shipper from seeking reparation based on overcharges and in a proper case collecting them if a complaint is filed under section 22 at any time within 2 years of the alleged injury.

* * * * *

The evidence of record gives no indication that carriers have thwarted the shippers' right to seek reparation under section 22 by "wasting away" the 2-year period during which such action could have been brought.

The cause of action having accrued at the time of shipment or at the time of payment, which ever is later,³ the cause of action accrued on five shipments on or before December 14, 1968. The complaint herein having been filed on April 30, 1971, 5 of these claims totalling \$1,466.12, covering the period August 9, 1968-December 14, 1968, are time barred for failure to file a complaint before the expiration of the 2-year period set by section 22 of the Shipping Act, 1916, as incorporated in section 7 of the Intercoastal Shipping Act, 1933. The remaining 4 claims, totalling \$811.00, covering the period June 9, 1969-February 13, 1970, must be considered on their merits.

With respect to three of the shipments which are the subject of the complaint herein, the carrier assessed a rate of \$1.65 per hundred weight as published in respondent's Outbound Freight Tariff No. 1, tenth revised page No. 57-B, Section 3, FMC-F No. 11, effective April 14, 1969. Claimant contends the applicable tariff rate assessed and collected should have been \$1.50 per hundred weight, published in that tariff, ninth revised page No. 57-A, effective April 14, 1969.

³ For the purposes of this proceeding the parties treat payment as of the date of the shipments.

Regarding the fourth shipment, the carrier assessed \$1.98 per hundred weight pursuant to eleventh revised page No. 57-B of that tariff effective November 6, 1969, whereas the claimant contends the rate should have been \$1.80 per hundred weight as set forth in tenth revised page No. 57-A of that tariff, effective November 6, 1969.

The carrier prepared claimant's bills of lading and described the commodity thereon as "pipe, not bent or shaped, or fittings (not valves) not coated or coated only with bituminous blacking, paint or tar pitch; eight inches and up to but not including twenty inches inside diameter."

In claimant's opinion the commodity involved is described on page No. 57-A of the tariff under "pipe or fittings, plain or galvanized, cast or wrought, viz.," "pipe, bent, shaped or prefabricated, not coated or coated only with bituminous blacking, paint or tar pitch." This commodity description was furnished the carrier by the shipper prior to arrival of each shipment at the port.

Further, the respondent assessed rates based on manufacturer's book weights as opposed to certified public railroad weights and claimant contends that rates should have been assessed on certified public railroad weights rather than on book weights.

Respondent contends, on the other hand, that the claims herein are based on the proposition that inasmuch as the pipe shipped was belled or had a flange end, the pipe was ". . . bent, shaped or prefabricated. . . ." The issue thus becomes whether or not a belled or flange end pipe is necessarily under the terms of the tariff to be considered as ". . . bent, shaped or prefabricated. . . ."

A review of the categories of the tariff herein which might be applicable on iron or steel pipe and fittings reveals that there are two major classifications under each type of pipe as described by material or fabrication. These two classifications are:

1. ". . . bent, shaped or prefabricated . . . which carries a rate based on both weight or measurement, or
2. ". . . not bent or shaped, or fittings . . ." which carries a rate based only on weight.

Respondent asserts this difference is very significant because it reflects truly different costs in handling "bent" as opposed to "not bent" pipe.

Shaped and fabricated pipe is more awkward and costly to handle and occupies more space and the tariff is designed to reflect a rate which covers the extra handling involved and extra space which will be occupied by ". . . bent, shaped or prefabricated. . . ." pipe.

On the other hand, the classification where the rate is based only on weight describes pipe as “. . . not bent or shaped, or fittings. . . .” Pipe as described in this classification clearly refers to pieces of straight pipe and simple fittings. It covers “fittings” but “(not valves)” which would support the interpretation that the tariff is designed to cover pipe of a more complex design only under the “. . . bent . . .” category. This interpretation is further supported by the fact that the classifications “. . . not bent . . .” and “. . . fittings . . .” are covered by the same rate based on weight but valves are not.

Fittings are small pieces of pipe, either straight or elbow, used to join other pipe. Fittings often have shaping and may be bent and may have flange or belled ends. However, even though fittings may be bent, shaped and have belled or flange ends, it appears that they are included within the “. . . not bent . . .” classification because they do not occupy appreciatively more space than does comparable diameter straight pipe. In this sense pipes with one straight and one belled end may be compared with tongue and grooved flooring where each piece is tongued on one edge and grooved on the other in order that the floor may be fitted together. Valves, on the other hand, appear to be excluded from the classification because of the space requirements for such commodity.

Belled or flange end pipe should not be considered “bent, shaped or prefabricated” within the scope of page 57-A of the tariff and, thus, claimant’s interpretation of the tariff is in error.

There is, however, merit in claimant’s contention that the rate should have been assessed on certified public railroad weights instead of manufacturer’s book weights as assessed by respondent. Although respondent used the weights shown on the shipper’s packing list it appears that the certified railroad weight more accurately reflects the actual weight as shipped. For the shipments of September 4 and September 17, 1969, the certified weights aggregated 4,233 pounds less than the weight assessed. The amount of overcharge at \$1.65 per 100 weight is \$69.85.

Reparation is awarded in the amount of \$69.85 with interest at 6 percent per annum if not paid within 80 days.

(Signed) STANLEY M. LEVY,
Presiding Examiner.

FEDERAL MARITIME COMMISSION

DOCKET No. 70-3

UNITED STEVEDORING CORP.

v.

BOSTON SHIPPING ASSOCIATION

November 2, 1971

Boston Shipping Association (BSA) found to be an "other person" subject to the Shipping Act, 1916 (the Act).

Incorporation papers and bylaws of the BSA found to be subject to section 15 of the act, and not having been filed and approved are unlawful.

Agreement among and between members of the BSA as to allocation of labor gangs among stevedores is subject to section 15 of the act, and not having been filed and approved is unlawful.

Agreement among and between members of the BSA as to the "first call-recall" system, although implemented via a labor agreement, is subject to section 15 of the act, and not having been filed and approved is unlawful.

Evidence adduced is insufficient to declare the practices of the BSA violative of sections 16 and/or 17 of the act.

Robert N. Kharasch and Olga Boikess for complainant.

Leo F. Glynn and Francis A. Scanlan for respondent.

Donald J. Brunner and Norman D. Kline, hearing counsel.

REPORT

By THE COMMISSION: (Helen Delich Bentley, *Chairman*; Ashton C. Barrett, *Vice Chairman*; James V. Day and George H. Hearn, *Commissioners*.)*

This proceeding was initiated by the Commission upon a petition of the United Stevedoring Corp., alleging that the Boston Shipping Association (BSA), had violated section 15 of the Shipping Act because it had not obtained Commission approval for its concerted activities in the allocation of stevedoring gangs at the port of Boston.

*Commissioner Clarence Morse did not participate.

As a result of the petition, the Commission directed the BSA to show cause why it should not cease and desist from its activities in allocating gangs for failing to obtain the required Commission approval.

Upon consideration of the affidavits of fact and memoranda of law filed by the parties, the Commission referred the case to the Office of Hearing Examiners for an evidentiary hearing to resolve the disputed issues of fact posed by the pleadings of the parties and for the issuance of an initial decision.

Following a request by United, the Commission expanded the scope of the proceeding to include the issue of "whether the practices of BSA in the allocation of stevedoring gangs on the Boston piers result in violations of sections 16 and 17 of the Shipping Act, 1916."

Broadly stated, United's position is that the BSA, pursuant to article 10 of its collective bargaining agreement with the International Longshoremen's Association, which reserves to the BSA the right to determine "the number of gangs to be employed and how they are to be distributed on the vessel," has "confine(d) to four favored stevedores (all of whom are competitors of United) effective daily control of the longshore work force in the Port of Boston." This effective control has resulted in "the ships served by the favored stevedores obtaining preference over all other ships calling at Boston, and prevents any other stevedore from offering fairly comparable service and obtaining customers." Moreover, this control, asserts United, is exercised pursuant to "an unwritten and unfiled working arrangement among the BSA members", which governs the "exercise of rights *reserved to management* under a collective bargaining agreement." United asserts that it "is a stevedore directly harmed" by these practices.

In his initial decision, Examiner Richard M. Hartsock ultimately concluded (1) that the BSA is not an other person subject to the Shipping Act; (2) that the collective bargaining agreement entered into by the BSA is not an agreement subject to approval by the Commission under section 15, hence the BSA has not violated section 15 by effectuating an unapproved agreement; (3) that the agreement between the members of the BSA to collectively bargain for house gangs and first call and recall rights with the ILA is not subject to section 15, but if it is, the agreement is not unreasonable or illegal or otherwise contrary to the act; and (4) that the BSA has not violated sections 16 and 17 of the Shipping Act.

United and hearing counsel except to each basic conclusion of the examiner. Thus, the Commission is confronted with a threshold issue of its jurisdiction over the parties in the case and their agreements in

addition to the question of the lawfulness of the particular activity in question under sections 16 and 17 of the act.

After charging that the decision is not a fair, balanced or complete analysis of either the Commission's jurisdiction or the testimony or exhibits of record, and after taking some 16 general exceptions to the decision, United "regretfully (asks) the Commission to start from scratch, to disregard the initial decision, and to consider anew our (United's) opening and reply briefs to the Examiner * * *."

In much the same vein, hearing counsel assert that not only did the examiner commit "serious errors of law regarding the Commission's jurisdiction", he also "ignored significant portions of the record", relied on "innuendo" and "concentrated on the portion of the record where no violations of the Shipping Act are shown, ignoring that portion of the record which demonstrates violations." In short, the exceptions call for an examination of the transcript of testimony and exhibits in the record in order to fill in the "gaps" left by the examiner so as to construct a factual foundation upon which the Commission may proceed to a determination of the issues. The facts as set forth below are not in conflict with those found by the examiner; rather, they include the facts found by him and others from portions of the record not dealt with in the initial decision.

STATEMENT OF FACTS

United Stevedoring Corp., is a locally owned stevedore at the port of Boston. United has been in business at Boston since some time in the 1930's. The Boston Shipping Association is an association of carriers, stevedores, ship agents, terminal operators and other maritime concerns at Boston. The BSA is a nonprofit corporation organized under the general laws of Massachusetts, primarily for the purpose of negotiating and administering collective bargaining agreements with labor.¹ The board of Governors of the BSA is composed of four officers and six members. Of the five general cargo stevedores operating in the port of Boston, all but United are directly represented on the board. Except for an annual membership meeting, decisions of the BSA are made by the board, and in general the board's actions do not appear to need ratification by the membership.

¹ The BSA's bylaws state that its other purposes are "to endeavor to promote and to assist in encouraging friendly and harmonious relations between shipowners, shipping agents, etc. * * * to improve working conditions in the shipping industry; to encourage sound business relationships between both the members and between the members and the employees * * *."

In September 1964, the U.S. Department of Labor published a study entitled, "Manpower Utilization—Job Security in the Longshore Industry, Boston", known as the "Stow Report." Among the various findings dealing with decline in longshore employment were under utilization of members of the work force, archaic hiring procedures, lack of permanent gangs, frequent shortage of sufficient gangs to work ships in port and resistance to technological change in cargo handling methods.

The basic reform arising out of the Stow report was a fundamental change in the gang and hiring systems. After an informal comparison of prevailing practices at other east coast ports, the International Longshoremen's Association local in Boston decided to replace the previous hiring method with a system of permanent gangs and a central hiring hall.² The permanent gangs were set up by what has become known as the "Final Shape". On December 6, 1966, each stevedore employer of longshore labor, having been notified in advance, was invited to send hiring bosses to a place in Boston known as Castle Island. The hiring bosses stood on piles of lumber and each longshoreman chose the boss for whom he wanted to work. This final shape resulted in the formation of 30 permanent gangs; the number remains the same today.

At the time of the final shape, there were seven stevedores operating in Boston, six general cargo and one scrap metal (Schiavonne). The six general cargo stevedores were J. T. Clark Sons, ITO Corp. (Jarka), Nacirema, Atlantic & Gulf, Bay State, and United. According to a general understanding among the ILA and stevedores, each hiring boss or foreman sent by a stevedore would be entitled to hire two gangs. Only United apparently had some difficulty with this understanding since it contends that it had no such understanding. Clark, Jarka, Nacirema and Atlantic & Gulf put up three bosses each and hired six gangs apiece; Bay State put up two bosses and hired four gangs; United put up one foreman but hired only one gang. Apparently, United had some difficulty in filling even one gang since the men were prone to "go where the work was," and were reluctant to "shape" in front of United's boss.

In the first half of 1967, one of the leading stevedores, Atlantic & Gulf, terminated its operations in Boston, making its six gangs avail-

² Under the old system, longshoremen would congregate daily on the streets and form around to "shape" in front of a hiring boss on an *ad hoc* basis and then move off to work the ships. It was felt that this system was not only undignified but extremely inefficient since the absence of permanent gangs prevented the development of those skills attendant an experienced team on which each member is familiar with each other's work habits, strengths and weaknesses.

able for redistribution among the remaining stevedores. Through the efforts of the BSA and with the cooperation of the ILA, these gangs were redistributed in June 1967, in a way that United picked up two more gangs while its competitors picked up one each. The reallocation left the distribution at: Clark, Jarka and Nacirema—seven gangs; Bay State—five gangs; United—three gangs; and Schiavonne (the scrap metal stevedore)—one gang. This distribution is in effect today.³

Between the final shape and October 1, 1969, the assignment system operated in such a way that considerable rotation of gangs among stevedores was permitted. Thus, if gangs were not requested by the stevedores to whom they had been assigned, they were free to work for other stevedores. Also, it appears that no single walking boss could secure more than three gangs. This seems to have meant that a stevedore with a single ship to service was effectively limited to the use of three gangs, even if he had five or six assigned to him.⁴ This particular part of the system was modified on October 1, 1969.

The change in the assignment system stemmed from the decision of the BSA to secure for management a greater control over the work force for the professed purpose of improving service to the ships calling at Boston. Consequently, one of the major objectives during the collective bargaining in 1968 was the modification of the then-existing gang assignment practices so as to establish a strengthened "first call-recall" system. This was met by resistance by the ILA, who wished to preserve the method of "rotation" of gangs under which the gangs were dispatched by the union from the hiring hall in sequence so as to distribute the work more equally and improve the position of "low hour" gangs.

So insistent were the parties that the port of Boston remained on strike in 1969 for several months beyond the end of the strike at other ports on the east coast. The issue was finally resolved by the union trading first call-recall rights for a guaranteed annual wage program. The change in the gang assignment practices was embodied in article X of the collective bargaining agreement.

³ In 1969, United attempted to obtain another gang and requested the BSA to assist it. The board of governors interceded on behalf of United with the union but decided that in return for the additional gang United should employ a second permanent hiring boss. The board felt this condition reasonable and necessary to persuade the union that United could produce the work. Significantly, other general cargo stevedores at Boston had two or three such bosses. For reasons not entirely clear from the record, the matter was not pressed and United did not get an additional gang.

⁴ At this point, it should be noted that neither United nor hearing counsel challenge the basic concept of the house gang system or the establishment of a central hiring hall. Nor do they quarrel too strenuously with the present allocation of gangs to the various stevedores.

Article X—Gang Assignment. *Until October 1, 1969*, the present system whereby each employer's hiring foreman controls a specific number of gangs shall remain in effect. Gangs not working for their regular hiring foreman shall be dispatched by the dispatcher in accordance with the present procedures. The employer shall determine the number of gangs to be employed and how they will initially be distributed on the vessel to which they have been ordered.

As of October 1, 1969, the effective date of the guaranteed annual income program, each employer will have first call on all the regular gangs assigned to his company. An employer whose regular gang is working for another employer at a time when the regular employer has no work for them may recall his regular gang when he has work available at the start of the next work period. In such instances, the work commenced will be completed by other gangs. Gangs not working for their regular employer shall be dispatched by the dispatcher in accordance with the present procedure. The employer shall determine the number of gangs to be employed and how they will initially be distributed on the vessel to which they have been ordered.

By the exercise of first call-recall rights provided in article X, a stevedore in addition to having the "first call" on any of the gangs assigned to him may "recall" any of his assigned gangs to any single vessel, even though the recalled gangs may not have completed work on the vessels from which they are recalled. Under the system embodied in article X, the stevedore exercising "recall" could employ his full quota of assigned gangs, seven in the cases of Clark, Jarka or Nacirema, on a single vessel, leaving the stevedore from whom the gangs were "recalled" as few as three gangs, in the case of United, even though United was working more than one ship. Apparently, under the old system a vessel with a single hiring boss or walking boss would have been limited to three gangs in such circumstances.

Barely 2 months after article X went into effect, the union complained to the BSA that certain gangs were not getting sufficient work and suggested that the union be allowed to "rotate" those low-hour gangs away from their assigned stevedores (in this case United and Bay State). The BSA considered any such rotation to be a breach of the collective bargaining agreement, but after a period of negotiation it was agreed that seven gangs would be "adopted" by other stevedores. Under the "adoption" system, stevedores who were designated "adopting" stevedores had first call on their "adopted" gangs over all other stevedores except the stevedore to whom the adopted gang was primarily assigned. This system was tried on an experimental basis for 3 months, but apparently because of problems arising under it, no attempt was made to continue it beyond the experimental period.

The ILA next made known its intention to return to the old system in effect prior to October 1, 1969, where the union would fill out gangs for any particular ship by its own selection of "low-hour" gangs ex-

cept for the two or three assigned to the particular walking boss for that ship. Management again considered this a breach of the collective bargaining agreement. Ultimately, arbitration resulted in a modification of the bargaining agreement by which the union was permitted to select the fourth and fifth gangs dispatched to any stevedore while the stevedore retained the right to call his regularly assigned first three gangs and the sixth and seventh gangs if he was entitled by assignment to a sixth and seventh gang. This was the last modification of the first call-recall system, representing an attempt to distribute the work among the 30 gangs more evenly and thereby support that number of gangs at the port.

The original allocation at the final shape which resulted in a 6-4-1-1 arrangement corresponded roughly to the previous year's volume of work per stevedore and reflected the ILA on-the-spot estimate of who could offer the most work. United did proportionately better than its competitors, receiving one gang per 40,000 hours worked the previous fiscal year to one gang per 75,740 for Nacirema; one gang per 63,615 for Atlantic & Gulf; one gang per 51,781 for Clark, etc. Again, when Atlantic & Gulf went out of business and its gangs were redistributed so as to give United two more, United did proportionately better than its competitors. Thus, although United now had three gangs, it only produced 48,000 hours of work for the three quarters prior to June 1967, compared with Nacirema's 310,000; Clark's 270,000; Jarka's 240,000; and Bay State's 116,000. Proportionately this means that Nacirema had two and one-third the number of gangs assigned United but produced over eight times as much work.⁵

On days when there is no congestion of vessels at the port and more than enough gangs are available, the distribution of gangs seems to present no problems. The daily average of gangs working has been declining over the past few years due to the general decline in activity at the port. In 1969, an average of 17.94 gangs were hired daily, while the first 6 months of 1970 showed a daily average of only 15.99 gangs. In 1968, the daily average was 20.15. Thus, on "quiet" days obtaining gangs presents no problem even under first call-recall since the union would always have gangs available and would be only too happy to dispatch them. However, vessels do not call at conveniently spaced intervals but tend to "cluster" on busy days. On these days a stevedore has been called upon with some frequency to work three ships

⁵ Latest BSA records show that United continues to be the low-hour stevedore. The only competitor who had proportionately more gangs than United per hour was Bay State with five gangs. Its hours were only 69,905 to United's 51,527.

simultaneously. Thus, in theory at least, even if each stevedore were assigned the same number of gangs, there could still be labor shortages; and, of course, any stevedore with a low number of assigned gangs vis-a-vis his competitors would have greater difficulty in securing sufficient labor.

DISCUSSION AND CONCLUSIONS

The Jurisdictional Issue

The examiner concluded that the BSA was not an "other person" within the meaning of section 1 of the Shipping Act. This conclusion is based, exclusively it would appear, on findings (1) that the BSA is a nonprofit corporation formed under the general laws of Massachusetts; (2) that the BSA is not a business corporation and is without business functions (which is really just another way of saying that the BSA is a nonprofit corporation); and (3) that the BSA is not "carrying on the business of forwarding or furnishing wharfage, dock, warehouse, or other terminal facilities" within the meaning of the definition of an "other person" (here the examiner is concerned solely with that corporate entity which is the BSA and not at all with the individual members of the BSA).

Additionally, the examiner concluded the "collective bargaining agreement" between the BSA and the ILA was not subject to section 15 and that the "consensus of management" or the agreement between the members to negotiate for a first call-recall system was not a section 15 agreement. The examiner dealt with no other agreements, actual or alleged.

The examiner has divided the question of the Commission's jurisdiction into two parts: (1) jurisdiction over the parties (the BSA, its members and the ILA or its members); and (2) jurisdiction over the subject matter (the particular agreements entered into by the parties).

1. Jurisdiction over the parties

United and hearing counsel except to the examiner's conclusion that the "corporate entity" known as the Boston Shipping Association is not subject to the Commission's jurisdiction which was based on the examiner's finding that the BSA does not itself perform any of the functions required by the definition of an "other person" in section 1 of the act. They urge that in failing to "pierce the corporate veil", the examiner refused to do precisely what the Commission itself has done on a number of occasions.

The BSA's reply to United and hearing counsel is simply an elaboration of the examiner's bare conclusions. Thus, the BSA argues:

The BSA * * * has no power to perform any of the corporate business functions required by the definition of "an other person subject to this Act" * * * Petitioner [United] has cited no case in which a mere member of a non-profit corporation * * * has given to that non-profit corporation the member's own jurisdictional character merely by virtue of his membership * * *. The functions of the members in their own corporate character are totally ultra vires of the BSA and are therefore separate from the corporate character of the Shipping Association [and] jurisdiction over the person of the Respondent is perforce dependent upon the jurisdictional character of that named Respondent and the BSA as a non-business corporation falls short of the definition of "other person subject to this [Act]."

Apparently in recognition of the applicability of this theory to a great many agreements admittedly subject to section 15 (including conferences), the BSA concludes:

Cases in which members of a conference are concerned are to be distinguished because the relationship among members of a Conference is determined by the contract which establishes the Conference and the Commission has jurisdiction *ab initio* over the contract and the conference it creates. The relationship among members of a conference is defined by a conference agreement which the Commission must consider and over which the Commission inherently retains jurisdiction.⁶

Whether or not stevedoring contractors are subject to the Act, terminal operators and steamship lines certainly are; thus, if the corporate veil of the BSA were pierced, we would have to conclude that members of the association in their individual capacities are subject to our jurisdiction. However, there is sufficient authority for our assertion of jurisdiction over the BSA as an entity without resort to a piercing of the corporate veil.

The act itself explicitly defines the term "person" to include "corporations, partnerships, and *associations*, existing under or authorized by the laws of the United States, or any State, Territory, District, or possession thereof, or of any foreign country." (*Italic ours.*) This alone we feel is sufficient basis for jurisdiction over the association as an entity. The U.S. Supreme Court, in dealing with the same issue with respect to public owners of wharves and piers, stated the law succinctly in *California v. U.S.*, 320 U.S. 577, 585 (1944).

We need not waste time on useless generalities about statutory construction in order to conclude that entities other than technical corporations, partnerships, and associations are "included" among the "persons" to whom the Shipping Act applies if its plain purposes preclude their exclusion.

Thus, it was a foregone conclusion to the Supreme Court that "technical corporations, partnerships, and associations" were subject to our

⁶ Overlooked in this "distinction" is the fact that, of course, the "Conference" itself does not solicit or book cargo, does not collect rates or run ships. Its members do these things.

jurisdiction. There can be no real dispute as to our jurisdiction over the BSA, and we conclude that the examiner was in error in finding that we lacked jurisdiction.

2. Jurisdiction over the subject matter

Before proceeding to a discussion of the agreements involving labor, we pause to consider a series of basic agreements among and between the members of the BSA, viz., the incorporation papers and bylaws of that organization. We are of the opinion that those papers and bylaws constitute "cooperative working arrangements", within the meaning of section 15 of the act.

The Supreme Court, in *Volkswagenwerk Aktiengesellschaft v. F.M.C.*, 390 U.S. 261 (1968), in dealing with the Commission's interpretation of section 15, concluded at 273 that, "The Commission thus took an extremely narrow view of a statute that uses expansive language." The Court continued:

To limit § 15 to agreements that "affect competition" as the Commission used that phrase in the present case, simply does not square with the structure of the statute. (at 275)

And in a footnote at the same page, the Court pointed out that:

Section 15 requires filing of "every agreement" in any of seven categories, and one of the seven comprises all agreements which "regulate * * * competition" * * *. The other six categories would be rendered virtually meaningless by the Commission's construction. (390 U.S. at 275)

We ourselves have on occasion taken a broader view of section 15. In *Agreement No. T-4: Terminal Lease Agreement at Long Beach, Calif.*, 8 F.M.C. 521 (1965), we held a terminal lease agreement to be subject to section 15. In response to an argument that only agreements which are intended to restrain competition in per se violation of the Sherman Act are section 15 agreements, we said, at 8 F.M.C. 531:

Section 15 describes in unambiguous language those agreements that must be filed; it does not speak of agreements per se violative of the Sherman Act. Since the wording of section 15 is clear, we need not refer to the legislative history; there simply is no ambiguity to resolve. Section 15 is not explicitly limited to those agreements that are per se violative of the Sherman Act; therefore, we will not, as we cannot, amend the section to limit it.

The legislative history lends support to our conclusion that such agreements as are embodied in incorporation papers and bylaws are section 15 agreements. In the Alexander report, at 418, it was said:

* * * the shippers who appeared as witnesses * * * were in the great majority of instances favorable to a comprehensive system of government supervision

* * * [and] the approval of contracts, agreements, and arrangements, and the general supervision of all conditions of water transportation * * *.

There is ample opportunity, in our opinion, for such an organization as the BSA to engage in practices which the act contemplates shall be subject to regulation.⁷ Thus, we find it necessary to require that these papers and agreements which form the foundation of the BSA be submitted for our approval. Since these papers have not been filed with us, we are forced to conclude that they are unlawful and that such failure to file them constitutes a violation of section 15 of the act.

With respect to the agreements involving labor, the examiner was of the view that jurisdiction over the parties to an agreement is not alone sufficient to require that the agreement be filed for approval under section 15. The concerted activity called for in the agreement must also be of the kind contemplated by section 15. The activity here in question is the "control of the longshore work" at the port of Boston. The examiner concluded that the Commission lacked jurisdiction over this activity. Although he failed to state his premise, it is clear that his deduction was based upon a feeling that the control of longshore "labor" is subject only to the National Labor Relations Board and thus not a concern of the Commission. In reaching his conclusion, the examiner first showed that the union had a continuing interest in "the allocation of gangs".⁸ He then concluded that the "collective bargaining agreement" between the BSA and the ILA "formalizing in the collective bargaining agreement the principles of house gangs * * * and first call and recall rights, did not constitute the type of agreement requiring Commission approval under section 15." Finally, he determined that "the consensus of management to exercise its prerogative to require formalization in the collective bargaining agreement of the house gang principle and first call and recall rights * * * did not constitute an agreement subject to Commission approval under section 15." The examiner then described the situation as he foresaw it if the Commission asserts jurisdiction:

If these agreements were subject to section 15, management, in negotiating a collective bargaining agreement with labor, would first have to determine its

⁷ The BSA, consisting of stevedoring contractors, steamship lines, steamship agents, line handlers, terminal operators, lighterage companies and equipment rental companies, although not operating ships or terminals, makes decisions and carries out functions relating to the shipping business, in this case distributing labor for loading and unloading ships, which have significant competitive effects on stevedores and carriers serving the port of Boston.

⁸ However, the examiner also stated: "* * * but the issue of first call and recall has little or no relevance to (the union) because the exercise of these rights comes into play only where there is an abundance of work for the gang." The exercise of first call-recall rights during "peak periods" is the overriding concern of Hearing Counsel and is the basis for virtually their entire case against the BSA.

position and what its demands or requirements in such an agreement would be, then submit the results to the Commission before it would be able to negotiate with labor looking toward a meaningful collective bargaining. And as the collective bargaining went on and its position changed, management would, each time, be required to come in for prior approval before new negotiations could commence. This would be utterly impractical.

United and hearing counsel except to the examiner's conclusions here. They invite attention to the fact that the examiner didn't even cite much less discuss the two recent cases comprising the only precedent thus far dealing with "labor-management" agreements and section 15.⁹ As hearing counsel put it:

In both of these cases, members of shipping associations comparable to the BSA had arranged among themselves the means to raise moneys for payments into funds established for labor's benefit under the respective collective bargaining agreements involved. The indirect relationship with labor contracts was specifically held not to place the association's arrangements outside Shipping Act jurisdiction.

That an agreement does not cease to be section 15 simply because it is embodied in a labor contract was clearly indicated in *Volkswagen*; and in *United Mineworkers of America v. Pennington*, 381 U.S. 657 (1965), the Supreme Court, when dealing with antitrust jurisdiction over labor agreements, said at pages 664-665:

This is not to say that an agreement resulting from union-employer negotiations is automatically exempt from Sherman Act scrutiny simply because the negotiations involved a compulsory subject of bargaining, regardless of the subject or the form and context of the agreement * * *." But there are limits to what a union or an employer may offer or extract in the name of wages, and because they must bargain does not mean that the agreement reached may disregard other laws * * *.

In *Volkswagen*, while the agreement between the Pacific Maritime Association and the ILWU to create the particular "Mech Fund" was not held subject to section 15, the agreement between the members of the association as to the formula for assessing the membership was found subject to section 15.

Hearing counsel and United urge that the examiner's fear of a breakdown in collective bargaining is groundless since no one is demanding any preapproval clearance of the negotiating positions of management during collective bargaining.

The two agreements which we find to be subject to section 15 of the act are the initial agreement among the members of the BSA to allocate labor gangs to the various stevedores and the later agreement to

⁹ The two cases are, of course, *Volkswagenwerk v. FMC*, 390 U.S. 261 (1968) and *Agreement No. T-2336—New York Shipping Association Cooperative Working Arrangement*, Docket No. 69-57, November 20, 1970.

provide for the first call-recall system. That the latter agreement is embodied in a labor agreement by no means removes it from our jurisdiction. There is ample evidence in the record which attests to the fact that these agreements were first worked out among and between the members of the BSA and only then were they incorporated into the labor agreement. In fact, these two agreements were of little or no concern to the union, whose vice president, Mr. Moran, testified that as far as the union was concerned, "It's a fight among them guys." (Referring to the BSA members.)

We feel that the examiner's fear of a breakdown in collective bargaining is without basis. We are not suggesting in this opinion that preapproval clearance of the negotiating positions of management during collective bargaining need be obtained from the Commission. What we are saying, however, is that if an agreement, subject to section 15, is embodied in a collective bargaining agreement, then the section 15 agreement must be filed for approval.

Construing the statute broadly, as the U.S. Supreme Court has mandated, we cannot conclude otherwise but that the two agreements here are cooperative working arrangements within the meaning of section 15 of the act. Thus, in the instant proceeding we find that both the initial allocation of gangs agreement, as well as the later first call-recall agreement embodied in the labor agreement, constitute "cooperative working arrangement[s]" within the meaning of that phrase in section 15 of the act. It is therefore our conclusion that both these agreements are section 15 agreements and as such must be filed with the Commission for approval. Since these agreements remain unfiled, they are unlawful and failure to so file constitutes a violation of the act.

It is not possible to lay down any hard and fast rules concerning the filing of agreements within the category of "cooperative working arrangements". Whether an agreement must be filed would depend upon the facts and circumstances under which the agreement came into being and the aims and purposes expressed therein. The Shipping Act was formulated in order to regulate carriers by water engaged in ocean transportation. Thus, any cooperative working arrangement dealing with or pertaining to ocean transportation and encompassed within the scope of the Shipping Act is an agreement subject to the Commission's scrutiny.

The two agreements in issue are "cooperative working arrangements". Whether they are cooperative working arrangements as that phrase is used in section 15 is quite another matter, but that they are

cooperative working arrangements within the literal meaning of the phrase is indisputable.

Proceeding from the premise that these agreements are literally cooperative working arrangements, we would reach the conclusion that they are section 15 agreements, even were we to proceed by the theory of *ejusdem generis* thought too narrow in the *Volkswagen* Supreme Court opinion.

Ejusdem generis would have us categorize section 15 agreements into seven headings as enumerated in section 15 of the act; to wit: (1) "fixing or regulating transportation rates or fares"; (2) "giving or receiving special rates, accommodations, or other special privileges or advantages"; (3) "controlling, regulating, preventing, or destroying competition"; (4) "pooling or apportioning earnings, losses, or traffic"; (5) "allotting ports or restricting or otherwise regulating the number and character of sailings between ports"; (6) "limiting or regulating in any way the volume or character of freight or passenger traffic to be carried"; (7) "or in any manner providing for an exclusive, preferential, or cooperative working arrangement."

Thus, in order for a cooperative working arrangement to fall within the purview of section 15, the principle of *ejusdem generis* requires that the last category (7) of section 15 agreements relate back to the previous six subheadings. Under this view, it is our conclusion that the cooperative working arrangements under consideration herein are of the same general nature as those enumerated in subheadings 1-6. The allocation of gangs and the first call-recall system agreements clearly give special accommodations or other special privileges or advantages to certain members of the BSA. The agreements also regulate competition among the various stevedores since those assigned fewer gangs cannot hold themselves out as able to handle as much work as a stevedore with more gangs. It is therefore apparent that even under the stricter construction of section 15 required by *ejusdem generis*, the cooperative working arrangements among the BSA members are section 15 agreements.

In the *Volkswagen* case, *supra*, the U.S. Supreme Court held that such a narrow construction of section 15 as would be warranted by the *ejusdem generis* theory was not required. In fact, in that case the examiner, proceeding from the premise that the agreement in question (assessment of Pacific Maritime Association members for a "Mechanization and Modernization Fund") was a cooperative working arrangement, concluded by means of the *ejusdem generis* theory that it was not a section 15 agreement. The Commission agreed with the examiner and added that the agreement was not subject to the act because it did not affect competition.

As we pointed out above in our discussion concerning the BSA incorporation papers and bylaws, the Supreme Court felt the Commission had taken "an extremely narrow view of a statute that uses expansive language." Our rationale, as well as the authority cited for our conclusion with respect to the BSA incorporation papers and bylaws, applies equally as well as to the agreements considered presently. Hence, as we concluded in that discussion, whether or not the agreements affect competition is beside the point; the legislative history of the statute squares with our conclusion that these cooperative working arrangements are section 15 agreements.

The Alleged Violations of Sections 16 and 17

The examiner concluded that even were the jurisdictional questions resolved in favor of United, the record failed to establish that United had been harmed by the practices of the BSA. The case is built upon gang shortages on peak days, and necessarily upon gang shortages under preisee and specific circumstances. Thus, in order to show that it has been prejudiced under section 16 or that the practices of the BSA are unfair or discriminatory under section 17, United must show:

1. That it has more than one vessel in port on a given day, thus establishing a need for additional gangs;
2. That all other gangs are unavailable because they have been called or recalled; and
3. That at least one of United's stevedore competitors is working only one vessel with all of its seven gangs.

Anything less than this, which is the allegation of United and hearing counsel, might constitute prejudice or discrimination but it would not be undue or unjust.

We have analyzed the record in this proceeding and have found no evidence to support any findings that the above situation actually occurred. Thus, we conclude that there have been no violations of sections 16 and/or 17 of the act.

ULTIMATE CONCLUSIONS

For the foregoing reasons, the examiner is reversed in all his conclusions except that as to sections 16 and 17 violations. We conclude that (1) the BSA as an entity is subject to the act; (2) the incorporation papers and bylaws of the BSA constitute section 15 agreements and must be filed for our approval; (3) the agreement among and between members of the BSA as to allocation of labor gangs among stevedores is subject to section 15 of the act and must be filed for our

approval; (4) the agreement among and between members of the BSA as to the "first call-recall" system is subject to section 15 and must be filed for our approval; and (5) there have been no violations of sections 16 and/or 17 of the act. As to the examiner's conclusion that the individual stevedoring members of the BSA are not subject to our jurisdiction, we express no opinion since to reach our decision it is unnecessary to resolve this jurisdictional question. We will order the BSA to cease and desist from operating under its present agreements until such agreements have been filed with and approved by the Commission.

An appropriate order will be issued.

(S) FRANCIS C. HURNEY,
Secretary.

ORDER

The Federal Maritime Commission has this day served its report in the subject proceeding, which we hereby incorporate herein, in which, *inter alia*, it found several agreements among and between parties subject to the Shipping Act, 1916, to be section 15 agreements.

Therefore, for the reasons articulated in said report,

It is ordered, That the incorporation papers and bylaws of the Boston Shipping Association (BSA) be submitted to the Commission for approval;

It is further ordered, That the agreement among and between the members of the BSA as to the allocation of labor gangs among stevedores be submitted to the Commission for approval;

It is further ordered, That the agreement among and between members of the BSA as to the "first call-recall" system be submitted to the Commission for approval; and

It is further ordered, That the BSA cease and desist from operating under the subject agreements until such time as they may be approved by the Commission.

By the Commission.

(S) FRANCIS C. HURNEY,
Secretary.

15 F.M.C.

FEDERAL MARITIME COMMISSION

WASHINGTON, D.C.

SPECIAL DOCKET NO. 429

OPPENHEIMER INTERCONTINENTAL CORP.

v.

MOORE-McCORMACK LINES, INC.

SPECIAL DOCKET NO. 430

OPPENHEIMER INTERCONTINENTAL CORP.

v.

SOUTH AFRICAN MARINE CORP.

November 30, 1971

NOTICE OF ADOPTION OF INITIAL DECISION

No exceptions having been filed to the initial decision of the examiner in this proceeding, served November 2, 1971, and the Commission having determined not to review same, notice is hereby given that the decision became the decision of the Commission on November 30, 1971.

It is ordered, That the applications of Moore-McCormack Lines, Inc., in Special Docket No. 429 and South African Marine Corp., in Special Docket No. 430, are denied.

By the Commission.

[SEAL]

(S) FRANCIS C. HURNEY,
Secretary.

FEDERAL MARITIME COMMISSION

SPECIAL DOCKET No. 429

OPPENHEIMER INTERCONTINENTAL CORP.

v.

MOORE-McCORMACK LINES, INC.

SPECIAL DOCKET No. 480

OPPENHEIMER INTERCONTINENTAL CORP.

v.

SOUTH AFRICAN MARINE CORPORATION

Denial of applications to waive a portion of freight charges.

INITIAL DECISION OF STANLEY M. LEVY, PRESIDING EXAMINER¹

Moore-McCormack Lines, Inc. (applicant/respondent) seeks permission to waive \$2,178 to Oppenheimer International Corp. (shipper), being a portion of the freight charges on a shipment in twelve 20-foot containers consisting of 12 peanut combines and 24 peanut-digger-shaker-windrawers from Savannah, Ga. to East London, South Africa on January 19, 1971.

South African Marine Corp. (applicant/respondent) seeks permission to waive \$2,112 to Oppenheimer International Corp. (shipper), being a portion of the freight charges on a shipment in twelve 20-foot containers of peanut combines, cultivators, diggers and ports from Savannah, Ga., to East London, South Africa on January 20, 1971.

The tariff involved is South and East Africa Conference South-bound Freight Tariff No. 1 (FMC No. 2).

The conference proposed to institute a general rate increase, effective October 1, 1970. On September 23, 1970, Oppenheimer wrote to

¹ This decision became the decision of the Commission Nov. 30, 1971.

the conference requesting relief from the then pending increase in order to prevent loss of sales of peanut combines and peanut-digger-shaker-windrawer which had been consummated on the basis of the rate in existence prior to October 1. At a meeting on September 30, 1970, the conference agreed to maintain the existing rate through January 31, 1971, and changed the tariff accordingly.²

Overlooked by the staff of the Conference was a previous action taken by the Conference on September 9, 1970, to increase the minimum rate³ for shipments made in containers from 90 cents per cubic foot to \$1.10 per cubic foot based on the cubic capacity of the container. The capacity of 20-foot containers is stated on page 88 of the tariff to be 1,100 cubic feet. At \$1.10 per cubic foot the minimum charge per container is \$1,210; at 90 cents per cubic foot the minimum charge per container was \$990.

The bill of lading for the Moore-McCormack shipment⁴ establishes that each container had in it a shipment of 935 cubic feet. If the shipment had been rated at \$44 per 40 cubic feet as intended by the parties on September 30, 1970, the result would have been a charge per container of \$1,028.50. This charge would have been in excess of the former minimum charge of \$990, but \$181.50 less per container than the new minimum charge of \$1,210. The bill of lading for the South African Marine Corp. shipment⁵ established that the content of the 12 containers varied between 915 cubic feet and 975 cubic feet per container, for a total of 11,280 cubic feet. If the shipment had been rated at \$44 per 40 cubic feet as intended, the result would have been a total charge of \$13,608 and would have been in excess of the former minimum charge totaling \$11,880 for the 12 containers. The parties failed to realize, however, that a penalty would accrue on each shipment by reason of the application of a new minimum charge.

If proper cognizance of the higher minimum charge had been taken by the conference staff, an exception could have been filed in the tariff exempting complainant's commodities from the application of the higher minimum charge through January 31, 1971, to correspond with the date for which the rate was filed. It is the difference between \$1,028.50 per container and the new container minimum of \$1,210 that Moore-McCormack seeks authority to waive. This difference for 12 containers totals \$2,178. It is the difference between \$13,608 and the

² First revision, page 143, effective date *Oct. 8, 1970. *Except as otherwise herein provided. (Peanut combines and peanut-digger-shaker-windrawers (effective Oct. 1 through Jan. 31, 1971)).

³ Effective Jan. 1, 1971.

⁴ Bill of lading No. 3, Mormacrtgel, Jan. 19, 1971.

⁵ Bill of lading No. 1, Welch City, Jan. 20, 1971.

new container minimum totaling \$15,720 that South African Marine seeks to waive.

DISCUSSION AND CONCLUSIONS

Section 18(b) (3) of the Shipping Act, 1916, specifies that no common carrier by water in foreign commerce or conference of such carriers shall charge or demand or collect or receive a *greater or less or different compensation* for the transportation of property *than the rates and charges which are specified in its tariffs* on file with the Commission and duly published and in effect at the time; *nor shall any such carrier rebate, refund, or remit in any manner* or by any device any portion of the rates or charges so specified. But because the Congress was aware of the possibility that errors in filed tariffs might result in a charge other than intended, it provided a specific remedy. The statute, accordingly, further sets forth that the Commission, in its discretion and for good cause, may permit a carrier to refund a portion of the charges collected or waive collection of a portion where it appears that there is an error in a tariff of a clerical or administrative nature or an error due to inadvertence in failing to file a new tariff.

The statute expressly states, however, that the Commission may permit a refund or waiver only "*Provided further, that the common carrier by water in foreign commerce or conference of such carriers has, prior to applying for authority to make refund, filed a new tariff with the Federal Maritime Commission which sets forth the rate on which such refund or waiver would be based.*"

The statute further provides, that such application for refund or waiver must be filed with the Commission within 180 days from the date of shipment.

Thus it is clear that no carrier may charge less than the filed tariff in effect at the time of shipment unless it is granted permission by the Commission. It is equally clear that before any such permission can be granted the carrier must first file a new tariff and thereafter file an application requesting the new tariff be made applicable to the prior shipment. Failure to take timely either of these two steps precludes the Commission from considering whether to permit a lesser charge than was actually in effect at the time of the shipment. This is so because the jurisdiction of the Commission to permit a refund is expressly set forth and expressly circumscribed by the statute. Failure of a carrier to comply with the statutory prior conditions deprives the Commission of jurisdiction.

Although the carriers filed applications within 180 days of the shipments involved herein ⁶ the filing thereof is a nullity for failure to file a new tariff prior to filing the applications.

Should the conference now file a new tariff and thereafter the carriers file another application such applications in the instant cases would fail for not having been filed within the statutory required period of 180 days from the date of shipment.

Because the examiner deemed critical to a decision in this proceeding the question of whether the Commission has jurisdiction to grant the relief requested when there has been no prior filing of a tariff which would form the basis for refund or waiver of collection, on August 6, 1971, after receipt of the completed applications filed on August 4, 1971, he requested the parties to submit a memorandum of law on this issue. The South and East Africa Conference filed a memorandum in response thereto.

In its memorandum the conference asserts that it filed a new rate prior to the applications. This begs the question. The rate filing referred to in its memorandum is the first revision, page 143. The waiver concerns itself with another provision of the tariff which governs the involved shipment. It is relief from the application of rule B 15, first revision, page 93, effective date January 1, 1971, which is sought and which must be obtained before waiver of charges is lawful. No further revision of this rule through the filing of a new tariff was ever undertaken prior to the filing on July 3, 1971, of the applications for authority to waive the collection of a portion of the freight charges.

If it was the intention of the parties to exempt the commodity shipped from the increase in container minimum charges, as exemplified by the first revision to page 93 of the tariff, then an appropriate further revision should have been filed. Failure to file such further revision prior to the shipment could be remedied after shipment only as provided by the statute.

There has been a failure of compliance with the statutory requirement. No authority resides with the examiner or the Commission to waive a statutory requirement unless the statute itself permits the waiver. This statute does not permit a waiver of the requirement of a filing of a new tariff prior to filing an application for authority to refund or waive collection of a portion of the freight charges.

⁶ The applications were filed with the Secretary of the Commission on July 3, 1971, 174 and 175 days after shipment. Although the applications were incomplete, they were subsequently completed on Aug. 4, 1971, and are considered as having been filed within 180 days of shipment. *Messrs. Da Prato-Florence etc. v. Med-Gulf Conf. etc.*, 13 F.M.C. 135 (1969).

There is no question that the carriers and the conference acted in good faith and that the publication first revision, page 143 was intended to implement the intention of the parties and preserve the lower rate through January 31, 1971. However, the proper charges of a common carrier by water in foreign commerce or conference of such carriers is established as specified in its tariffs on file with the Commission and duly published and in effect at the time. The tariff, looked at as a whole as it must be, established a rate at the time of the shipment which was higher than contemplated by the agreement of the parties.

The conference in its memorandum suggests that the minimum container charge is not a rate within the meaning of the statute since this charge appears in the rules section of the tariff and not in the rate section. It says that in effect the charge sets a floor for the per container revenue and does not become operative until the revenue produced by the rate falls below the level of the minimum charge. Here the increased minimum container charge which was applied to this shipment was at the same level as the rate, that is, \$1.10 per cubic feet for the charge and \$44 per 40 cubic feet for the rate. The charge was applied to space not occupied by the shipment. Hence, the conference contends, in this sense the charge was not in fact a rate and therefore would not need to be filed prior to application for waiver in circumstances where the basic rate intended to be applied was on file at the time of shipment.

The suggestion of the conference is contrary to the very rationale which is the foundation and cornerstone of section 18 of the Shipping Act, 1916, requiring published tariffs. The conference admits that the minimum container charge establishes a floor for the per container revenue. Yet the charge contended for by it would ignore the clearly resulting revenue floor established by the application and utilization of rule C2 relating to charges per cubic foot. The conference would read this rate out of the tariff. No such reading out is permitted by section 18(b)(3).

The applications for authority to waive a portion of the freight charges are denied because of applicants/respondents' failure to file a new tariff which would set forth the rate on which such waiver would be based. Freight charges hitherto waived should be collected.

(S) STANLEY M. LEVY,
Presiding Examiner.

WASHINGTON, D.C.,
November 2, 1971.

FEDERAL MARITIME COMMISSION

DOCKET No. 68-44

MALPRACTICES—BRAZIL/UNITED STATES TRADE

December 3, 1971

Companhia de Navegacion Maritima, Netumar, Norton Line, Companhia de Navegacao Loide Brasileiro, Empresa Lineas Maritimas Argentinas, and Navegacao Mercantil S/A-Navem, found to have violated sections 16 Second and 18(b) (3) of the Shipping Act, 1916.

Sanford C. Miller for respondents Brodin Lines, Columbus Line, Holland Pan-American Line, and Northern Pan-American Line.

Harold Mesirov for respondents Booth Steamship Co., Dovar Line, and Lamport-Holt Line.

Elmer C. Maddy and *Baldwin Einarson* for respondents Norton Line and Ivaran Steamship Line.

Donald Macleay and *Thomas E. Stakem* for respondents Delta Steamship Lines and Moore-McCormack Lines.

Frank J. McConnell for respondent Navegacao Mercantil S.A.—Navem.

Frank P. Kopp for respondent Georgia Steamship Corp.

David Kay and *Seymour H. Kligler* for respondent Empresa Lineas Maritimas Argentinas.

Renato C. Giallorenzi for respondent Companhia de Navegacion Maritima, Netumar.

Marvin J. Coles, *Neal N. Mayer*, and *William T. Foley, Jr.*, for respondent Companhia de Navegacao Lloyd Brasileiro, S.A.

Philip J. Harter for intervener Department of Transportation.

James L. Malone, *Paul Fitzpatrick* and *Donald J. Brunner*, hearing counsel.

REPORT

BY THE COMMISSION: (Helen Delich Bentley, *chairman*; Ashton C. Barrett, *vice chairman*; James V. Day, George H. Hearn, *commissioners*)*

On October 28, 1968, the Commission, pursuant to sections 16, 18(b) (3) and 22 of the Shipping Act, 1916, instituted an investigation and hearing to determine whether:

*Commissioner Clarence Morse did not participate.

* * * any common carrier by water in the trades between the U.S. Atlantic and gulf coasts and Brazil either alone or in conjunction with other persons, directly or indirectly, made or gave any undue preference or advantage to any particular person, locality or description of traffic to any undue or unreasonable prejudice or disadvantage in any respect whatsoever in violation of section 16 first of the act, and whether any common carrier or other person subject to the act, either alone or in conjunction with, any other person directly or indirectly, allowed any person to obtain transportation for property at less than the regular rates or charges then established on the line of such carriers by means of any unjust or unfair device or means in violation of section 16 second and 18(b) (3) of the act.

During the course of the hearing and upon motion by hearing counsel, the order of investigation was amended to expand the proceeding to determine whether any common carriers by water "made or gave or are making or giving undue preference or advantage" or whether any common carrier by water or other person subject to the act, either alone or in conjunction with any other person, directly or indirectly, "allowed or is allowing" any person to obtain transportation of property at less than the regular rates.

Memoranda were filed by hearing counsel and 10 of the designated respondents, including Navegacao Mercantil S/A (Navem), Brodin Line, Columbus Line, Inc., The Northern Pan-American Line S/A (NOPAL), Companhia de Navegacao Lloyd Brasileiro (Loide), Empresa Lineas Maritimas Argentinas (E.L.M.A.), Ivaran Line, Norton Line, Georgia Steamship Corp. and Companhia de Navegacao Maritima Netumar (Netumar).

Presiding Examiner Herbert K. Greer issued an initial decision in which he found that "rebating is and has been since 1964, a practice in the northbound trade between Brazil and the United States." Specifically, he found that respondents Norton, E.L.M.A., Navem, Loide and Netumar violated section 16 second of the act by allowing Imperial Commodities Corp. (Imperial) to obtain transportation at less than the regular rates or charges by the unjust and unfair means of compensating Procafe and/or Stockler, exporters from Brazil, for the privilege of being selected as the carrier of coffee sold by those exporters to Imperial, and the passing on of all or a part of that compensation by the exporters to Imperial who paid the freight." He also found respondents Norton, E.L.M.A., Navem, Loide and Netumar to have violated section 18(b) (3) of the Shipping Act, 1916 (46 U.S.C. 801, *et seq.*) by receiving less or different compensation for the transportation of coffee than specified in the applicable tariff. He found no violations of section 16 first of the act as the record did not disclose that anyone was an actual victim of prejudice or disadvantage.

Exceptions to the examiner's decision have been filed by Loide, Norton, Navem, Netumar and E.L.M.A. We have heard oral argument.

THE EXAMINER'S DECISION

After a careful and thorough review of the record before us, we have concluded that the examiner's initial decision both sets forth a true and complete statement of the facts as they existed in the trade in question and constitutes a correct and justifiable resolution of the issues presented for determination. Therefore, we adopt the examiner's initial decision (a copy of which is attached hereto and made a part hereof) as our own.

EXCEPTIONS

In excepting to the examiner's decision, the respondents set forth identical or similar arguments, many of which simply reemphasize points or positions made in their initial legal memoranda. The crux of these exceptions is the proposition that under the Administrative Procedure Act (5 U.S.C. 500, *et seq.*) an agency's ultimate finding must be supported by *substantial and probative evidence*, which respondent's contending hearing counsel have failed to adduce with respect to the present allegations of rebating. Instead, they contend in common that the evidence is "uncorroborated hearsay, based on rumor, gossip, beliefs, and statistics which fail to show a specific rebate by any carrier." Cited in support of their position, *inter alia*, are the cases of *Edison v. Labor Board*, 305 U.S. 197 (1938) and *Willapoint Oysters v. Ewing*, 174 F. 2d 676 (9th Cir. 1949), wherein the courts said in one form or another that "substantial evidence" included more than "uncorroborated hearsay" or hearsay corroborated by mere scintilla.

We, however, affirm the examiner's analysis of the quality of the evidence in this record. As pointed out by the examiner in his initial decision, there is sufficient reliable evidence in the record to corroborate the hearsay testimony in the record before us.

Moreover, the respondent's argument that uncorroborated hearsay may not constitute reliable, probative, and substantial evidence to support a finding in our administrative proceeding is unfounded. As appropriately pointed out by hearing counsel, there is a well-developed trend favoring increased relaxation of the so-called jury trial rules when making findings in administrative proceedings. There are times when uncorroborated hearsay can constitute substantial evidence to support an administrative finding and times when it does not, depending upon a number of variables. When the conditions are appropriate, there is nothing, in our opinion, to prevent an examiner from basing

his decision, which is adverse to a claimant, on hearsay evidence, *if* such evidence has sufficient probative force to support the decision. The sufficiency of the hearsay to support a finding must be judged by taking into account the convincing quality of the particular hearsay or lack of it, the opposing evidence or lack of it, and the circumstances.

Indeed, the Supreme Court has most recently handed down a decision in the case of *Richardson v. Perales*, 39 L.W. 4497 (May 3, 1971), wherein it held that hearsay evidence may constitute substantial evidence supportive of a finding by the hearing examiner adverse to the claimant. The question therein essentially was what procedural due process required with respect to examining physician's reports in a social security disability claim hearing and whether such reports could constitute "substantial evidence" supportive of a finding of non-disability. The court held that the written reports by the physicians constituted "substantial evidence" notwithstanding the reports' hearsay character, the absence of cross-examination, and the directly opposing testimony by the claimant and his medical witness.

Of particular interest are the Court's comments on Mr. Chief Justice Hughes' statement in *Consolidated Edison Co. v. NLRB*, 305 U.S. at 230: "mere uncorroborated hearsay or rumor does not constitute substantial evidence." That statement and ones of similar content have been referred to frequently by respondents in the case presently before us. The court said in reference thereto:

* * * we feel that the claimant and the court of appeals read too much into the single sentence from *Consolidated Edison*. The contrast the Chief Justice was drawing, at the very page cited, was not with material that would be deemed formally inadmissible in judicial proceedings but with material "without a basis in evidence having rational probative force." This was not a blanket rejection by the court of administrative reliance of hearsay irrespective of reliability and probative value. The opposite was the case.

While there are, however, certain factual differences between that case and the one before the Commission, the decision does support the general assertion that hearsay evidence can constitute, *under certain conditions*, substantial evidence to support an administrative finding.

The Court therein was prompted in its analysis by a number of factors which it felt assured the underlying reliability and probative value of the evidence in question.

We, likewise, feel that, regardless of the question of corroborating evidence, the record herein repeatedly indicates that rebating was practiced by the respondents and substantiates that conclusion with evidence which, as the examiner indicates under existing conditions is "logically probative of the existence of the fact sought to be shown."

Therefore, respondents' exceptions to the examiner's decision based on his reliance on hearsay evidence are without merit under the present facts.

Norton, joined by E.L.M.A., also except to the examiner's conclusion that if a finding of violations of the act is supported by this record (which both lines maintain is not the case), the person nominated by the line to solicit freight in Brazil was its agent for the purpose of engaging in the alleged rebating transactions. Both Norton and E.L.M.A. contend it has not been shown on the record that they knew or should have known that anyone in Brazil, purporting to act in their behalf, was involved in the transactions that the examiner suspects may have occurred. Proof that the person nominated by them to solicit freight in Brazil was their agent for the purpose of engaging in the alleged transactions is, in their opinion, vital to any finding of violation of law by either line. Norton and E.L.M.A. contend there is simply no evidence of this sort on the record.

Having found that the alleged incidents of rebating were proven on the record, the above exception is without merit. As validly pointed out by hearing counsel, the Shipping Act cannot be circumvented through the medium of an agent and therefore, whether the carrier authorized the agent to rebate, or indeed even knew of such activity, is not the fundamental concern.

E.L.M.A. further excepts to the examiner's additional finding of fact, wherein an incident of rebating was found based on an E.L.M.A. bill of lading dated January 25, 1970, and a Procafe credit memorandum dated January 30, 1970. That finding involves the testimony of Mr. Anisansel as president of Imperial and exhibits 293, 294, and 295, introduced into evidence as a result of his testimony involving events which transpired on or after January 19, 1970. E.L.M.A. argues the alleged violation is outside the scope of the investigation since the latest time as of when the Commission could have spoken in utilizing the term "current" and in amending the order to include present-tense verbs, was as of the date of its amendatory order, i.e., January 5, 1970.

The examiner summarily rejected the contention, and E.L.M.A. excepts to his conclusion on the grounds that it could set precedent for indefinitely extending the duration of every Commission investigation *and* that such interpretation would render it unconstitutional as a violation of the constitutional precept of due process in that respondents have been denied adequate warning of the "parameters of the investigation, prior to the hearing, so that they can have time to prepare therefor."

We fail, however, to find any merit in this complaint. The examiner has given the only logical interpretation to our use of present-tense verbs and the word "current" in our amended order of investigation. Respondents have received adequate warning of the parameters of the investigation in order to prepare their defense. No precepts of due process have been violated, and the examiner's rejection of E.L.M.A.'s argument is upheld.

Also in support of its assertion that it was denied a fair hearing, E.L.M.A. excepts to the examiner's failure to issue the requested subpoena to Imperial for missing documents related to exhibits 293-295 and showing the terms of the purchase of the 5,000 bags of coffee by Imperial from Procafe. E.L.M.A. asserts that the examiner's failure to issue the subpoena prejudiced its right to a full and complete cross-examination of the witness Anisansel concerning its alleged violation of law in regard to the shipment on the "Rio Bermejo and, therefore, violates any evidentiary value which may be ascribed to exhibits 293-295 and Mr. Anisansel's testimony concerning them."

Though the record indicates that there may have been some confusion on the part of all parties as to the status of the request for the subpoena, the examiner was correct in finding that the conditional nature of the request by E.L.M.A. for the issuance of the subpoena did not comply with the procedure outlined in the Commission's rule 9(a) of the rules of practice and procedure, 46 CFR 502, *et seq.*, and therefore could not be honored. More importantly, however, was the conditional nature of the examiner's original agreement to issue a subpoena *if a need exists*—a need which the examiner subsequently found in his judgment did not exist in light of Imperial's exhaustive search for any other relevant documents. We affirm that judgment by the examiner and conclude that E.L.M.A. has not shown, in our opinion, that the examiner's action prejudiced its right to a full and complete cross-examination of the witness.

Finally, E.L.M.A. excepts to the examiner's ruling that he would limit the cross-examination by any respondent's counsel of any witness called during the duration of the hearing "to that part of the witness' direct testimony in regard to the respondent carrier which that attorney represented." It is E.L.M.A.'s contention that such curtailment of cross-examination prevented E.L.M.A.'s counsel from demonstrating material inconsistencies and gross defects in Mr. Anisansel's testimony and therefore vitiates the testimony adduced at the hearing.

The examiner justified his ruling on the ground that it "was made to avoid undue delay in the conduct of the hearing."

E.L.M.A.'s counsel has properly pointed out the sacred stature of the right to cross-examination in order to obtain "a full and true dis-

closure of the facts" under both the Administrative Procedure Act (section 7(d)) and the Commission's own rules of practice and procedure (rule 10(n)). However, under the same Commission rule the examiner is given the right to limit cross-examination of the witnesses when, *in his judgment*, such evidence is (1) cumulative, or is (2) productive of undue delay in the conduct of a hearing. The determining factor is the independent judgment of the presiding examiner, and in our opinion, his judgment should be upheld unless it results in some serious miscarriage of justice. E.L.M.A.'s counsel has failed to convince us in the present case of any denial of his right to a full and fair cross-examination. No miscarriage of justice has resulted from the examiner's ruling, and his action is therefore affirmed.

CONCLUSION

We are fully cognizant of the numerous difficulties which face an inquiry such as this, including among others the problems of non-availability of witnesses and documents located in foreign countries. Recognizing these problems, however, it is still our responsibility to insure that all common carriers by water operating in the commerce of the United States with foreign countries and its own territories perform in such manner as not to jeopardize the legitimate and enforceable interests of any common carriers participating in the same trade.

Therefore, our goal in all controversies is to arrive at a just or equitable result for all parties in accordance with the mandates of the Shipping Act, 1916, and with a minimum of governmental interference. We trust that in the future when problems such as those now before us arise in the United States/Brazil trade, we may expect the continued cooperation of the Government of Brazil in resolving those problems on an informal basis without resorting to time-consuming and often pointless litigation. Much progress has been made in resolving the problems that have traditionally plagued the United States/Brazil trade, and it is our intent with the cooperation of the carriers concerned, to exert every effort to further develop that long sought after spirit of cooperation.

Whenever possible, Governments should permit commercial initiative to be the chief catalyst in solving problems in ocean commerce. The Government at either end of a trade route should intervene only when carriers or conferences are unable to resolve the issues, or when there is actual or imminent harm to the country's foreign waterborne commerce. And the United States certainly will intervene to prevent

all unjust discriminations or protective devices against our ships or cargoes, and any other conditions causing detriment to our foreign commerce. We will do so whether the detriment is caused by commercial or governmental action.

Carriers should avoid creating situations which necessitate solutions by regulation, decree or similar Government action. Conferences and carriers must bear the responsibility to cooperate in maintaining stable and reliable service.

The introduction to this or any trade of rebating and other malpractices can lead only to chaos, and will produce prohibitive costs to shippers, carriers, and national interests. As a result of this proceeding and the role played by the parties and Governments concerned, we hope and expect to see in the Brazil/United States trade the stability and reliability necessary to serve the best interests of the users and suppliers of ocean transportation.

Any other exception to the initial decision or requests for findings not specifically ruled upon herein have been found to be improper or immaterial, cumulative, or otherwise unnecessary to the decision.

An appropriate order will be entered.

[SEAL.]

(S) FRANCIS C. HURNEY,
Secretary.

15 F.M.C.

FEDERAL MARITIME COMMISSION

DOCKET No. 68-44

MALPRACTICES—BRAZIL/UNITED STATES TRADE

ORDER

The Federal Maritime Commission instituted this proceeding to determine whether:

* * * any common carrier by water in the trades between the U.S. Atlantic and Gulf coasts and Brazil either alone or in conjunction with other persons, directly or indirectly, made or gave or are making or giving any undue preference or advantage to any particular person, locality or description of traffic to any undue or unreasonable prejudice or disadvantage in any respect whatsoever in violation of section 16 first of the act, and whether any common carrier or other person subject to the act, either alone or in conjunction with, any other person directly or indirectly allowed or is allowing any person to obtain transportation for property at less than the regular rates or charges then established on the line of such carriers by means of any unjust or unfair device or means in violation of section 16 second and 18(b) (3) of the act.

The Commission having fully considered the above matter and having this date made and entered its report stating its findings and conclusions, which report is made a part hereof:

It is ordered, That all carriers serving in the northbound trade between Brazil and the United States, and specifically E.L.M.A., Loide, and Netumar as the only remaining carriers in that trade of the respondents found in violation of the Shipping Act, 1916, henceforth cease and desist from transporting coffee at less or different compensation than that specified in the applicable tariff.

By the Commission.

[SEAL]

(S) FRANCIS C. HURNEY,
Secretary.

FEDERAL MARITIME COMMISSION

No. 68-44

MALPRACTICES—BRAZIL/UNITED STATES TRADE

Companhia de Navegacao Maritima Netumar, Norton Line, Companhia de Navegacao Loide Brasileiro, Empresa Lineas Maritimas Argentinas, and Navegacao Mercantil S/A found to have violated sections 16 second and 18(b) (8) of the Shipping Act, 1916.

Sanford C. Miller for respondents Brodin Lines, Columbus Line, Holland Pan-American Line, and Northern Pan-American Line.

Harold Mesirov for respondents Booth Steamship Co., Dovar Line, and Lamport-Holt Line.

Elmer C. Maddy and *Baldvin Einarson* for respondents Norton Line and Ivaran Steamship Line.

Donald Macleay and *Thomas E. Stakem* for respondents Delta Steamship Lines and Moore-McCormack Lines.

Frank J. McConnell for respondent Navegacao Mercantil S/A.

Frank P. Kopp for respondent Georgia Steamship Corp.

Seymour H. Kligler for respondent Empresa Lineas Maritimas Argentinas.

Renato C. Giallorenzi for respondent Companhia de Navegacao Maritime Netumar.

Marvin J. Coles, *Neal N. Mayer*, and *William T. Foley, Jr.*, for respondent Companhia de Navegacao Loide Brasileiro.

Phillip J. Harter for intervener Department of Transportation.

Donald J. Brunner, *Paul Fitzpatrick* and *James L. Malone*, hearing counsel.

INITIAL DECISION OF HERBERT K. GREER, PRESIDING EXAMINER¹

This proceeding was instituted for the purpose of determining whether any common carrier by water in the trades between the U.S.

¹ This decision became the decision of the Commission Dec. 8, 1971.

Atlantic and gulf coasts and Brazil either alone or in conjunction with other persons, directly or indirectly, made or gave any undue preference or advantage to any particular person, locality, or description of traffic to any undue or unreasonable prejudice or disadvantage in any respect whatsoever in violation of section 16, first, of the Shipping Act, 1916 (the act), and whether any common carrier or other person subject to the act, either alone or in conjunction with any other person, directly or indirectly, allowed any person to obtain transportation for property at less than the regular rates or charges then established and on the lines of such carriers by means of any unjust or unfair device or means in violation of section 16, second, and 18(b) (3) of the act. During the course of the hearing and upon motion by hearing counsel, the order of investigation was amended to expand the proceeding to determine whether any common carrier by water "made or gave or are making or giving undue preference or advantage" or whether any common carrier by water or other person subject to the act, either alone or in conjunction with any other person, directly or indirectly, "allowed or is allowing" any person to obtain transportation of property at less than the regular rates.

Common carriers by water made respondents are Brodin Line, The Booth Steamship Co., Ltd. (Booth), Columbus Line, Inc., Companhia de Navegacao Loide Brasileiro (Loide), Companhia de Navegacao Maritima Netumar (Netumar), Delta Steamship Lines, Inc. (Delta), Dovar Line, Empresa Lineas Maritimas Argentinas (E.L.M.A.), Georgia Steamship Corp., Holland Pan-American Line (HOPAL), Ivaran Line, Lamport-Holt Line, Limited, Navegacao Mercantil S/A (Navem), The Northern Pan American Line S/A (NOPAL), Montemar S.A. Commercial Y Maritima (Montemar) Moore-McCormack Lines, Inc. (Moormac), and Norton Line. The Department of Transportation intervened but took no active part in the proceeding.

FINDINGS OF FACT

1. The northbound trade between Brazil and the United States involves many Brazilian produced commodities, including coffee, cacao, sisal, binder twine, castor oil, and Brazil nuts. The trade is highly competitive and the profit margin narrow. Brazilian exporters and U.S. importers carry on their negotiations principally by means of telex and cable communications. Offers and counteroffers include not only the price of the commodity but the privilege of selecting the vessel on which the shipment will be made.

2. Brazilian exporters quote two prices for their products, the lower price being conditioned upon the right of the exporters to select the vessel. The importers pay the freight charges but generally they will waive the right to select the vessel in order to obtain the commodities at the lower prices or to obtain other benefits.

3. The term "points" is used in negotiations for the sale and purchase of coffee as well as the price per bag. A bag of coffee weighs 132 pounds and a point represents one hundredth of a cent per pound, or 1.32 cents per bag.

4. The importers and exporters in negotiating the terms of their purchase and sale agreements by telex and cable frequently use the terms "rebate," "freight rebate," and "freight kickback."

5. The U.S. importers have not been shown to have received freight rebates directly from the carriers. The benefits they receive in return for relinquishing their right to select the vessel, insofar as the record discloses, emanate from the lower prices paid or from credits on account accorded to them by the Brazilian exporters.

6. When the dual-quotation system results in the selection of the vessel by the Brazilian exporters, the vessels selected are of foreign flag lines.

7. The U.S. flag lines, Delta and Moormac, have experienced significant losses of revenue for the reason that they have refused to rebate. While this loss of revenue generally results in connection with the carriage of all commodities in the trade, the loss has been particularly evident with respect to coffee. Delta and Moormac have been traditionally the predominant carriers of coffee.

8. Prior to 1957, Delta carried over 70 percent of the coffee exported each year from Brazil to U.S. gulf coast, but during the period from 1958 to 1968, its carryings steadily decreased to 28.57 percent, and during the first 9 months of 1969, it carried 12.86 percent. E.L.M.A.'s yearly carryings rose from 3.08 percent in 1958 to 10.12 percent in 1968, and during the first 9 months of 1969, to 27.57 percent. Navem entering the trade in 1968, carried 11.69 percent, and during the first 9 months of 1969, it carried 18.51 percent.

9. During 1956, Moormac carried 47 percent of the coffee exported from Brazil to the U.S. east coast, which share steadily decreased each year and to 26 percent in 1968. The carrier with the most significant increase in the carriage of coffee during this period was Loide, from 7 percent to 30 percent.

10. Rebating was a subject openly discussed by Brazilian shippers in the presence of representatives of U.S. flag lines. Brazilian exporters have refused to do business with the U.S. flag lines because those lines would not offer rebates.

11. U.S. importers generally accepted the existence of the practice of rebating by some lines and it was common knowledge "on the street" that the practice existed.

12. Rebating has been a subject discussed between officials of U.S. flag lines and Brazilian officials during attempts to eliminate the practice.

13. During periods covered by this investigation, the Brazilian Government issued decrees to enhance the carriage by their national flag lines.

14. The U.S. flag lines offer equal or better service than the lines selected by Brazilian exporters under the dual-quotation system.

Additional findings of fact as applicable to the individual respondents will be set forth hereinafter.

POSITION OF THE PARTIES

Hearing Counsel

Hearing counsel contend that the record shows widespread rebating by many respondent carriers to exporters of Brazilian commodities, the passage on of all or part of the benefits of the rebates to American importers through the medium of price reductions, and specific violations of sections 16, first and second, and 18(b)(3) of the act by Loide, Navem, E.L.M.A., Netumar, and Norton. They rely on the evidence which demonstrates that it is common knowledge in the trade that rebates are made by certain respondents and that the practice has been common since January 1964, with scattered instances dating back to 1960. They find probative value in the opinion of experts in the trade given on the basis of personal knowledge derived from discussions with Brazilian exporters, contacts with representatives of their carrier competitors, and reports from carrier traffic and sales personnel. Recognizing the abundance of hearsay evidence in the record, they propose a liberal application of the substantial evidence requirement and contend:

Quite aside from whether there has been certain corroborating circumstantial evidence, hearing counsel contends that to the extent their proposed findings of fact rest on wholly hearsay evidence they nevertheless constitute substantial evidence upon which the Commission may rely in making findings.

The requirements of APA section 7(c) calling for Commission findings based only upon reliable, probative, and substantial evidence can be, and indeed in this proceeding are, met by hearsay evidence alone.

In support of their contention, the statement of Judge Hand in *N.L.R.B. v. Remington Rand*, 94 F. 2d (2d Cir., 1938) at page 873, *cert. den.* 304 U.S 576, is quoted:

* * * mere rumor will (not) serve to support a finding, but hearsay may do so if more is not conveniently available, and if in the end the finding is supported by the kind of evidence upon which reasonable persons are accustomed to rely in serious affairs.

Relating this proceeding to the fact that witnesses and documentary evidence in Brazil cannot be made available to the Commission, Judge Hand is further quoted from *G and C. Merriman Co. v. Syndicate Publishing Co.*, 207 F. 515 2d Cir., 1913), at page 518:

If this is not evidence I can see no way of getting any better, and the fact cannot be established at all. Surely the law is not so unreasonable as that.

Also cited is *John Bene & Sons, Inc. v. F.T.C.*, 299 F. 468 (2d Cir., 1924), and quoted is the Court's statement at page 471 that:

We are of opinion that evidence or testimony, even though legally incompetent, if of the kind that usually affects fairminded men in the conduct of their daily and more important affairs, should be received and considered; but it should be done fairly * * *

Professor Davis (2 Davis, *Administrative Law Treatise*, 14.10 (1958)) is quoted on the question of evaluation hearsay as:

(a) The alternative to reliance on the incompetent evidence; (b) the state of the supporting and opposing evidence, if any; (c) the policy of the program being administered and the consequences of a decision either way; (d) the importance or unimportance of the subject matter and considerations of economy of government; (e) the degree of efficacy or lack of efficacy of cross-examination with respect to particular hearsay declarations.

To demonstrate the flexibility of the substantial evidence requirement and the problem faced in applying it, *Jacobowitz v. United States*, 424 F. 2d 555 (Ct. Cl. 1970), at page 561 is cited and the Court's discussion of the problem quoted:

What, then, is substantial evidence? This is a constantly recurring problem which has troubled courts for a long time. A precise definition of substantial evidence is difficult to express in a way that will make it applicable to all situations in all cases. This is so, because there are so many factors that have to be considered, such as different statutes and regulations, "good" hearsay and "bad" hearsay (which are difficult to define), whether or not hearsay is objected to or corroborated, and if corroborated, by what and how much and whether the hearsay is contradicted by direct, legal, and competent evidence and whether the agency has subpoena power.

Hearing counsel further cite, *United States ex rel Dong Wing Ott v. Shaughnessy*, 116 F. Supp. 745 (S.D.N.Y., 1954), at page 750 to support the argument that "Congress has explicitly avoided the requirement of competent evidence to support findings in the Administrative Procedure Act." Also relied upon is *American Rubber Products Corp. v. N.L.R.B.*, 214 F. 2d 47 (7th Cir., 1954). They point out that the

evidence adduced is not contradicted and argue that under the circumstances here appearing, hearsay evidence may support administrative conclusions if more is not conveniently available.

Respondents

Those respondents having filed briefs contend in common that hearing counsel have not adduced evidence which is substantial as required by the Administrative Procedure Act to support an Administrative Agency's conclusions. The evidence is characterized as uncorroborated hearsay, based on rumor, gossip, beliefs, and statistics which fail to show a specific rebate by any carrier. They rely principally on *Edison v. Labor Board*, 305 U.S. 197, 230 (1938), wherein the Court is commenting on the substantial evidence requirement, stated :

The statute provides that the rules of evidence prevailing in courts of law and equity shall not be controlling. The obvious purpose of this and similar provisions is to free administrative boards from the compulsion of technical rules so that the mere admission of matter which would be deemed incompetent in judicial proceedings would not invalidate the administrative order * * *. But this assurance of a desirable flexibility in administrative procedure does not go so far as to justify orders without a basis in evidence having rational probative force. Mere uncorroborated hearsay or rumor does not constitute substantial evidence.

Also cited is *Willapa Point Oysters v. Ewing*, 174 F. 2d 676 (9th Cir., 1949), at page 690, wherein it was held :

The requirement that the administrative findings accord with the substantial evidence does not forbid administrative utilization of probative hearsay in making such findings. Such construction would nullify the first portion of section 7(c) Administrative Procedure Act providing for the receipt of such evidence.

The degrees of probative force and reliability of hearsay evidence are infinite in variation, and its use by administrative bodies, ex necessitate, must in part be governed by the relative unavailability of other and better evidence. However since "substantial evidence" includes more than "uncorroborated hearsay:" and "more than a mere scintilla," the findings to be valid, cannot be based on hearsay alone, not upon hearsay corroborated by mere scintilla. Founded upon these requirements, the test whether the evidence is "substantial," is whether, in the individual case before the court, there is "such relevant evidence as a reasonable mind might accept as adequate to support a conclusion."

Norton refers to *Cohen v. Perales*, 412 F. 2d 44 (5th Cir., 1959), rehearing denied, 416 F. 2d 47, cert. granted sub. nom. *Elliott L. Richardson, Secretary of Health, Education, and Welfare v. Pedro Perales*, 402 U.S. 389 (1970) ², as the most recent confirmation of the substantial evidence rule. This case cites most of the authorities relied upon by respondents.

² The question of the probative value of hearsay may be decided by the Supreme Court in this appeal.

Brodin, Columbus, and Nopal criticize hearing counsel's inference that all respondents were rebating and that uncontradicted evidence involves these carriers. Failure to rebut by evidence, if made a factor is seen as imposing the duty on a carrier to contradict rumors passed by competitors. Ivaran Lines contend that the general statement by a witness that he knew all lines were rebating is not reliable or probative evidence and that no substantial evidence has been adduced to implicate this respondent in any malpractice. Netumar sees only rumor displayed on the record and points out that knowledgeable executives engaged in the trade could not cite any instance of rebating. Navem refers to the many reasons which may influence vessel bookings to include friendship, business relations, national pride, and competition as well as efficiency in carriage, and also the necessity to use any vessel available to get the coffee to the buyer on a specified date.

The testimony relied upon by hearing counsel to involve Loide, Netumar, Navem, ELMA, and Norton with deals made between Imperial, a U.S. importer and Procafe, a Brazilian exporter, is said by them not to demonstrate that the carriers were rebating but only to show that a credit arrangement existed between Imperial and Procafe, not involving the carriers.

Norton, in general agreement with other respondents that only uncorroborated hearsay has been adduced, goes into some detail regarding the coffee trade, pointing out that Brazilian exporters are allowed to register coffee sold 90 days before exportation, which registration guarantees the price for that period; that special contracts are allowed for large roasters which result in a decrease in the price of Brazilian coffee which is called "special coffee"; that the Brazilian Government gives gratuities in exchange for buying more Brazilian coffee, not in the form of currency, but called "advisos"; that the Brazilian Government may set a minimum price for coffee in order to conserve foreign exchange and the importer will at times be invoiced for this price but when the world price is above the minimum price some companies will issue a debt advice to evidence the difference between the Government price and the sales price. It is contended that the evidence does not show any credit advices to be for sales below the minimum price, although credits in evidence were said to be rebates. It is further contended by Norton that the hearing was fundamentally unfair in that the examiner was disposed to admit evidence because if it was not admitted, hearing counsel could not prove their case. The examiner is admonished to stay within his role as a judicial officer and to reach a decision based on evidence, and that as the evidence is unsupported hearsay, this proceeding should be discontinued.

This investigation is seen by Norton as an attempt by the Commission to interfere with U.S. relationships with Brazil, contrary to the comity of nations.

E.L.M.A. in general agreement with other respondents as to the quality of the evidence, objects to the curtailment of its right to cross-examine under the examiner's ruling that cross-examination of a witness would be limited to the respondent or respondents regarding whom the witness testified. It further contends that the incidents hearing counsel rely on to demonstrate a violation of the act by this respondent, occurred subsequently to the time period set forth in the amended order of investigation and are thus beyond the scope of this investigation. Additionally, that rebating has not occurred as the alleged payments by this carrier were made prior to the payment of freight by the consignee. The examiner's refusal to issue a subpoena duces tecum directed to Imperial is said to be error.

Loide argues that the evidence adduced is only uncorroborated hearsay which cannot be the sole basis for findings; that the expert testimony is of no value as such testimony must be based on facts occurring, not on conjecture. Hearing counsel's case is considered weak, unreliable, and farcical and insufficient to support a finding of rebating as to Loide. It contends that Loide always received the full freight and never offered or paid a rebate.

Georgia Steamship Corp. moves that it be dismissed as a party as the record is totally bereft of even a scintilla of evidence that it engaged in malpractices. Other respondents did not file briefs.

DISCUSSION

The briefs deal primarily with the question of rebating for the reason that hearing counsel rely principally on that practice to establish violations of the act. Nevertheless, the issues presented by the order of investigation, as amended, are broader and other violations of sections 16 first and second and 18(b)(3) are also involved. For brevity and convenience, the term "respondents" as hereinafter used refers to those having filed briefs.

The basic issue is whether the record discloses substantial evidence, hearsay and direct or circumstantial, sufficient to support findings of violations of the act. In *Unapproved Section 15 Agreements, S. African Trade*, 7 F.M.C. 159 (1962), at page 169, the Commission held:

The weight to be accorded the statement of someone not on the stand (i.e., hearsay) does not govern and should not be confused with its admissibility. If competent under the criteria applicable in an administrative proceeding, the

statement is receivable in evidence and may be used to support agency action if there is at least some other supporting proof in the record of a direct nature. There is no question here as to the exclusive use of hearsay. To the contrary, there is more than ample proof in the record, both oral and written and often squarely related to and corroborative of the hearsay evidence to justify according the latter credibility and weight. See *N.L.R.B. v. Remington Rand*, 94 F. 2d 862, 873 (CA 2, 1938), cert. den. 304 U.S. 576.

This decision is consonant with the authorities cited by the respondents. These cases do not, however, resolve the question of the quality of the evidence necessary to support hearsay beyond holding that a mere scintilla or remote hearsay is insufficient. The Court in discussing substantial evidence in *Universal Camera Corp. v. N.L.R.B.*, 340 U.S. 474 (1951) at page 496 held:

We intend only to recognize that evidence supporting a conclusion may be less substantial when an impartial, experienced examiner who has observed the witnesses and lived with the case has drawn conclusions * * *. The findings of the examiner are to be considered along with the consistency and inherent probability of testimony. The significance of his report, of course, depends largely on the importance of credibility in a particular case. To give it this significance does not seem to us materially more difficult than to heed the other facts which in sum determine whether the evidence is "substantial."

The direction in which the law moves is often a guide for decision in particular cases, and here it serves to confirm our conclusion. However halting its progress, the trend in litigation is toward a rational inquiry into truth, in which the tribunal considers everything "logically probative of some matter requiring to be proved."

The Court in *International Ass'n. of Machinists v. N.L.R.B.*, 110 F. 2d 29 (D.C. Cir., 1939), at page 35, affirmed 311 U.S. 72, stated:

In the decision of questions of fact, the Board's findings are made conclusive, if supported by evidence which must be substantial. But it is only convincing, not lawyer's evidence, which is required. The Board is not limited to rules of evidence prevailing in courts of law or equity. The evidence must be such as a reasonable mind might accept, though other like minds might not do so * * *. We are required to sustain the Board's findings, if reasonable minds, unhampered by preconceptions derived from the technical law of evidence, might differ as to conclusions to be drawn from the evidence presented.

Analysis of the cases cited by the parties and other authorities leads to the conclusion that the substantial evidence test is flexible and when, as here, direct evidence of the actual payment by carriers to Brazilian exporters is not available, the test is whether the hearsay is supported by the evidence, direct or circumstantial, which a reasonable mind might accept as logically probative of the existence of the fact sought to be shown.

As a background for the determination of whether any particular respondent has violated the act, it is appropriate to examine the entire record and make preliminary determination of whether rebating has

been a general practice in the trade at times covered by this investigation.

The record abounds with hearsay evidence that rebating was practiced. It would be unduly burdensome and of little value to refer to every document of record or to set forth the testimony of every witness which was received as relevant to this general question. The record is voluminous. Typical are the reports made by U.S. line representatives to their home offices setting forth the results of their investigations into the reason for the failure to obtain cargo. Many of these reports were supported by the testimony of the author. Not all of the statements made in the reports were based upon remote hearsay but on statements made to the author by exporters who expressed facts within their personal knowledge. Rebating was accepted as an element of doing business by Brazilian exporters. It was a subject openly discussed among themselves and in the presence of representatives of U.S. flag lines. There is testimony that Brazilian officials admitted that the practice existed. A former representative of a U.S. flag line testified that when stationed in Brazil, he constantly visited exporters and carrier representatives and as a result of his discussions with these individuals, he knew that Brodin, Booth, Columbus, Loide, E.L.M.A., Ivaran, Lamport-Holt, Navem, Montemar, and Norton were rebating. There is additional hearsay which involves foreign flag respondent carriers in the practice.

If as hearing counsel contend, hearsay alone may support findings when other evidence is not conveniently available, the fact is well established. There is, however, reliable evidence to corroborate the hearsay. The fact that dual-quotations dependent upon the selection of the vessel were made by Brazilian exporters to U.S. importers is established by direct and uncontradicted evidence. It is equally well established by the testimony of individuals directly engaged in dealing with Brazilian exporters, that Moormac and Delta were refused cargo because these lines did not rebate. Statistics demonstrate that these lines, during the relevant periods, experienced significant decreases in the carriage of cargo in this trade, although the service they offered was equal to or better than the lines gaining business. There is the testimony of a New Orleans importer that in his experience, discounts were offered on his purchases if shipments could be made on vessels of Loide, Navem, and E.L.M.A. The negotiation between U.S. importers and Brazilian exporters were mainly conducted by telex and cable communication. These documents, received in evidence because relevant to the issue of violations of the act and as they reflect the terms of the transactions, were from the records of importers maintained in the

ordinary course of business, and bear the guarantee of reliability which is found in the accuracy which inheres in the performance of routine work. As they represent conditions, offers and counteroffers made contemporaneously with the transactions with which they were concerned and without contemplation of the use of the information in any controversy, they may be accorded the assurance of a high degree of accuracy. Further, they represent the best evidence obtainable as to the negotiations to which they relate and there is a practical necessity of their being received if evidence is to be had of the offers, counteroffers, and conditions of sale imposed by or agreed upon by Brazilian exporters. See *United States v. Wescoat*, 49 F. 2d 193 (10th Cir., 1931), at page 195. These documents reflect that a lower price is offered by the exporter if the cargo is shipped on certain foreign flag lines, or, if the exporter has the right to select the vessel. In the negotiations, the terms "rebates," "freight rebates," and "freight kickbacks" appear. Some examples taken from the records of these negotiations follow: "Also indicate exact rebate we would receive. We have one steamer of Lloyd Brasileiro called Loide Guatamala 25/7 to New Orleans and another possibility working with Navem which will be confirmed later;" "What would the rebate be? The rebate in 5,500 bags is 30 cents per bag, i.e., 15 for you and 15 for us;" "Re: freight rebates. Largest we have heard is Loide which 80 R 80 Brazilian cents or about 30 R 30 U.S. cents per bag;" "Above prices rock bottom and including freight rebate which we can reasonably expect for that period and therefore choice of steamers would have to be ours;" "However, freight kickbacks for our account;" "Parafours still traded locally equivalent 83.90/34.10 duly considering freight rebates;" "Freight rebate obtainable 10-15 points;" "Meanwhile, there is a discount steamer." There can be no doubt that U.S. importers and Brazilian exporters recognized that rebating was a factor to be considered in their transactions. Delta's president, a qualified expert on transportation conditions in the trade, testified that in his opinion, Loide, Navem, and E.L.M.A. were rebating. This opinion testimony has been attacked as based on facts not of record, however, the witness founded his opinion on statistics, reports received from subordinates stationed in Brazil, and on personal conversations with Brazilian officials. This opinion is accorded probative value on the question of the general practice in the trade. In *Standard Oil Co. v. Moore*, 215 F. 2d (9th Cir., 1958), at page 218, the Court held:

It is a common practice for a prospective witness, in preparing himself to express an expert opinion, to pursue pretrial studies and investigations of one kind or another. Frequently, the information so gained is hearsay or double hearsay,

in so far as the trier of facts is concerned. This, however, does not necessarily stand in the way of receiving such expert opinion in evidence. It is for the trial court to determine, in the exercise of its discretion, whether the expert's sources of information are sufficiently reliable to warrant reception of the opinion.

Logically probative of the fact that rebating exists and has existed in the trade is that there is no basis whatsoever for a belief that the Brazilian exporter would accept a substantial loss of revenue merely for the privilege of selecting the vessel. The trade is highly competitive and the profit margin small. Patriotism was ruled out by the testimony that profit was the basic motive of persons engaged in the trade and in any event, this motive, as well as Brazilian Government decrees, would not apply to non-Brazilian flag lines. The only incentive for the exporter to select the vessel would be that he would profit thereby and the only source of profit, or even funds to reimburse him for the loss of revenue incident to accepting a lower price, would be the carrier he selected. The fact that the importer pays the full freight and does not directly receive a rebate from a carrier would not detract from the conclusion that rebating is practiced. Rebating or refunding any portion of the freight by any manner or means, directly or indirectly, is prohibited by the act. If, as here, monetary consideration given to a shipper by any device is traceable to the freight paid by that shipper, rebating is shown.

While there are other factors which may enter into the selection of a vessel, this record considered as a whole demonstrates that rebating was the primary reason.

It is concluded that the practice of rebating has existed in the trade since 1964.

Hearing counsel rely upon transactions between Imperial Commodities Corp. (Imperial), a New York based importer of coffee, and Procafe and Stockler, Brazilian exporters of green coffee, to prove specific violations of the act by respondents Norton, Loide, Navem, Netumar, and E.L.M.A. As to these transactions, the following additional facts are found.

ADDITIONAL FINDINGS OF FACT

I. As to Norton:

A. On June 26, 1967, Norton issued four bills of lading for shipment of coffee from Stockler to Imperial. The negotiations between Imperial and Stockler prior to the shipment included a telex from Imperial stating, "Ship *Svenskund* 1,000 bags New York 500 Philadelphia 15 pts per lb rebate this steamer our account." The shipment was made via that steamer and on July 7, 1967, Stockler credited \$297 to Im-

perial's account as "Rebate on freight regarding 1,500 bags coffee shipped on board S.S. '*Svenskund*'. (15 points per pound)."

B. On May 16, 1969, Norton issued bills of lading for shipment of coffee from Procafe to Imperial. A total of 1,000 bags was carried on the *Dorotea*. Negotiations between Procafe and Imperial prior to shipment included a telex exchange which included, "We now show 750 bags balance undestined. What we would like now is to have a total of 1,500 bags S/L 600 to be shipped on the *Dorotea* to New York at prices reflecting freight rebate of 20. Repeat freight rebate of 20 points." "Minimum 2,000 bags *Dorotea* in order with us if owners accept shipt basis minimum 20 points discount. Shipt 750 bags balance C1487 and 1250 bags S/L 600 against C1484." On May 22, 1969, Procafe issued to Imperial a credit memorandum for "Excess on the following invoice :- 1.250/*Dorotea*, 248.50; 750 bags idem 148.50," a total of \$396, representing 20 points.

C. On September 26 and 29, 1969, Norton issued bills of lading for shipments of coffee from Procafe to Imperial from Santos and Paranagua to New York, option Philadelphia. The coffee was carried on the *Gudmundra*, a Norton vessel. Negotiations between Procafe and Imperial by telex, prior to shipment, included, "We have another rebate steamer by the name of "*Gudmundra*" and she is sailing the day after tomorrow southbound and paying 20 points." "We were calling you to see how your rebate dept. was functioning." "If we close a total of 2,500 bags they will pay 33 points whilst 1,000 bags the rebate is 30 points." On 4,000 bags shipped, Procafe credited Imperial \$1,760 representing 33 points.

D. On March 16, 1970, Norton issued bills of lading for a shipment of coffee by Procafe to Imperial from Paranagua to Philadelphia. Five hundred bags of coffee were carried on the Norton vessel *Gudmundra*. Procafe credited Imperial with 30 points on this shipment.

II. As to Netumar:

A. On March 28 and 29, 1968, Netumar issued bills of lading for a shipment by Procafe to Imperial from Paranagua on the Netumar vessel *Diana*. The transaction between the importer and exporter involved 50,000 bags of coffee. This shipment involved 6,250 bags only. The negotiations between Procafe and Imperial by cable included, "We accept stklot 600 34.35 Delmundo to New Orleans." The response was, "Please ship 6,250 bags our Paranas *Diana* destination later provided price changed to 33.37 FOB." "6,250 B/C Parana price reduced to 33.37 FOB." Imperial purchased the coffee at 33.75 cents per pound and Procafe invoiced it at 33.37 cents per pound, a 38 point allowance

because Imperial agreed that the shipment would be carried on the *Diana*.

B. On March 21 and 22, 1968, Netumar issued bills of lading on shipments of coffee by Procafe from Paranagua to Imperial. The shipment was handled by the Netumar vessel *Dabila* and involved a portion of the 50,000 bags referred to in (A) above. Procafe credited Imperial on this transaction with \$4,180 which represented 38 points on 8,250 bags of coffee.

C. On June 30, 1969, Netumar issued a bill of lading for shipment of 5,000 bags of coffee by Procafe from Santos to Imperial on the Netumar vessel *Pedro Teixeira*. The negotiations preceding the shipment between the importer and exporter included, "We are thinking of Netumar Line's *Pedro Teixeira* . . . What do they indicate in the way of rebate." "You may ship 7,500 bags per the SS *Pedro Teixeira* to New York . . . 15 cents per bag rebate against PO 1,614 and have purchase price PO 1,613 remain unchanged at 33.50." "The rebate on the 5,500 bags is 30 cents per bag, i.e., 15 for you and 15 for us, total amount around doll. 825 each . . . The rebate will be the same as for *Pedro Teixeira* for quantities of 5,000 bags or more." Five thousand bags were carried on the *Pedro Teixeira*. Imperial received a credit on July 4, 1969 of \$750 or 15 cents per bag, one-half of the 30 cents per bag credit.

III. As to Loide :

A. Under a Loide bill of lading, a shipment arrived in New Orleans on December 19, 1967, from Central CO-OP of Coffee Culture to Imperial of 1,000 bags of coffee. The negotiations between the exporter and importer included, "*Loide Peru* to New Orleans. On this vessel we to receive difference 500 old cruzeiros." On this transaction, Procafe credited Imperial with the 500 old cruzeiros.

B. Under a Loide bill of lading, Procafe shipped to Imperial 500 bags of coffee on the Loide vessel *Sunny Lady* which arrived in Philadelphia on April 13, 1970. The negotiations between the importer and exporter prior to the shipment by telex exchange included, "We have tried to find a possibility of downgrading a total of 1,000B to shipped '*Sunny Lady*' but cannot do better than 24 points. Please instruct." Imperial replied, "Regret cannot ship total 1,000 bags as our buyer requests shipment to be made on two steamers. Apprec ur efforts. Will have to accept 24." As resolved by the parties, "500 bags *Sunny Lady*." Imperial received a credit from Procafe of 24 points on this transaction.

IV. As to Navem :

A. Under a Navem bill of lading dated April 16, 1963, a shipment from Procafe to Imperial of 1,500 bags of coffee was carried on the

Navem vessel *Corina* from Santos to Houston. On April 22, 1968, Procafe credited Imperial's account in the amount of \$752.40 "Excess our invoice value covering shipment of 1,500 bags of coffee per SS *Corina*," a 38 point reduction. The negotiations for this transaction included, "Ship 1500 B/C—*Corina* . . . reducing price to 34.12."

B. Navem issued bills of lading dated June 4, 1969, for shipments from Procafe to Imperial of 4,000 bags of coffee on the *Corina*. On this transaction, Procafe allowed Imperial a credit of 20 points which amounted to a "shade over \$1,000."

C. Under Navem bills of lading dated June 10-11, 1969, Procafe shipped 5,000 bags of coffee to Imperial on the *Piratini* from Santos. Negotiations between the importer and exporter included "We offer firm FOB—basis sight draft—5,000 b/c/S/L 600 34.25. If *Piratini* 0.38 less." Imperial accepted and received a credit of 33 points, approximately \$2,500. The telex exchange between these parties included, "Are we to understand that you really will not get the rebate unless the quantity is 21,000 bags?"

D. Under a Navem bill of lading dated July 17, 1969, 4,500 bags of coffee were shipped by Procafe to Imperial from Santos. The telex negotiations included, "Re 4,500 bags have now firm 35 cents per bag from Navem for shipment SS *Maren Skou*. . . ." "Pls ship the 4,500 bags on the *Maren Skou* to New Orleans intransit Vancouver. 35 cents per bag split." Procafe credited Imperial on this transaction with 17½ cents representing its share the split.

V. As to E.L.M.A.:

A. Under an E.L.M.A. bill of lading dated January 25, 1970, Procafe shipped to Imperial 5,000 bags of coffee. The telex negotiations between the importer and the exporter included, "We wud like to downgrade quality on Jan shipt however wud prefer New Orleans destination. See what can be done." "Cud downgrade quality and reduct price by 25 points. Shipment scheduled for S/S *Rio Bermoje* to N.O. leaving P'gua 21.1.70" The shipment was made on the *Rio Bermoje*. On January 30, 1970, Procafe issued a credit memorandum to Imperial for "Allowance of 25 pts. on 5,000 bags of coffee shipped '*Rio Bermoje*' re downgrading of quality," which amounted to \$1,650. Imperial would not have put the shipment on this vessel without getting a credit. This vessel was not the only vessel available as Delta had a fairly regular schedule and could have carried the shipment.

VI. The term "downgrade" was a code term used by Imperial and Procafe to represent a credit because of shipment on a certain designated vessel. The term "discount" as used in their negotiations had a similar meaning.

VII. Imperial did not directly receive a rebate from any carrier, its benefit derived from permitting Procafe or Stockler to select the vessel having been in the form of credits on account. The funds used by Procafe or Stockler for credits to Imperial represented payments to them by the carriers.

The question presented as to these transactions is whether there is substantial and convincing evidence to corroborate the hearsay testimony of Imperial's president that the funds used by the exporters for crediting Imperial's account came from payments received by the exporters from the carriers. Imperial's president had no first hand knowledge of what went on between the exporters and the carriers and his firm had not received a freight rebate directly from any carrier. Nevertheless, in evaluating the testimony of Imperial's president, it is apparent that he was well aware that the vessels were the source of the credits, for one reason, that he had been so told by Procafe officials "in plain English." This testimony is hearsay but not remote hearsay as the individuals who received the funds from the carriers supplied the witness with the information. Corroboration is found in the records of the transactions between the exporters and Imperial and as their negotiations were conducted exclusively by telex and cable, these records are the best evidence available. The term "rebate" was used frequently in the negotiations. It would be naive to believe that individuals experienced in shipping were not conversant with the meaning and intent of the term; that it related to freight. E.L.M.A. attempts to discount the testimony as to the meaning of the term "downgrade" used by the parties for the reason that the witness had not been the person directly connected with the arrangement between Procafe and Imperial, and those adopting the code word did not appear to testify. However, Imperial's president charged with responsibility for the carrying on of the company business was aware of the meaning of the term. "Discount" also appears in the negotiations and in at least one transaction, it was used interchangeably with the word "rebate." The established pattern of the negotiations between the importer and the exporters was that benefits would accrue to the importer provided the exporters selected the vessel and that "downgrade" or "discount" related to these benefits. The finding that rebating was widely practiced in the trade gives support to the conclusion that these transactions involved credits related to freight. The fact that the U.S. flag lines, not rebating, carried none of the coffee involved has significance. Imperial's president testified that he would not have used the vessels selected by the exporters had his firm not been offered something in return for permitting the exporter to select the vessel.

As above discussed, the only motive for exporters from Brazil to insist on the right to select the vessel would be that they would somehow profit by the selection. It cannot be determined whether the exporters passed on all or only part of the funds received from the carriers except that in two of the transactions, there was a split, a fact which denotes that the exporters were not using their own funds to credit Imperial but that the funds came from a third source. Despite the admitted lack of knowledge of direct rebating or payment by carriers to the exporters, Imperial's president was well aware of the source of the funds representing his firm's credits, testified that Stockler was not a philanthropic organization engaged in giving money away and that they must have gotten the money from a third party.

If there was any source other than the carriers, to so find would strain credulity. Patriotism could not have been a motive for selecting a vessel as Procafe was jointly owned by D. Stockler and B. Rothos of Hamburg, Germany. Nor could the service offered by competing U.S. lines make a difference, that service being equal to or better than the service offered by the lines obtaining the cargo. Applying the facts which surrounded the relations between the importer and the exporters to the hearsay testimony of Imperial's president, it is evident that Imperial received credits only because it permitted the exporters to select the vessel and the relationship of these credits to the selection of the vessel requires the conclusion that the funds represented the freight charges received or to be received by the carrier from Imperial.

Section 18 (b) (3) of the act provides :

(3) No common carrier by water in foreign commerce or conference of such carriers shall charge or demand or collect or receive a greater or less or different compensation for the transportation of property or for any service in connection therewith than the rates and charges which are specified in its tariffs on file with the Commission and duly published and in effect at the time; nor shall any such carrier rebate, refund, or remit in any manner or by any device any portion of the rates or charges so specified, nor extend or deny to any person any privilege or facility, except in accordance with such tariffs.

E.L.M.A. contends that as the credits to Imperial from Procafe were made prior to Imperial's payment of the freight, rebating could not have occurred. Reference is made to section 14, first which prohibits deferred rebates and which defines the term as :

* * * a return of any portion of the freight money by a carrier to any shipper as a consideration for the giving of all or any portion of his shipments to the same or any other carrier, or for any other purpose, the payment of which is deferred beyond the completion of the service for which it is paid, and is made only, if during both the period computed and the period of deferment, the shipper has complied with the terms of the rebate agreement or arrangement.

Hearing counsel argue that E.L.M.A. is engaging in parrying with semantics and that "This verbal artifice does not mask the fact that

the receipt from E.L.M.A. or E.L.M.A.'s agent in Brazil by Procafe of a monetary 'kickback' enable Procafe to reduce the effective price at which it offered coffee shipped on the 'Rio Bermejo' to Imperial by 25 points; thus reducing the ocean freight which Imperial was out-of-pocket * * * the price reduction in the coffee Imperial bought was reimbursed it for a portion of this cost."

The pattern of the negotiations between the exporters and Imperial demonstrates that in many of the transactions (not all dates of credits were specified on the record) Procafe or Stockler credited Imperial's account prior to Imperial's payment of the freight to the carrier. Although the term "deferred rebate" is not used, the plain meaning of the terms "rebate," "refund," and "remit" as used in section 18(b) (3) is that a violation of that nature must involve a return of a portion of the rates or charges received by the carrier. Thus as to these five respondents, rebating, refunding, or remitting has not been shown. However, section 18(b) (3) is not limited to rebating. Carriers are prohibited from receiving a lesser compensation for the transportation of property than the rates specified in their tariffs. This portion of the section is not limited to repayments, rebates, or refunds. It is violated if the carrier's ultimate compensation derived from the carriage of property is less than the tariff rate. Although it appears that the carriers received from Imperial the correct freight as set forth in the applicable tariff, it must be concluded that the exporters, engaged in a highly competitive endeavor which involved a narrow profit margin, received compensation from the vessels at the time of shipment and when according Imperial credits, had the funds on hand which related to the shipment; and, that it was out of these funds that credit was passed on, in whole or in part, to Imperial. Inasmuch as the compensation received by the exporters was in return for selecting the vessel, an inescapable conclusion, the compensation related to freight which was the carrier's source of revenue. Regardless of whether the carrier compensated the exporter for being selected to transport the goods before or after payment of freight was received from the importer, or whether the importer received credit before the freight was paid to the carrier, the ultimate outcome was that the importer's cost was reduced by indirect receipt of carrier funds, thus related to the freight charges.

Violation of section 16 first is not found as the record does not disclose that anyone was an actual victim of prejudice or disadvantage. *Pacific Far East Lines—Alleged Rebates*, 11 F.M.C. 357, 366 (1968). However, a violation of section 16 second has been shown. The section provides that it shall be unlawful for any common carrier by water directly or indirectly:

To allow any person to obtain transportation for property at less than the regular rates or charges then established and enforced on the line of such carrier by means of false billing, false classification, false weighing, false report of weight, or by any other unjust or unfair device or means.

Payments to Procafe or Stockler by the carriers and by them passed on, all or in part, to Imperial by means of credits which emanated from such payments, is an unjust or unfair device or means of allowing Imperial to obtain transportation for property at less than the regular rates and charges then established. Again, it is immaterial that the payment of the freight was subsequent to the credits granted to Imperial. If the final outcome is that the credits are related to the freight, as has been herein found, the violation is established. Nor does the fact that Imperial paid the full freight detract from this conclusion. It had indirectly received funds, by means of credits, to apply when the freight was paid.

It is concluded that respondents Norton, E.L.M.A., Netumar, Loide, and Navem have violated sections 18(b) (3) and 16 second of the act. The record does not support findings of specific violations of the act by other respondents.

Further issues raised by respondents which merit consideration include E.L.M.A.'s contention that the transaction in which it is allegedly involved occurred subsequent to the date of the amended order of investigation and thus is beyond the scope of the investigation. The amended order which was issued prior to the date of the alleged involvement of E.L.M.A. in a specific transaction expanded the investigation to include whether any respondent "is giving undue preferences or advantages" or "allowing the carriage of goods at less than the tariff rate." The language of the amended order plainly covers any event occurring during the hearing. The undesirable alternative would be the institution of an additional investigation as to this transaction and the further expenditure of time and litigation costs. E.L.M.A. further contends that the examiner's ruling that cross-examination would be limited to counsel representing any respondent involved in the direct testimony improperly hampered E.L.M.A.'s counsel in cross-examination and that the ruling vitiates all of the testimony adduced at the hearing. The ruling was based on rule 10(n) of the Commission's rules of practice and procedure, and was made to avoid undue delay in the conduct of the hearing. Nine counsel appeared to represent the various respondents. Had each counsel cross-examined every witness, it is evident that the hearing would be unduly prolonged. Counsel for E.L.M.A. vigorously cross-examined each witness who testified as to his clients involvement. He bases his technical point on the ground that he was refused the right to cross-ex-

amine a witness who testified that all foreign lines were rebating. Such testimony being too general in nature to have probative value was not considered in any finding here made. If E.L.M.A. has been deprived of any substantial right, the fact has not been persuasively demonstrated.

Additionally, E.L.M.A. finds fatal error on the ground that the examiner refused to issue a subpoena *duces tecum*. The docket discloses that counsel wrote to the examiner stating that if counsel for Imperial failed to furnish certain additional documents voluntarily within a reasonable time, "then I request that you issued a subpoena *duces tecum* . . ." A further letter advised the examiner, "I wish to avoid the necessity for issuance of a subpoena *duces tecum* for the production of all of the telexes which I was told I would receive * * * Unless this is done voluntarily (by Imperial's counsel) I request the issuance of a subpoena *duces tecum* for their production." And, "If Mr. Simons fails to furnish these documents voluntarily, within a reasonable time, then I request that you issue a subpoena *duces tecum* for the production of these telexes * * *." Further, "I therefore request that Mr. Simons have his client undertake a further search in his office to ascertain where the missing telexes are. Unless this is done voluntarily, I request the issuance of a subpoena *duces tecum* for their production." It appears that Imperial conducted a further search of its files and produced two additional telexes and advised the examiner that Imperial was of the opinion that they were the only documents relevant to the request of E.L.M.A.'s counsel. The conditional nature of any request for the issuance of the subpoena does not constitute a proper request for action by the examiner. Counsel did not submit an original and two copies of the subpoena which the Commission's rule 9(a) requires when production of evidence is sought. Nor did counsel avail himself of the available discovery procedure. Under these circumstances, the issuance of a subpoena *duces tecum* was neither warranted nor required. E.L.M.A. also contends that speculation about actions of its agents does not constitute a basis for a valid finding of a violation of the act. This goes to the sufficiency of the evidence and is above discussed.

Counsel for Norton consider this investigation an ill founded attempt by the Commission to interfere with the relationships in Brazil contrary to the comity of nations; and, that taken in their best light, the allegations against Norton concern dealings between its agent in Brazil and a Brazilian coffee exporter. This argument is not persuasive. If a carrier subject to the Commission's jurisdiction could avoid the regulatory authority of the Commission by carrying out malpractices on foreign soil and by persons who could not be required

to appear before the Commission, the obvious result would be that malpractices could not be controlled and they might become rife to the detriment of commerce. This question was resolved by the Commission in *Unapproved Section 15 Agreements—Spanish/Portuguese Trade*, 8 F.M.C. 596, 609 (1965). A carrier may not immunize itself from responsibility to adhere to the act's provision by disassociating itself from its agent's activities, regardless of where these activities are conducted. Norton further attacks the examiner's conduct of the hearing as fundamentally unfair as he was disposed to admit evidence, for unless he did, hearing counsel could not prove a case. The examiner stated on the record that he recognized the difficulty of adducing proof under the circumstances existing. Hearsay was admitted, some of it remote, if it was relevant to the issues involved. However, the admitting of hearsay is not reversible error. If the examiner conducted himself with less than the judicial detachment required for a fair hearing, it is for a reviewing forum to determine by examination of the entire record.

Other contentions advanced by respondents include an attack on the evidence adduced by hearing counsel, particularly the testimony of Imperial's president, as unreliable, inconsistent, and mere conjecture. The only testimony herein considered was given by witnesses who were subpoenaed and, as one of them stated, "while walking on a tight rope." Many faced the possibility of offending the persons in Brazil with whom they did business, or the Brazilian government, to the detriment of their businesses. As to shipper witnesses, particularly Imperial's president, they would be aware of that portion of section 16 of the act which makes it unlawful for a shipper to obtain or attempt to obtain transportation at less than the applicable rates. There is some inconsistency between testimony given on direct and on cross-examination but there can be no implication that any witness failed to respond to any question propounded to the best of his ability. The examiner considered these factors in weighing the evidence together with his observation of the witnesses while testifying. Rumor or remote hearsay have not been relied upon to arrive at any finding made also been considered in weighing the evidence, but has not been deemed probative of the fact that the practice of rebating was widely known in the trade. The fact that the sources of information set forth in the hearsay evidence were persons not available for cross-examination has also been considered in weighing the evidence, but has not been deemed to be a basis for excluding non-remote hearsay from the category of probative evidence. The sources of the hearsay were not available to hearing counsel although respondents could have made available their

own personnel or agents in Brazil to rebut the hearsay had they elected to do so. As one counsel has stated, no carrier is required to rebut rumor allegedly spread by competitors but there is far more than rumor spread on this record. Loide's argument that a standard of evidence higher than mere hearsay is required in view of possible criminal and civil penalties has been considered but it is not persuasive in view of the Commission's decision in *Unapproved Section 15 Agreements—S. African Trade, supra*. The Commission is an administrative body. Penalties may be imposed only by the courts and in such proceedings, the limitations on evidence are far stricter than in an administrative proceeding. Hearing counsel has established a prima facie case of violations of the act by respondents Netumar, E.L.M.A., Navem, Loide, and Norton. Respondents elected not to rebut the evidence adduced. Violations of the act are supported by evidence far more substantial than a scintilla, mere rumor or uncorroborated hearsay. In this proceeding, there is such relevant evidence that is logically probative, that is, such as a reasonable mind might accept as adequate and of rational probative force to support the conclusions made. *Willapoint Oysters v. Ewing, supra*; *Edison v. Labor Board, supra*; *Universal Camera Corp. v. N.L.R.B., supra*.

ULTIMATE CONCLUSIONS

Rebating is and has been since 1964, a practice in the northbound trade between Brazil and the United States.

Respondents Norton, E.L.M.A., Navem, Loide and Netumar violated section 16 second of the act by allowing Imperial to obtain transportation at less than the regular rates or charges by the unjust and unfair means of compensating Procafe and/or Stockler, exporters from Brazil, for the privilege of being selected as the carrier of coffee sold by those exporters to Imperial, and the passing on of all or a part of that compensation by the exporters to Imperial who paid the freight.

Respondents Norton, E.L.M.A., Navem, Loide and Netumar violated section 18(b) (3) of the act by receiving less or different compensation for the transportation of coffee than specified in the applicable tariff.

As to all other respondents, this proceeding is dismissed.

(S) HERBERT K. GREER,
Presiding Examiner.

WASHINGTON, D.C.,
March 15, 1971.

FEDERAL MARITIME COMMISSION

WASHINGTON, D. C.

SPECIAL DOCKET No. 431

YAMAHA MOTOR COMPANY, LTD.

v.

PARTIES TO JAPAN/GREAT LAKES MEMORANDUM

(December 10, 1971)

NOTICE OF ADOPTION OF INITIAL DECISION AND ORDER PERMITTING REFUND OF CHARGES

No exceptions having been taken to the initial decision of the Examiner in this proceeding and the Commission having determined not to review same, notice is hereby given that the initial decision became the decision of the Commission on December 10, 1971.

It is ordered, That applicant is authorized to refund \$5,194.58 of the charge previously assessed Yamaha Motor Company, Ltd.

It is further ordered, That applicant publish promptly in its appropriate tariff the following notice:

Notice is hereby given that as required by the decision of the Federal Maritime Commission in Special Docket 431, that effective June 20, 1971, the rate on Item No. 1566 Snowmobiles, for purposes of refunds or waiver of freight charges on any shipments which may have been shipped during the period June 20, 1971, to June 23, 1971, is \$46.75 W/M, but subject to all other applicable rules, regulations, terms, and conditions of said rate and this tariff.

It is further ordered, That refund of the charges shall be effectuated within 30 days of this notice and applicant shall within five (5) days thereafter notify the Commission of the date and manner of effectuating the refund.

By the Commission.

[SEAL]

(S) FRANCIS C. HURNEY,
Secretary.

FEDERAL MARITIME COMMISSION

SPECIAL DOCKET No. 431

YAMAHA MOTOR COMPANY, LTD.

v.

PARTIES TO JAPAN/GREAT LAKES MEMORANDUM ¹

Respondent is permitted to refund to complainant the sum of \$5,194.53 as part of the freight charges assessed and collected for the transportation of snowmobiles from Shimizu, Japan, to Chicago, Illinois.

A. A. *deGiglio* for respondent.

INITIAL DECISION OF ASHBROOK P. BRYANT, PRESIDING EXAMINER ²

This is an application filed by respondent under Public Law 90-298, 90th Congress, for permission to refund to complainant the sum of \$5,194.53 as part of the charges assessed and collected by Nippon Yusen Kaisha, a member of respondent, for the transportation of the cargo referred to below.

On June 10, 1971, complainant requested respondent to establish a special rate on snowmobiles from Japan to Chicago, the rate at that time being \$68.25 W/M on sporting goods N.O.S. Respondent acceded to the request and published a rate of \$46.75 W/M on snowmobiles, to become effective June 14, 1971, and complainant was so notified on June 11, 1971. Because of a clerical error in transmission, the new rate was not timely filed with the Commission.

On June 20, 1971, complainant shipped 300 cartons of snowmobiles from Shimizu, Japan, to Chicago, Illinois, on Nippon Yusen Kaisha's M/S *King Minos*, bill of lading No. 85-006, and charges of \$16,665.28 were collected from complainant. It was later discovered that the new rate had not been filed with the Commission, whereupon additional

¹ The correct name of respondent is Japan Great Lakes Rate Memorandum.

² This decision became the decision of the Commission December 10, 1971.

charges of \$5,194.53 were collected from complainant, based upon the tariff which the conference had intended to amend. The present application seeks refund of this additional freight.

Section 18(b) (3) of the Shipping Act, 1916, as amended by Public Law 90-298, referred to above, provides that the Commission may, in its discretion and for good cause shown, permit a common carrier by water in foreign commerce, or a conference of such carriers, to refund a portion of freight charges collected where it appears that there is an error in a tariff of a clerical or administrative nature, and that such refund will not result in discrimination among shippers. The application discloses a set of facts and circumstances which fall within the purview and intent of the statute. Having complied with the requirements of the statute, and good cause appearing, applicant is permitted to refund to complainant the sum of \$5,194.53. The notice required by the statute shall be published in the conference tariff and refund shall be made within 30 days of such notice. Within five days thereafter applicant shall notify the Commission of the date of the refund and the manner in which payment has been made.

(S) ASHBROOK P. BRYANT,
WASHINGTON, D.C., *November 22, 1971.*

FEDERAL MARITIME COMMISSION

WASHINGTON, D.C.

SPECIAL DOCKET No. 433

COMMODITY CREDIT CORPORATION, AS AGENT FOR A.I.D.

v.

MINI CARRIERS SYSTEMS, INC.

December 29, 1971

NOTICE OF ADOPTION OF INITIAL DECISION AND ORDER PERMITTING WAIVER OF CHARGES

No exceptions having been taken to the initial decision of the Examiner in this proceeding and the Commission having determined not to review same, notice is hereby given that the initial decision became the decision of the Commission on December 29, 1971.

It is ordered, That applicant is authorized to waive collection of \$151,208.58 of the charge previously assessed Commodity Credit Corporation.

It is further ordered, That applicant shall publish promptly in its appropriate tariff, the following notice:

"Notice is hereby given, as required by the decision of the Federal Maritime Commission in Special Docket No. 433, that effective September 23, 1971, the rate on wheat bulgar for purposes of refund or waiver of freight charges on any shipments from New Orleans, Louisiana to Georgetown, Guyana which may have been shipped during the period from September 23, 1971, through October 20, 1971, is \$29.50 W subject to all other applicable rules, regulations, terms, and conditions of said rate and this tariff."

It is further ordered, That waiver of the charges shall be effectuated within 30 days of service of this notice and applicant shall within five (5) days thereafter notify the Commission of the date and manner of effectuating the waiver.

By the Commission.

[SEAL]

(S) FRANCIS C. HURNEY,
Secretary.

FEDERAL MARITIME COMMISSION

SPECIAL DOCKET No. 433
COMMODITY CREDIT CORPORATION, AS AGENT FOR A.I.D.

v.

MINI CARRIERS SYSTEMS, INC.

Application to waive a portion of freight charges granted.

INITIAL DECISION OF STANLEY M. LEVY, PRESIDING EXAMINER ¹

This is an application filed by respondent pursuant to section 18(b) (3) of the Shipping Act, 1916, for permission to waive collection of \$151,208.58 for the transportation of a shipment of wheat bulgar from New Orleans, Louisiana, to Georgetown, Guyana, on September 23, 1971, aboard respondent's vessel M.V. *Mini Lap*.

At the time the shipment for the Commodity Credit Corporation as agent for A.I.D. was arranged, the carrier erroneously thought the commodity to be a wheat flour for which the tariff provided a rate of \$29.50 per 2,000 pounds.² The parties intended that the shipment be transported at \$29.50 per 2,000 pounds with a resulting total charge of \$2,628.63.³ In fact wheat bulgar is a separate and distinct commodity from wheat flour and for which the tariff had no specific rate. Having no specific rate wheat bulgar would otherwise have to be rated as Cargo N.O.S. at \$92.50 per 40 cubic feet or 2,000 pounds. At such rate the transportation charges of \$153,887.21⁴ would be far in excess of the parties' intention and agreement. In order to rectify the error and close the gap in the tariff structure, Mini Lines filed an amendment to the tariff⁴ reflecting a rate for wheat bulgar of \$29.50 per 2,000 pounds.

¹ This decision became the decision of the Commission December 29, 1971.

² Mini Line Southbound Freight Tariff No. 8 (F.M.C. No. 8), Third revised page 46, effective April 28, 1971.

³ Includes \$472.21 of miscellaneous charges. The shipment measuring 66,815 cubic feet weighed 146,198 pounds.

⁴ Telegraphic revision to page 63, item 2060, effective October 21, 1971, received by the Commission October 21, 1971.

Section 18(b)(3) provides that the Commission may, in its discretion and for good cause shown, permit a common carrier by water in foreign commerce to waive the collection of a portion of the freight charges from the shipper where it appears there is error in the tariff of an administrative nature and that such waiver will not result in discrimination among shippers and provided further that the carrier prior to filing for authority to waive collection filed a new tariff with the Commission which sets forth the rate on which such waiver would be based.

The circumstances in this case fall within the purview and intent of the statute. Having complied with the requirements of the statute, and good cause appearing, applicant is permitted to waive collection of \$151,208.58. Notice of waiver shall be published in the tariff within 30 days of this decision.

(S) STANLEY M. LEVY,
Presiding Examiner.

WASHINGTON, D.C., *December 6, 1971.*

15 F.M.C.

FEDERAL MARITIME COMMISSION

DOCKET No. 71-17

VIOLATIONS OF SECTIONS 14 FOURTH, 16 FIRST AND 17, SHIPPING ACT, 1916, IN THE NONASSESSMENT OF FUEL SURCHARGES ON MILITARY SEALIFT COMMAND (MSC) RATES UNDER THE MSC REQUEST FOR RATE PROPOSALS (RFP) BIDDING SYSTEM

January 13, 1972

Motion to Strike Portions of Hearing Counsel's "Reply" denied.

No violation of section 14 Fourth, Shipping Act, 1916, found in the failure of respondent carriers to impose a surcharge on the carriage of military cargo for MSC while imposing the surcharge on the carriage of commercial cargo. Section 16 First, Shipping Act, 1916, found to be violated by the above practice. Section 17, Shipping Act, 1916, also found to be violated by the above practice.

Richard W. Kurrus and *Howard A. Levy* for American Export Isbrandtsen Lines, Inc., United States Lines, Inc., and Seatrain Lines, Inc.; *Gerald A. Malia* for Sea-Land Service, Inc.; *Edward D. Ransom* and *Thomas E. Kimball* for American Mail Line, Ltd., American President Lines, Ltd., Pacific Far East Line, Inc., and States Steamship Co.; *Ronald A. Capone* for Central Gulf Steamship Corp.; *Lloyd F. Dolese* for Gulf & South American Steamship Co., Inc.; *Sterling F. Stoudenmire, Jr.* for Waterman Steamship Corp.; *John B. Souther* for Columbia Steamship Co., Inc.; *David Simon* for Prudential-Grace Lines, Inc.; *Robert N. Kharasch* for States Marine International, Inc., Isthmian Lines, Inc., and Global Bulk Transport, Inc.; *W. J. Amoss, Jr.* for Lykes Bros. Steamship Co., Inc.; *David F. Anderson* and *Peter P. Wilson* for Matson Navigation Co.; *Amy Scupi* for American Union Transport; *Alan F. Wohlstetter* for United Fruit Co. respondents.

Dudley J. Clapp, Jr., *Milton J. Stickle, Jr.*, and *E. Duncan Hamner, Jr.* for Military Sealift Command, intervenor.

Joseph B. Slunt and *Donald J. Brunner*, Hearing Counsel.

REPORT

BY THE COMMISSION (Helen Delich Bentley, *Chairman*; Ashton C. Barrett, *Vice Chairman*; James V. Day, George H. Hearn, *Commissioners*):

On February 23, 1971, we ordered respondent carriers¹ to show cause why their failure to impose a fuel surcharge on military cargo carried pursuant to the Military Sealift Command's (MSC) competitive procurement system is not in violation of section 14 Fourth, section 16 First, and/or section 17 of the Shipping Act, 1916, in view of the fact that such surcharge was imposed upon all commercial cargo carried.

A subsequent Commission order of investigation in Docket No. 71-35, *Investigation of Competitive Procurement Practices on Military Cargo*, issued on April 7, 1971, prompted hearing counsel to move for dismissal of the instant proceeding on the ground that the issues herein would be resolved in Docket No. 71-35. This motion to dismiss was denied by order served on June 16, 1971.

A brief sketch of the facts surrounding the imposition of the bunker surcharge is in order. Beginning in the fall of 1970, common carriers in the foreign commerce of the United States began filing in their tariffs bunker surcharges to offset increases in the cost of fuel. These surcharges range from \$1 per freight ton to as high as 5 percent of the applicable rate. However, most of the surcharges are published as either a \$2 or \$3 per freight ton or a 2 or 3 percent increase in the applicable freight rate.

With the few exceptions mentioned below, all the surcharges have been assessed solely against commercial and nonmilitary government cargoes. The American flag common carriers who transport most military cargoes (under the cargo preference laws) have not assessed similar surcharges against military traffic. The military cargo moving via these lines under shipping and container agreements, which are filed with the Commission in lieu of tariffs, moves in the same vessels at the same time that commercial cargoes are moving.

Since it would seem that any increase in the cost of fuel which necessitates the carrier to assess a surcharge against commercial cargoes

¹ Respondents in this proceeding include: American Export Isbrandtsen Lines, Inc.; American Mail Line, Ltd.; American President Lines, Ltd.; American Union Transport, Inc.; Central Gulf Steamship Corporation; Columbia Steamship Company, Inc.; Global Bulk Transport Incorporated; Gulf & South American Steamship Co., Inc.; Isthmian Lines, Inc.; Lykes Bros. Steamship Co., Inc.; Matson Navigation Co.; Moore-McCormack Lines, Inc.; Pacific Far East Line, Inc.; Prudential-Grace Lines, Inc.; Sea-Land Service, Inc.; Seatrain Lines, Inc.; States Marine International, Inc.; States Steamship Co.; United Fruit Co.; United States Lines, Inc.; and Waterman Steamship Corp.

would also necessitate the assessment of a surcharge against those military cargoes carried having the same general characteristics, the Commission instituted this proceeding to determine if the practice in question violated pertinent provisions of the Shipping Act, 1916; namely, sections 14 Fourth, 16 First and 17.²

By a petition for leave to intervene, the commander of the Military Sealift Command became a party to the proceeding and has filed a brief on behalf of the Department of Defense. Three of the above-named respondents submitted replies stating that they were no longer operating as common carriers or no longer carried military cargo and requested that this proceeding as to them should be dismissed. As to these three carriers, American Union Transport, Inc., United Fruit Co., and Matson Navigation Co., the proceeding is dismissed.

Hearing counsel's "Reply" to respondents' answers to the show cause order was filed on July 15, 1971. This prompted Sea-Land Service, Inc. to file a "Motion to strike Portions of Hearing Counsel's 'Reply,'" which was submitted on July 19, 1971.

DISCUSSION AND CONCLUSION

1. The motion to strike

In its motion to strike portions of hearing counsel's "Reply," Sea-Land Service, Inc. claims that several of hearing counsel's statements are in error and could be misleading and therefore prejudicial. The statements to which Sea-Land refers are: ". . . that the Military Sealift Command's container agreements do not 'allow for the imposition of a surcharge' for bunkers and that the carriers have failed to 'levy a fuel surcharge against military cargoes . . .'" Further referred to is hearing counsel's allegation of a "'practice of charging a surcharge only against commercial traffic', and, finally he [sic] refers to our 'failure to impose a military surcharge . . .'"

² Section 14 Fourth prohibits common carriers by water from making any unjustly discriminatory contract with any shipper based on volume of freight. The fact that the shipping and container agreements do not allow the carriers the right to assess additional charges thereunder, even as a result of the unexpected cumulative increase experienced in regard to bunker fuel costs, is said to result in a prima facie violation of section 14 Fourth.

Section 16 First makes it unlawful for any common carrier by water to give any unreasonable preference or advantage to any description of traffic. Thus, the failure to impose a bunker surcharge on military cargo while commercial cargo has to pay for the increased bunker costs would also create a prima facie violation of section 16 First.

Section 17 forbids common carriers by water in foreign commerce from charging or collecting any rate or charge which is unjustly discriminatory between shippers. As the commercial shippers are being charged a bunker surcharge, while a large portion of cargo is not similarly assessed a surcharge, this also results in a prima facie violation of section 17.

Sea-Land is particularly disturbed at hearing counsel for failing to take into account the pending case at the Armed Services Board of Contract Appeals (ASBCA), where Sea-Land is currently pursuing its attempt to collect the surcharge on military cargo.

Despite hearing counsel's oversights, the Commission will be able to render a cogent decision without resort to striking portions of hearing counsel's reply. The Commission is well aware of the fact that Sea-Land is presently pursuing its remedy before the ASBCA and it is felt that the other statements referred to by Sea-Land will not cause irreparable damage to any party nor will they hinder the Commission in resolving the issues in the instant proceeding. For the foregoing reasons, the motion to strike is denied.

2. The violations

In general, the consensus of the replies to the Commission's order to show cause was that any assessment of the surcharge against MSC would be futile since it has flatly refused to acquiesce in the imposition of surcharges of any kind.

The real blame for the problems encountered by the industry in its dealings with MSC is alleged to be due to the arbitrary procurement practices followed by MSC. Thus, the substance of respondents' argument is that there is something "rotten in the state" of the entire procurement system. Although it would appear that the industry is not entirely blameless, MSC bears the burden of responsibility for this proceeding caused in great part by its overly restrictive contractual prohibitions. The Commission is attempting to sort out the problems of the system by means of an investigative proceeding in Docket No. 71-35. The immediate problem under consideration herein, the imposition of surcharges to compensate for increased bunker fuel costs, has been alleviated for the future by the implementation of RFP 600, effective April 16, 1971.

This proceeding is not concerned with the matter of the fairness of the system as a whole; rather, the precise issue herein is whether the failure of the respondent carriers to impose a surcharge on the carriage of military cargo for the MSC while imposing the surcharge on the carriage of commercial cargo is unlawful under the Shipping Act, 1916.

Therefore, the contentions of the various respondents with respect to the ills of the MSC procurement system as a whole are deemed to be irrelevant to this proceeding. Similarly, respondents' protestations regarding the underlying contract and the inherent unfairness of RFP 500 are also beside the point. Consequently, substantive portions of respondents', hearing counsel's and especially MSC's briefs dealing

with the above subjects can for practical purposes be ignored. For purposes of this report, only those portions of the briefs dealing with the alleged violations, the only issue in this proceeding, will be considered.

Aside from the above-mentioned general replies that the imposition of a surcharge would be a futile gesture in view of MSC's totally adamant attitude toward the payment of same, several respondents submitted more detailed briefs in their defense. Of these, only one respondent, Sea-Land Service, Inc., has taken one of the two remedies for relieving itself of the alleged violations. Sea-Land has imposed the surcharge and is currently attempting to collect it by pursuing its remedy before the Armed Services Board of Contract Appeals (ASBCA).

The other alternative available to respondents, in the event that a violation is found is, of course, to remove the surcharge from the commercial cargo on which it has so far been levied. This would therefore eliminate any trace of discrimination or preference. Once having pursued the former alternative, the imposition of the surcharge on military cargo, followed by resort to the ASBCA, a respondent would have done all it can as far as the Commission is concerned since the shipper (MSC) is beyond its jurisdiction in this type of situation where no violations of the act by the shipper have been alleged.

We therefore conclude that Sea-Land Service, having imposed the surcharge and pursued its remedy before the ASBCA, is no longer in violation of any of the sections of the Shipping Act in issue. However, as to the remaining respondents, if any violations of the act are found, these respondents, having relied on their defense that to impose the surcharge would be futile, will be held liable for those violations.

A. THE SECTION 14 FOURTH VIOLATION

Section 14 Fourth of the Shipping Act, 1916, is said to be violated by the fact that the failure to impose and collect a surcharge on the military cargo carried constitutes an "unfair or unjustly discriminatory contract with [a] shipper based on the volume of freight offered . . ."

The section 14 Fourth contentions advanced by respondents, MSC, and hearing counsel, miss the mark as they are concentrated on the underlying contract itself, arguing either that RFP 500 *is* or *is not* a volume contract of the sort proscribed by section 14 Fourth. It is not, however, the underlying contract with which we are concerned here but rather the surcharge and the manner of its imposition or lack thereof.

As regards respondents' and MSC's argument that these contracts are not volume contracts, suffice it to state that the Commission as well as the courts took a long and hard look at the present competitive bidding system when it first went into effect in 1967. The D.C. Court of Appeals in *American Export Isbrandtsen Lines v. F.M.C.*, 380 F. 2d 609 (D.C. Cir. 1967) concluded that the contracts under consideration there (under agreement RFP 100) were volume contracts subject to section 14 Fourth.

Thus, it is clear that the underlying contracts are in fact volume contracts, subject to section 14 Fourth. On this point, we are in agreement with hearing counsel. We cannot agree with hearing counsel's argument, however, that section 14 Fourth is violated by the "shipping and container agreement's failure under RFP-500 to contain a provision which would allow a surcharge to be imposed during the course of a full year on such a large share of a carrier's cargo. . . ." As stated above, the basic contract itself is irrelevant to this proceeding; its inherent defects, if any, are the subject of Docket No. 71-35. What must be analyzed in light of the prohibitions of section 14 Fourth is the fact that a surcharge has not been imposed on the carriage of cargo for one particular shipper, viz., MSC, while the surcharge was imposed on the carriage of cargo for all other shippers.

The question which must then be asked is whether such an imposition of a surcharge constitutes an unfair or unjustly discriminatory contract with a shipper based on the volume of freight offered. The answer to this question in the instant proceeding, we conclude, must be no. It is readily apparent that the imposition of the surcharge has absolutely nothing to do with the volume of freight offered; it was imposed on one shipper and not another merely because one shipper had stated that it would not acquiesce in the surcharge. Thus, the volume of freight offered is irrelevant. The nature of the activity proscribed by section 14 Fourth is not the alleged violation of this proceeding.

B. THE SECTION 16 FIRST VIOLATION

Section 16 First of the Shipping Act, 1916, is alleged to have been violated by the fact that the imposition of the surcharge upon cargo of one shipper and not that of another constitutes the giving of an undue and unreasonable preference or advantage to MSC, as well as an undue or unreasonable prejudice or disadvantage to the commercial shippers.

Respondents' replies to this allegation center around the necessity for a competitive relationship between the shippers or between the

types of traffic with a showing of injurious effect upon the traffic discriminated against as a condition precedent for a violation of section 16 First.

It is true that a competitive relationship is necessary before a violation of this section can be found in the ordinary rate disparity case, since it is only logical that the cost of shipping bananas should bear no relationship to the cost of shipping heavy industrial equipment. Thus, to find an unlawful discrimination in transportation charges quite properly requires a showing of competitive relationship between two shippers who are assessed different rates.

However, when dealing with a service which is absolute or an across-the-board fixed charge on all cargo carried regardless of the commodity involved (the instant surcharge); the competitive relationship is no longer required. As the Commission stated in *Investigation of Free Time Practices—Port of San Diego*, 9 F.M.C. 525 (1966):

. . . unequal treatment has no place in a regulated industry. The equality required in situations of this kind is absolute and is not conditioned on such things as competition, proximate cause and the like. To the extent that the other cases may read as requiring the establishment of a competitive relationship in the situation here involved they are overruled. (9 F.M.C. at 547)

As hearing counsel correctly pointed out, a surcharge is not geared to either transportation factors or the differing characteristics of commodities since it is imposed on each and every ton of cargo regardless of the commodity or length of voyage. Here, respondents had an obligation to administer the surcharge equally to all commodities. Failure to do so establishes a clear situation of undue prejudice to a "description of traffic" vis-a-vis other commodities in violation of section 16 of the act.

Hearing counsel also point out that the *Investigation of Free Time Practices—Port of San Diego* case, *supra*, stated the principle that section 16 First may be violated by shifting the burden of paying the cost of a service to nonusers of the service. This, in turn, was based on the principle first enunciated by the Commission in *Practices, Etc., of San Francisco Bay Area Terminals*, 2 U.S.M.C. 588, 603 (1941), that it was not proper to shift the burden of paying for certain terminal services to users of other terminal services. Thus, the surcharge situation is analogous since its imposition upon only nonmilitary cargo places the burden of paying for an increased vessel operating expense solely on commercial shippers.

Respondents' argument that the resultant discrimination, if any, is unintentional does not impress us. Although we have no reason to suspect their good intentions, an otherwise unjustly prejudicial prac-

tice will not be saved from condemnation. As the Commission stated in *Am. Tobacco Co. v. Compagnie Generale Transatlantique*, 1 U.S.S.B 53, 56 (1923), if a carrier's conduct subjects a shipper to undue discrimination, the carrier's "knowledge or lack of knowledge of such condition is plainly immaterial." We conclude that section 16 First is clearly violated by the imposition of the surcharge on non-military cargo only.

C. THE SECTION 17 VIOLATION

Hearing counsel claim that section 17 is violated by a disparity in rates which cannot reasonably be justified as in the instant case. Respondents' argument is that the Commission has held that in order to find a section 17 violation, there must be two shippers of like traffic over the same line between the same points under the same circumstances and conditions but who are paying different rates. Since the commodities involved in this proceeding are different, i.e., military cargo versus commercial cargo, it is argued that there can be no section 17 violation.

As in the discussion of the section 16 First violation (which discussion is equally applicable to the section 17 violation), what we are concerned with is not the initial rates of carriage which are justifiably different for military and for commercial cargo, but rather the flat per ton surcharge imposed across-the-board without regard to the type of commodity carried. We conclude that the failure to collect this charge from MSC and to collect it from commercial shippers only constitutes the collection of a "charge which is unjustly discriminatory between shippers" in violation of section 17 of the act. There is no reason whatsoever to justify the collection of the surcharge from commercial shippers and not from the military shipper, MSC. Without any justification for the collection of the surcharge from one shipper and not another, under the circumstances of this case one can only conclude that respondents are in violation of section 17.

We conclude that for the foregoing reasons there is no violation of section 14 Fourth, but there are violations of sections 16 and 17 by virtue of respondents' failure to impose and collect the surcharge on the carriage of military cargo for MSC, while imposing and collecting the surcharge on the carriage of commercial cargo. This discrimination is clearly to the disadvantage of the commercial shipper who as a consequence is forced to bear the burden of increased vessel operating expenses which would otherwise be spread equally over all shippers. The alternatives available to respondents are the imposition of the surcharge and the further effort to collect it as Sea-Land Service has

done in its pursuit before the ASBCA or the cancellation of the surcharge imposed against shippers of commercial cargo. Accordingly, an appropriate order will be entered.

COMMISSIONER CLARENCE MORSE dissenting:

The sole issue in this case is stated in the report as being "whether the failure of the respondent carriers to impose a surcharge on the carriage of military cargo for the MSC while imposing the surcharge on the carriage of commercial cargo is unlawful under the Shipping Act, 1916." (Page 95.)

The report holds that respondents violated sections 16 First and 17, Shipping Act, 1916, by the mere fact of failing to assess a surcharge against military shipments when assessing a surcharge against commercial shipments. In my opinion the report of the majority errs as a matter of law in at least two basic respects, namely, (1) in holding that as a matter of law the surcharge must be imposed on military shipments if a surcharge is imposed on commercial shipments, and (2) it disregards the guaranteed time and rate terms of contracts MSTs P-26 and P-27.

First. The law is clear the government may lawfully be granted reduced rate transportation. *In the Matter of the Carriage of Military Cargo*, (1966), 10 FMC 69, 81, footnote 19, affirmed *American Export Isbrandtsen Lines v. FMC* (1967), 380 F.2d 609. In fact, the Report itself reaffirms this statement when it declares: ". . . what we are concerned with is not the *initial rates of carriage which are justifiably different for military and for commercial cargo*, but rather the flat per ton surcharge imposed across-the-board without regard to the type of commodity carried." (Underscoring supplied—page 99.) If the initial MSC rates were justifiably different, then the surcharge/no surcharge situation may be justifiably different, for "the surcharge here is but a rate increase by another name." *Surcharge of North Atlantic West-bound Freight Association*, Docket 71-28, 14 FMC 298. I fail to see any difference in principle between giving the government reduced rate transportation as compared to rates to commercial shippers and the actions here taken of assessing no bunker surcharge on government cargo but assessing a bunker surcharge on commercial cargo. Holding that the mere absence of the surcharge against military cargo is unlawful if a surcharge is assessed against commercial cargo negates the principle that government cargo may lawfully receive more favorable rates, terms, and conditions than that accorded to commercial cargo. All discriminations are not ipso facto unjust discrimination.

Second. Respondents and MSC entered into one-year contracts wherein respondents severally agreed to transport merchandise between specified ranges of ports when tendered by MSC at firm, specified rates. In *American Export Isbrandtsen Lines*, both the Commission, 10 FMC at 70, and Court, 380 F. 2d at 619, recognize the contracts in question provide that the rates are guaranteed for one year. Under these contracts the cost of bunker fuel is for the account and risk of respondents. The contracts specify the terms, conditions, and procedures under which the contracts may be modified or terminated. Hence, absent a change of circumstances of such magnitude as to amount to commercial frustration, respondents must perform at the stipulated rates unless granted relief in the manner permitted under the contracts.

For us to compel respondents to assess the bunker surcharge against MSC in this situation is to hold, in effect, that respondents are not firmly bound by the rate terms of a firm, fixed price contract of carriage. For us to compel respondents to assess the bunker surcharge against MSC in this situation is to say that respondents by their unilateral actions (voluntarily imposing bunker surcharges on commercial shipments) can effectively change the terms of the MSC contracts from a "firm, fixed price" contract to a "firm, fixed price plus three dollars per ton" contract. For us to compel respondents to assess the bunker surcharge against MSC in this situation is to rewrite the terms of the guaranteed fixed rate contract. This, I cannot accept.

It may be contended that if respondents refrained voluntarily from assessing a bunker surcharge against military shipments, it was unlawful under sections 16 First and 17 to assess any bunker surcharge against commercial shipments. That does not follow for the reason that government shipments may lawfully be accorded different (more favorable) treatment than that accorded to commercial shipments. For like reasoning, it follows that because respondents may be foreclosed by their contracts from assessing a bunker surcharge against military shipments, respondents have not foreclosed themselves from assessing a bunker surcharge against commercial shipments. But the effect of the Report when it requires the surcharge to be applied against all or none is diametrically opposed to that view. Nevertheless, if, by becoming a party to MSTs P-26 and P-27, respondents have thereby foreclosed themselves from assessing a bunker surcharge on commercial cargo (and with such an argument I disagree), then so be it. We did not shape the facts. We can only apply the law and reason to the facts which are presented to us.

There was no evidentiary hearing. The limited record here does not establish (a) whether the \$8 surcharge against commercial cargo was justified by costs or whether the surcharge in fact should have been higher or lower, (b) whether the surcharge levied against commercial cargo was intended to effect a full recovery of the entire bunker cost increase or whether it was intended to effect recovery only of commercial cargo's share of the bunker cost increase, or (c) whether respondents did or did not include in their bids to MSC under RFP 500 a cost factor to cover projected increased bunker price costs. *Atlantic and Gulf/West Coast of South America Conference*, FMC Docket 70-43 (Dec. 21, 1970), 14 FMC 170 details the several years of spiraling bunker oil costs immediately preceding the signing by respondents of the contracts with MSC. To my mind these are essential facts which should have been developed and without which a reasoned judgment cannot issue even if I am held to be incorrect on the two points I have argued supra. I am not asserting that discount rates to the government are always lawful.⁴ What I am saying is that on this record there is no proof of undue or unreasonable preference or prejudice by bare proof or difference in treatment as to the bunker surcharge.

I am not unsympathetic to the desire of my associates to assist respondents' fight against the competitive bid system utilized by MSC, but I cannot associate myself with the manner of assistance herein provided by the majority.

Respondents had duly filed commercial tariffs and also tariffs with the Commission which incorporated the rates, terms, and conditions of contracts MSTP P-26 and P-27. Therefore, in view of section 18(b)(3) of the act, I fail to understand the alternative suggestions voiced in the penultimate sentence of the report.

The two alternatives proposed in the report to cure the violations found are: one, impose the surcharge against military cargo and pursue carriers' remedies before ASBCA, and two, remove the surcharge from the commercial cargo on which it has so far been levied. If MSC is successful in defeating the surcharge before ASBCA, the charged difference in treatment of different shippers (surcharge against commercial and no surcharge against MSC) has not been corrected. So how has the carrier purged itself when its inability to collect from MSC stems from a contract it, the carrier, voluntarily entered into? Likewise, and assuming ASBCA disallows the surcharge against military cargo, to "remove the surcharge" in the second alternative

⁴ *Nashville Ry. v. Tennessee*, 262 US 318 (1923).

must mean, if it is to place all shippers on the same level, the refunding of all bunker surcharge heretofore collected from commercial shippers and immediate cessation of the assessment prospectively. To my thinking, the two alternatives are unrealistic.

I concur in the view that a competitive relationship need not exist in this situation in order to apply section 16 First or section 17.

[SEAL]

(S) FRANCIS C. HURNEY,
Secretary.

FEDERAL MARITIME COMMISSION

DOCKET No. 71-17

VIOLATIONS OF SECTIONS 14 FOURTH, 16 FIRST AND 17, SHIPPING ACT, 1916, IN THE NON-ASSESSMENT OF FUEL SURCHARGES ON MILITARY SEALIFT COMMAND (MSC) RATES UNDER THE MSC REQUEST FOR RATE PROPOSALS (RFP) BIDDING SYSTEM

ORDER

This proceeding was instituted on February 23, 1971, by a Commission-issued Order to Show Cause to determine whether the failure of the carriers involved in the carriage of military cargo to impose a fuel surcharge on military cargo carried pursuant to the Military Sealift Command's (MSC) competitive procurement system results in violation of sections 14 Fourth, 16 First and/or 17 of the Shipping Act, 1916, in view of the fact that such surcharge was imposed upon all commercial cargo carried. Respondents' replies and responses of all other interested parties have been duly considered. The Commission has this day issued its report in the instant proceeding, which is hereby incorporated herein by reference, in which it determined that respondent carriers, with four exceptions, were in violation of sections 16 First and 17 of the Shipping Act, 1916.

Therefore, it is ordered, That with respect to American Union Transport, Inc., United Fruit Co., Matson Navigation Co., and Sea-Land Service, Inc., this proceeding is dismissed.

It is further ordered, That the motion to strike portions of hearing counsel's "Reply" is denied.

It is further ordered, That all other respondent carriers cease and desist from further violations of sections 16 First and 17 of the Shipping Act, 1916.

By the Commission.

[SEAL.]

(S) FRANCIS C. HURNEY,
Secretary.

FEDERAL MARITIME COMMISSION

SPECIAL DOCKET No. 434

A.I.D.-U.S. DEPARTMENT OF AGRICULTURE

v.

STERLING NAVIGATION Co., LTD.

NOTICE OF ADOPTING OF INITIAL DECISION AND ORDER PERMITTING WAIVER OF CHARGES

February 3, 1972

No exceptions having been taken to the initial decision of the Examiner in this proceeding and the Commission having determined not to review same, notice is hereby given that the initial decision became the decision of the Commission on February 3, 1972.

It is ordered, That applicant is authorized to waive collection of \$1,557,486.55 of the charge previously assessed Agency for International Development, U.S. Department of Agriculture.

It is further ordered, That applicant shall publish promptly in its appropriate tariff, the following notice.

Notice is hereby given, as required by the decision of the Federal Maritime Commission in Special Docket 434 that effective November 15, 1971, the rate on "FLOUR, Bagged" for purposes of refund or waiver of freight charges on any shipments from U.S. Great Lakes ports to Ashdod, Israel, which may have been shipped during the period from November 15, 1971 through December 27, 1971, is \$38.50 per 2240 pounds, subject to all other applicable rules, regulations, terms, and conditions of said rate and this tariff.

It is further ordered, That waiver of the charges shall be effectuated within 30 days of service of this notice and applicant shall within 5 days thereafter notify the Commission of the date and manner of effectuating the waiver.

By the Commission.

[SEAL]

(Signed) FRANCIS C. HURNEY,
Secretary.

FEDERAL MARITIME COMMISSION

SPECIAL DOCKET No. 484

A.I.D.-U.S. DEPARTMENT OF AGRICULTURE

v.

STERLING NAVIGATION Co., LTD.

Application to waive a portion of freight charges granted.

INITIAL DECISION OF HERBERT K. GREER, PRESIDING EXAMINER¹

Sterling Navigation Co., Ltd., a common carrier by water in the foreign commerce of the United States, has applied for permission to waive collection of a portion of the freight charges on four shipments of bagged flour carried for the Agency for International Development, Department of Agriculture, from U.S. Great Lakes ports to Asbdod, Israel, pursuant to bills of lading dated November 15, 19, 25, and 30, 1971. At the time of the shipments, applicant's tariff did not contain a rate for bagged flour, and under its tariff filed with the Commission (FMC No. 3, original p. No. 16) the applicable rate was \$250 per 2,000 pounds. The total weight of the four shipments was 12,403,890 pounds.

Prior to the shipments and as evidenced by the rate set forth on the bills of lading and cargo booking confirmations, the applicant had agreed to carry the shipments at the rate of \$38.50 per 2,240 pounds. Applicant intended to file this rate with the Commission according to the contract negotiated between the parties, but through inadvertence failed to do so. Prior to the filing of this application applicant amended its tariff by filing a rate of \$38.50 per 2,240 pounds on flour, bagged.

Public Law 90-298 authorizes the Commission, for good cause shown, to permit a common carrier by water in the foreign commerce of the United States to waive collection of a portion of the freight charges where there is an error in a tariff of a clerical or administrative nature or an error due to inadvertence in filing a new tariff. The facts demonstrate an inadvertent failure to file the rate of \$38.50 per

¹ assistance when billing customers.

2,240 pounds in accordance with the agreement with the shipper, a situation within the purview of Public Law 90-298. The application was filed within 180 days of the date of the shipments and no other shipments of the same or a similar commodity moved on applicant's vessels during approximately the same time as the shipments here involved. No other proceeding involving the same rate situation is now pending.

Good cause appearing and applicant having complied with the provisions of Public Law 90-298, permission to waive collection of \$1,557,486.55 and to apply to the shipments the agreed rate of \$38.50 per 2,240 pounds is granted. Applicant shall publish notice in its tariff as required by the statute. The waiver of the charges here authorized shall be effectuated within 30 days of service of this notice and applicant shall within 5 days thereafter notify the Commission of the date and manner of effectuating the waiver.

HERBERT K. GREER,
Presiding Examiner.

Washington, D.C.

JANUARY 12, 1972.

15 F.M.C.

FEDERAL MARITIME COMMISSION

WASHINGTON, D.C.

SPECIAL DOCKET NOS. 485 AND 486

U.S.D.A.

v.

AMBER MARITIME CORP.

February 8, 1972

NOTICE OF ADOPTION OF INITIAL DECISION AND ORDER PERMITTING WAIVER OF CHARGES

No exceptions having been taken to the initial decision of the examiner in these proceedings and the Commission having determined not to review same, notice is hereby given that the initial decision became the decision of the Commission on February 8, 1972.

It is ordered, That applicant is authorized to waive collection of \$474.80 and \$1,877.90 of the charges previously assessed Commodity Credit Corporation, U.S. Department of Agriculture.

It is further ordered, That applicant shall publish promptly in its appropriate tariff, the following notice.

Notice is hereby given, as required by the decision of the Federal Maritime Commission in Special Dockets 485 and 486 that effective November 11, 1971, the rate on "Grain and Grain Products in bags, including Corn, Soyabeans, Soyabean Meal, Bulger, Flour" for purposes of refund or waiver of freight charges on any shipments which may have been shipped during the period from November 11, 1971 through January 4, 1972, is \$44.50 W per Long Ton and including Seaway Tolls, subject to all other applicable rules, regulations, terms and conditions of said rate and this tariff.

It is further ordered, That waiver of the charges shall be effectuated within 80 days of service of this notice and applicant shall within 5 days thereafter notify the Commission of the date and manner of effectuating the waiver.

By the Commission.

[SEAL]

(S) FRANCIS C. HURNEY,
Secretary.

FEDERAL MARITIME COMMISSION

SPECIAL DOCKET NOS. 435 AND 436

U.S.D.A.

v.

AMBER MARITIME CORP.

Applications to waive a portion of freight charges granted

INITIAL DECISION OF STANLEY M. LEVY, PRESIDING EXAMINER¹

Amber Maritime Corp., respondent, a common carrier by water in the foreign commerce of the United States, has applied for permission to waive a portion of the freight charges on 10 shipments of bagged grain and grain products carried for the Commodity Credit Corporation as agent for A.I.D. from Great Lake Ports to Bangkok, Thailand and Singapore, Malaysia.

Four of the shipments, aggregating 1,488,437 pounds² were loaded in Chicago and destined for Bangkok. Six of the shipments totalling 4,319,455 pounds³ were loaded in Milwaukee and destined for Singapore. All shipments moved pursuant to Amber's freight tariff No. 1 (F.M.C.-11), page 10, issued October 8, 1971, effective November 11, 1971, at \$44.50 per metric ton. At such rate the charges for the four shipments to Bangkok aggregated \$30,044.19, and for the six shipments to Singapore aggregated \$81,188.49. As set forth hereafter, respondent seeks to waive \$474.80 of the Bangkok charges and \$1,377.90 of the Singapore charges.

The negotiations for the booking of these shipments with the U.S. Department of Agriculture were initially carried out with the freight rate being based on metric tons and respondent filed its tariff on October 8, 1971, in anticipation of a booking on this basis. However, the negotiations were later changed and ultimately concluded on a

¹ This decision became the decision of the Commission February 8, 1972.

² Special docket No. 435.

³ Special docket No. 436.

long ton basis by the brokers, with the quantity on each booking remaining in metric tons, but the freight rate basis changed to long tons.

The actual booking notices were, however, not issued until November 5, 1971, although as set forth above, in anticipation the tariff had been filed on October 8, 1971, to become effective November 11, 1971. The change in the booking notice reflecting long tons as the basis for the freight rate was inadvertently overlooked by the carrier's operation manager who thus failed to file a revised tariff before receiving the shipments. When the U.S. Department of Agriculture in the process of checking freight invoices discovered the higher billings based on metric tons it notified the carrier who prior to the filing of the applications herein did on December 29, 1971, effective January 4, 1972, file a first rev. page 10 to its tariff.

Public Law 90-298 authorizes the Commission, for good cause shown, to permit a common carrier by water in the foreign commerce of the United States to waive collection of a portion of the freight charges where there is an error in a tariff of a clerical or administrative nature or an error due to inadvertence in filing a new tariff. The facts demonstrate an inadvertent failure to file the rate of \$44.50 per 2,240 pounds in accordance with the agreement with the shipper, a situation within the purview of Public Law 90-298. The application was filed within 180 days of the date of the shipments and no other shipments of the same or a similar commodity moved on applicant's vessels during approximately the same time as the shipments here involved. No other proceeding involving the same rate situation is now pending.

Good cause appearing and applicant having complied with the provisions of Public Law 90-298, permission to waive collection of \$474.80 and \$1,377.90 and to apply to the shipments the agreed rate of \$44.50 per 2,240 pounds is granted. Applicant shall publish notice in its tariff as required by the statute. The waiver of the charges here authorized shall be effectuated within 30 days of service of this notice and applicant shall within five (5) days thereafter notify the Commission of the date and manner of effectuating the waivers.

(S) STANLEY M. LEVY,
Presiding Examiner.

WASHINGTON, D.C., *January 18, 1972.*

FEDERAL MARITIME COMMISSION

WASHINGTON, D.C.

SPECIAL DOCKET NOS. 438 AND 439

COMMODITY CREDIT CORPORATION, AS AGENTS FOR WORLD FOOD
PROGRAM

v.

SAN ROCCO LINE (ANCHOR SHIPPING CORP.—GENERAL AGENTS)

February 16, 1972

NOTICE OF ADOPTION OF INITIAL DECISION AND ORDER PERMITTING WAIVER OF CHARGES

No exceptions having been taken to the initial decision of the examiner in these proceedings and the Commission having determined not to review same, notice is hereby given that the initial decision became the decision of the Commission on February 16, 1972.

It is ordered, That applicant is authorized to waive collection of \$51,703.05 for the shipments described in special docket No. 438 and \$2,411.70 for the shipment described in special docket No. 439.

It is further ordered, That applicant shall publish promptly in its appropriate tariff, the following notice.

Notice is hereby given, as required by the decision of the Federal Maritime Commission in Special Dockets 438 and 439 that effective December 2, 1971, the rate on "Flour N.O.S." for purposes of refund or waiver of freight charges on any shipments which may have been shipped from U.S. Great Lakes Ports to Beirut, Istanbul, and Famagusta during the period from December 2, 1971 through January 3, 1972 is \$35.75 W including all Terminal charges and Seaway Tolls, subject to all other applicable rules, regulations, terms and conditions of said rate and this tariff.

It is further ordered, That waiver of the charges shall be effectuated within 30 days of service of this notice and applicant shall within five (5) days thereafter notify the Commission of the date and manner of effectuating the waiver.

By the Commission.

[SEAL]

(S) JOSEPH C. POLKING,
Assistant to the Secretary.

FEDERAL MARITIME COMMISSION

SPECIAL DOCKET NOS. 488 AND 439

COMMODITY CREDIT CORPORATION, AS AGENTS FOR WORLD FOOD
PROGRAM

v.

SAN ROCCO LINE (ANCHOR SHIPPING CORP.—GENERAL AGENTS)

Permission to waive a portion of freight charges granted.

INITIAL DECISION OF HERBERT K. GREER, PRESIDING EXAMINER¹

San Rocco Line, a common carrier by water in the foreign commerce of the United States, through its agent Anchor Shipping Corp., has filed applications for permission to waive collection of a portion of the freight charges on four shipments carried for the Commodity Credit Corporation, agents for the world food program, from Milwaukee, Wis., to Famagusta, Cyprus.

Special Docket No. 438. Pursuant to three bills of lading dated December 2, 1971, applicant carried a total of 2,363,568 gross pounds of "Flour, All Purpose." Each bill of lading set forth a rate of \$35.75 per 2,240 pounds, including terminal charges and seaway tolls, the rate agreed upon by the parties prior to the shipments. Due to clerical and administrative error, applicant failed to file the agreed rate with the Commission and, at the time of the shipments, the rate applicable was \$84.75 W/M on cargo, NOS, not dangerous or hazardous which, if charged, would amount to \$51,703.05 more than the agreed rate.

Special Docket No. 439. The rate situation in this proceeding is identical with the facts above set forth. Applicant's bill of lading dated December 2, 1971, was for a shipment of 110,249 gross pounds of "Bulgar." Assessment of the applicable NOS rate would impose a charge on complainant of \$2,411.70 in excess of the rate agreed upon prior to the shipment.

¹ This decision became the decision of the Commission February 16, 1972.

Prior to submitting the applications, applicant filed with the Commission a rate of \$35.75 per 2,240 pounds on "FLOUR, N.O.S., for account of U.S. Department of Agriculture. Rates include all terminal charges and Seaway Tolls," (FMC No. 1, revised page 25), and the same rate on Bulgar. (FMC No. 1, revised page 26.)

Public Law 90-298 authorizes the Commission, for good cause shown, to permit a common carrier by water in the foreign commerce of the United States to waive collection of a portion of the freight charges where there is an error in a tariff of a clerical or administrative nature or an error due to inadvertence in filing a new tariff. The facts demonstrate an inadvertent failure to file the \$35.75 per 2,240 pounds rate in accordance with the agreement with the shipper, a situation within the purview of Public Law 90-298. The application was filed within 180 days of the date of the shipments. The waiver will not result in discrimination among shippers. An additional application for waiver of a portion of the charges on a similar shipment carried by applicant for complainant is pending.

Good cause appearing and applicant having complied with the provisions of Public Law 90-298, permission to waive collection of \$51,703.05 for the shipments described in special docket No. 438, and \$2,411.70 for the shipment described in special docket No. 439, and to apply the \$35.75 rate per 2,240 pounds to such shipments is granted. Applicant shall publish notice in its tariff as required by the statute. The waivers of the charges here authorized shall be effectuated within 30 days of the service of the notice and applicant shall within 5 days thereafter notify the Commission of the date and manner of effectuating the waivers.

(S) HERBERT K. GREER,
Presiding Examiner.

WASHINGTON, D.C., *January 28, 1972.*

15 F.M.C.

FEDERAL MARITIME COMMISSION

DOCKET No. 70-4

YORK FORWARDING CORP.,
J. B. WOOD SHIPPING CO., INC.,
AND EDWARDS FUGE CORP.

Licensed freight forwarders with shipper connections indicating an opportunity for interrelationships and control found not to be independent freight forwarders within the meaning of sections 1 and 44 of the Shipping Act, 1916.

Licensed freight forwarders engaging in exclusive preferential working arrangements and failing to file a memorandum for approval to this effect found to violate section 15 of the Shipping Act, 1916.

Absent a meaningful showing that wages and other payments were received for any reason other than for services rendered, and such payments are not assertedly correlative to rates and charges of any shipment or shipments, such practices cannot be equated to an "unfair device or means" used to obtain transportation at less than the "rates or charges otherwise applicable" and held to be in violation of section 16 of the Shipping Act, 1916, or section 510.24 (c) of General Order 4 of this Commission.

Licensed freight forwarder who willingly allows person or persons not employed by it to perform forwarding services under its license found to violate section 510.23(a) of General Order 4 of this Commission.

License of freight forwarder operating in name only and without qualified personnel ordered revoked.

License of freight forwarder which formerly provided good and valuable service to the shipping public allowed to be retained subject to certain requirements.

Morton Zuckerman for respondents.

Paul J. Kaller and *Donald J. Brunner* as hearing counsel.

March 2, 1972

REPORT

BY THE COMMISSION: (Helen Delich Bentley, Chairman; James V. Day and George H. Hearn, Commissioners) *

The Commission instituted this proceeding to determine; (1) Whether York Forwarding Corp. (York) and J. B. Wood Shipping

*Vice Chairman Ashton C. Barrett and Clarence Morse, Commissioner did not participate.

Co., Inc. (Wood Shipping), continue to qualify as independent ocean freight forwarders and whether their licenses should be continued in effect or be revoked pursuant to section 44 of the Shipping Act, 1916 (the Act) and section 510.9 of Commission General Order 4; (2) whether York and Wood Shipping are in fact independent of shipper connections as defined in section 1 of the Act; (3) whether York and Wood Shipping are operating in violation of section 15 of the Act, or have so operated by carrying out an unapproved exclusive cooperative working arrangement; (4) whether Edwards Fuge Corp. (EFC) violated section 16 First of the act by having obtained, or attempting to have obtained, directly or indirectly, transportation by water for property at less than the rates or charges which would otherwise be applicable; (5) whether York and/or Wood Shipping violated section 16 Second of the Act by indirectly allowing EFC to obtain transportation for property by oceangoing common carriers at less than the freight rates established by such carriers through the unjust means of permitting EFC to benefit from the compensation received by York and/or Wood Shipping on EFC shipments; (6) whether York shared any compensation or freight forwarding fee in violation of section 510.24(c) of General Order 4; and (7) whether York willfully falsified its application for its ocean freight forwarder license.

Subsequently, and at the request of Hearing Counsel, the Commission amended its initial order of investigation to include the following additional issues: (1) Whether the principals of respondents York and Wood Shipping willfully misrepresented information and made false statements to a Commission investigator in an attempt to obstruct the investigation in violation of sections 510.9 (b) and (c) of General Order 4; and (2) whether they permitted their names and licenses to be used by persons not employed by them for the purpose of freight forwarding services in violation of section 510.23(a) of General Order 4.

Hearings were held before Examiner Richard M. Hartsock, who issued an initial decision. Joint exceptions to the Examiner's decision were filed by respondents York, Wood Shipping, and EFC, to which Hearing Counsel have replied. We heard oral argument.

FACTS

York Forwarding Corp previously held Federal Maritime Board Certificate No. 2353, issued on September 10, 1958. After the enactment of the new section 44 to the Shipping Act, York filed an application for a license as an independent ocean freight forwarder under that

section. This application indicated, *inter alia*, that: (1) Nora McDonnell was president, treasurer, and sole stockholder of York; (2) William Otero was secretary; and (3) neither York nor any officer, director, stockholder (owing 5 percent or more of stock), or employee thereof was in any way shipper or consignee connected. Since nothing in York's application or the staff's investigative report indicated that the applicant was not qualified to be licensed, York was issued a Commission license on April 8, 1964.

The Edwards Fuge Corp. has for more than a decade been an exporter and shipper to foreign countries by oceangoing common carrier. Prior to 1960, EFC performed all of its own ocean freight forwarder functions with respect to its shipments. Subsequently, when the law required that ocean freight forwarders be independent of shipper and/or consignee connections, the ocean freight forwarding activities related to EFC's shipments and those of its customers were transferred to York.¹ The president of EFC, and the central figure in this proceeding, is Albert J. Fuge (Dr. Fuge). The only other officer or employee of EFC is Dr. Fuge's wife Bertha. Dr. and Mrs. Fuge are also the sole owners of EFC.

At the time Dr. Fuge was an owner and officer of EFC, he was also an officer and stockholder, along with his wife, in what is now York Forwarding Corp.² Dr. Fuge remained an officer of York until late 1959, when he and the other officers of the corporation resigned. They were replaced by Mrs. Fuge and one Nora McDonnell, a former employee of EFC and a long-time friend of Dr. Fuge. By late September of 1960, all of the York stock had been transferred by gift to Mrs. McDonnell. Because Mrs. McDonnell has no experience in forwarding operations,³ an EFC employee, William Otero, was made secretary of York and became York's primary employee, responsible for all of York's freight forwarder operations. This entailed performing the same services, for the same clients, as he had done as an EFC employee.

When Mr. Otero left the employ of York in January of 1965, he was immediately replaced by another EFC employee, one Ernest Zimmermann. Mr. Zimmermann, however, did not appear on York's payroll until early October of 1965. Therefore, subsequent to Mr. Otero's

¹ In addition to EFC, York's other principal shipper clients are Borg Warner International Corp., a company from which EFC purchased goods for resale, and HOPSA (Hojalateria Panama), an overseas customer of EFC. The standard transmittal form by which York distributed documents to these clients specifically requested them to "refer to" a specific EFC file number.

² In 1948, Dr. Fuge became an officer of Jafret Corp., whose name was changed in 1957 to York Forwarding Corp.

³ The record indicates that Mrs. McDonnell cannot identify an invoice or describe its purpose, nor state what documents are prepared in conjunction with ocean shipments. Moreover, she was unable to prepare an export declaration or bill of lading and even needed assistance when billing customers.

departure and while still in the employ of EFC, Mr. Zimmermann performed all of York's freight forwarding functions for some seven months. Even during Mr. Zimmermann's period of employment with York, Mrs. McDonnell never participated in the preparation of shipping documents. Her functions with York were limited to manning the switchboard and acting as a messenger. Any questions concerning freight forwarding matters were taken up directly with Dr. Fuge, who worked in the adjoining office.⁴

Wood shipping was established by Joseph B. Wood in 1922 and issued Independent Ocean Freight Forwarder License No. 81 by the Commission on February 8, 1963. In 1964, Wood Shipping was located on the eighth floor of 80 Broad Street in New York City. Following Mr. Wood's death in March 1966, Andrew Aquino and Tom Barber arranged to purchase Wood Shipping, each acquiring 50 percent of the company's stock.⁵ By subsequent separate negotiations between Mr. Barber and Nora McDonnell, an agreement was reached whereby Mrs. McDonnell would receive 35 percent of Wood Shipping stock and Mr. Barber would acquire 100 percent interest in York.⁶

Shortly after the purchase of Wood Shipping, its offices were relocated to the 24th floor of 80 Broad Street, with Dr. Fuge and Mr. Aquino negotiating the new lease.⁷ Wood Shipping shared its new premises on the 24th floor with the Imperial Iranian Air Force Purchase Mission (Iranian Mission), Mitradad Co. (represented by Edwards Fuge Associates, Inc.), Agat International, and Grand Cargo. The lease to these premises was maintained in the name of Wood Shipping, and the rent was paid by Wood Shipping.⁸

Today, Wood Shipping leases an entire building at 33 Worth Street in New York from Agat International.⁹ The first floor of this address is occupied by the main telephone switchboard and the shipping and receiving departments of both York¹⁰ and Wood Shipping. Wood Shipping occupies the second and third floors, and the fourth floor is occupied by the Iranian Mission. The premises at 33 Worth

⁴ York and EFC occupied adjoining offices on the 11th floor of a building in New York City identified variously as 95 Broad Street, 24 Stone Street, and 59 Pearl Street, depending upon from which street one faced the building. EFC used the address 95 Broad Street, while York used the 24 Stone Street address.

⁵ The record shows that at the time of the purchase of Wood Shipping, neither Mr. Aquino nor Mr. Barber knew or had any relation with Dr. Fuge or Mrs. McDonnell.

⁶ Although the record shows that these transactions have yet to be fully effectuated, Mrs. McDonnell has already voted her interest in Wood Shipping.

⁷ Dr. Fuge and Mr. Aquino were also the parties with whom the management of 80 Broad Street dealt as to matters pertaining to Wood Shipping after the death of Mr. J. B. Wood.

⁸ By letter of September 23, 1966, Wood Shipping advised that it had moved again and was now sharing office space with York at 17 Battery Place, New York.

⁹ Salvatore Alba and Albert Abdalla, a bookkeeper for York and Wood Shipping, are president and vice president, respectively, of Agat. Mr. Alba is also an employee of Wood Shipping.

¹⁰ York has apparently made no rental payments since November 1967.

Street are also used as a telephone and mailing address for EFC, Agat, and Albert Fuge Associates, the latter being a consulting service in the person of Dr. Fuge. Wood Shipping pays for all telephone service, including the switchboard which serves the entire building. Moreover, it has expended some \$47,000 for maintenance and general improvements of the premises, including painting of the building.

Since 1966, Mr. Aquino has been president of both York and Wood Shipping. Sometime in 1966, an arrangement was made whereby York would prepare shipping documents for Wood Shipping, payments to be based upon man-hours of work performed by the two York employees, Mr. Zimmermann preparing the shipping documents and Mrs. McDonnell serving as a messenger.¹¹ During fiscal years through 1969, York received from Wood Shipping \$14,185, \$18,585, and \$12,914, respectively, for preparing shipment and incidental documents for Wood Shipping pursuant to their agreement. During fiscal year 1967, cash receipts show other York income of only \$2,052, being the inland freight on EFC shipments. Wood Shipping accounted for \$18,585 of York's total handling income of \$22,947 during fiscal 1968, and \$6,239 out of \$9,172 in 1969.

In 1967, Wood Shipping entered into an agreement with the Iranian Mission whereby Wood Shipping would "reforward material from U.S. points of origin to . . . Iran". Although Wood Shipping has more than nine experienced freight forwarders on its staff, Dr. Fuge and his associate Gus Vogle received \$11,040 and \$15,850, respectively, in 1969 as special consultants to Wood Shipping with respect to that account.¹² In addition, Wood Shipping paid \$3,230 to Fuge and \$1,486 to Vogle during 1969 for travel expenses and entertainment. An additional \$3,269 was paid to TWA for transportation.¹³ At present, Wood Shipping appears to be in a state of financial decline, having suffered losses of some \$37,000 during 1969. During that same calendar year, however, Wood Shipping's cash disbursement ledger shows that it paid for repairs to an automobile owned by Dr. Fuge and for legal services rendered to EFC, Edwards Fuge Associates and Agat International. Moreover, from September 26 through Dec-

¹¹ This agreement was not altered when Mr. Zimmermann left York in 1968. Mrs. McDonnell requested that the arrangement be continued and Mr. Aquino consented although Mrs. McDonnell and Albert Abdalla, the only two persons who remain on York's payroll, are admittedly unknowledgeable and inexperienced in freight forwarder operations. During this period, some of York's work may have been performed by Mr. Zimmermann, though no longer an employee, or by another nonemployee, or by Wood Shipping personnel.

¹² Albert Fuge Associates and Gus Vogle Associates became the executives called for in the agreement between Wood Shipping and the Iranian Mission.

¹³ Mr. Aquino explained that it was necessary for Dr. Fuge to attend meetings concerning the Iranian Mission account. During 1969 he traveled to Iran, Panama, Switzerland, and London.

ember 26, 1969, Mrs. Fuge¹⁴ was paid \$175 per week for a total of \$2,275 to accompany certain Iranian Nationals, who were also customers of Wood Shipping, around New York City. The disbursement ledger also indicates that six months' rent at \$250 per month was paid by Wood Shipping for the accommodations of an Iranian Mission Warrant Officer. Examination of the books and records of Wood Shipping also shows that it either "loaned" or "advanced" sums of money in varying amounts to not only its officers, Mrs. McDonnell and Mr. Barber, and certain employees, Mrs. Fuge and A. J. Fuge, Jr., but also to Albert Fuge Associates (Dr. Fuge) and two members of the Iranian Mission.

York and EFC have also made personal loans to officers of the other respondents. York's books and records show that during the two fiscal years immediately prior to the hearings in this proceeding, Mrs. McDonnell borrowed a total of \$17,231.25 in addition to her salary. The record indicates that of that sum, only \$6,675 has been repaid.¹⁵ The cash disbursements ledger of EFC for the period May 1, 1969 to April 30, 1970 shows total loans of some \$1,200 to Mr. Abdalla, the bookkeeper for York and Wood Shipping, and a loan of \$1,000 to Mr. Aquino, president of Wood Shipping and York.

DISCUSSION AND CONCLUSIONS

In his initial decision, the presiding examiner concluded:

1. Neither York nor Wood Shipping are in fact independent as defined in section 1 of the Act.
2. York and Wood Shipping have and are operating in violation of section 15 of the Act by carrying out an unapproved exclusive cooperative working agreement.
3. EFC violated section 16 First of the Act by having obtained indirectly transportation by water for property at less than the rates or charges which otherwise would be applicable.

¹⁴ Dr. Fuge's entire family is on the Wood Shipping payroll. Albert Fuge, Jr., has received remuneration from Wood Shipping for his services as a traffic clerk in Wood Shipping, and Joanne Fuge assists the company in bookkeeping and clerical matters. Dr. Fuge himself has on at least one occasion held himself out as acting in a managerial or representative capacity for Wood Shipping. Exhibit 26 is a copy of a letter, dated June 6, 1969, from Wood Shipping to an overseas consignee in Australia regarding nonpayment of an invoice in the amount of \$29.37. The letter was signed by Dr. Fuge for "J. B. Wood Shipping Co., Inc."

¹⁵ In August 1969, there arose a dispute as to the billings of York to Wood Shipping on the rates and hours of service performed by York. The disputed amount, \$6,675, was agreed to by Mr. Aquino and Mrs. McDonnell as representing a fair refund of York's overcharges to Wood Shipping for the period involved. This amount was entered on the books of Wood Shipping upon receipt of a check in that amount from York. Thereafter, EFC issued a check noted as "loan only" to Mrs. McDonnell for \$6,675, which Mrs. McDonnell made payable to the order of York. Mrs. McDonnell repaid the EFC loan in May 1970.

4. York and Wood Shipping violated section 16 Second of the Act by allowing EFC "to obtain transportation for property at less than the regular rates or charges then established by means of an unjust or unfair device or means."

5. Wood Shipping and York violated section 510.24(c) of General Order 4 by permitting EFC to share "indirectly [the] compensation or freight forwarding fee" of the licensee.

6. York permitted its name and license to be used by persons not employed by it for the purpose of freight forwarding services in violation of section 510.28(a) of General Order 4.

7. The licenses of Wood Shipping and York should be revoked pursuant to section 510.9 of General Order 4.

Our conclusions differ somewhat from those of the Examiner. We are convinced that York has never been an independent ocean freight forwarder. Prior to 1960, Dr. Fuge, President of EFC, was an owner of York, and while he has divested himself of ownership, he never relinquished control as advisor to York on matters relating to freight forwarding. Such control is evidenced in the fact that in 1960, Mrs. McDonnell, a long-time friend of Dr. Fuge, who is inexperienced as an ocean freight forwarder, was given 100 percent ownership of York and made its President. The only inference to be drawn from the record is that Mrs. McDonnell was but Dr. Fuge's alter ego. In addition, William Otero, an EFC employee, was made Secretary of York and became responsible for running its freight forwarding operation, which actually involved performing the same services, for the same clients, he did as an EFC employee. Furthermore, when Otero left York he was replaced by Zimmermann, another EFC employee, whom Otero trained in the techniques of ocean freight forwarding and as the new Secretary of York, became responsible for its forwarding operations. In fact, Mr. Zimmermann performed these functions for eight months in 1965, while he was actually still employed by EFC.

Wood Shipping lost its independence as an ocean freight forwarder following the death of Mr. Wood in 1966. Dr. Fuge had no connections with Wood Shipping prior to the death of Mr. Wood, and neither Andrew Aquino nor Thomas Barber ever knew Mrs. McDonnell or Dr. Fuge prior to that time. Thereafter, Mrs. McDonnell obtained control of 85 percent of the stock of Wood Shipping and was elected a director and officer of Wood Shipping. After the death of Mr. Wood, Dr. Fuge arranged for the relocation of Wood Shipping's offices with the building management and Wood Shipping began to share office space with the Iranian Mission, Edwards Fuge Associates, and others.

Since 1966, York has been virtually absorbed by Wood Shipping and is connected with and controlled by those who control Wood Shipping,

one of whom is Dr. Fuge. The arrangement between York and Wood Shipping ultimately resulted in York operating without experienced personnel, as it is now doing, since neither Mrs. McDonnell nor Albert Abdalla are qualified as ocean freight forwarders.

The record is replete with evidence of Dr. Fuge's participation in Wood Shipping's business affairs and amply demonstrates a pattern of controlling connections and interrelationships that existed between York Forwarding, Wood Shipping and Dr. Fuge, the owner of EFC. Therefore, the Examiner rightfully concluded that neither York nor Wood Shipping is in fact independent of shipper connections within the meaning of sections 1 and 44 of the Shipping Act, 1916. These sections were intended to prevent even the opportunity for a shipper to exercise control over a freight forwarder. See *Application for Freight Forwarder License—York Shipping Corp.*, 9 F.M.C. 72, 75 (1965). It must be remembered that neither the shipper's intention not to exercise control nor the forwarder's intention to prevent such exercise is material. See *Application for Freight Forwarder License—Delmar Shipping Corp.*, 8 F.M.C. 493, 497 (1965).

As noted, the Examiner concluded Wood Shipping and York were violating section 15 of the Shipping Act by carrying out an unapproved section 15 agreement. It is, of course, not possible to lay down hard and fast rules concerning the filing of agreements within the category of "cooperative working arrangements", and whether a particular agreement must be filed depends upon the facts and circumstances under which the agreement came into being and the aims and purposes expressed therein. Here, it is apparent that an exclusive and preferential working arrangement existed between Andrew Aquino as president of both York and Wood Shipping and Mrs. McDonnell for the performance by York of some of the freight forwarding work of Wood Shipping.¹⁶

While nonexclusive, cooperative working agreements between licensed ocean freight forwarders which provide for the completion of documentation and performing of other services on export shipments on behalf of the parties have been granted an exemption from the provisions of section 15 of the Shipping Act, 1916,¹⁷ this is not the situation that exists here where there has been a gradual overt absorption of one forwarder by another by means of a thorough and comprehensive working arrangement. Because of the close interrelationship between them, it is evident that York and Wood Shipping were not op-

¹⁶ Mr. Aquino owns 50 percent of the stock of Wood Shipping. It will be recalled that an agreement was reached between Mr. Barber and Mrs. McDonnell whereby she would receive 35 percent of the stock of Wood Shipping and Barber would become 100 percent owner of York.

¹⁷ See 46 CFR 510.26(b).

erating as entities separate and apart from each other. The failure to file a memorandum of this arrangement with the Commission for approval under section 15 constitutes a violation of that section. See *Volkswagenwerk v. FMC*, 390 U.S. 261 (1968); and *American Export Isbrandtsen Lines, Inc.*, 14 F.M.C. 82 (1970).

EFC was found by the Examiner to have violated section 16 First of the Shipping Act, 1916, by indirectly obtaining from Wood Shipping and York transportation by water for property at "less than the rates or charges which would otherwise be applicable." Conversely, the Examiner found that Wood Shipping and York had violated section 16 Second by allowing EFC to "obtain transportation at less than the regular rates or charges then established by means of an unjust or unfair device or means." These violations were grounded upon the general conclusion that Wood Shipping had been used as a conduit for preferential treatment of EFC.

The record does show that Wood Shipping paid an auto repair bill for Dr. Fuge and certain attorney's fees for EFC and Albert Fuge Associates. Wood Shipping also paid Bertha Fuge \$2,275 during 1969 for accompanying her husband while entertaining the Iranian Mission. Finally, Wood Shipping paid Dr. Fuge a salary and traveling expenses for performing some ill-defined "consultant services" for Wood Shipping.

The real difficulty in concluding that this conduct violated section 16 is found in the attempt to equate it with an "unfair device or means" used to obtain transportation at less than the "rates or charges otherwise applicable." There has been no meaningful showing that the wages received by the Fuge family were anything other than for services rendered to Wood Shipping. Nor is it entirely clear that the repairs on Dr. Fuge's automobile were not paid for on the basis of its use in Wood Shipping business. Finally, there is no asserted correlation between the wages and the cost of repairs and the rates and charges of any shipment or shipments. In short, we simply are without the essential ingredients of a section 16 violation. See *Pacific Far East Lines—Alleged Rebates*, 11 F.M.C. 357 (1968). The same is true of the legal expenses of EFC.

Our disposition of the alleged violations of section 16 of the Shipping Act, 1916, dictates a similar conclusion under section 510.24(c) of General Order 4 (46 CFR 510.24(c)), which provides:

No licensee shall share, directly or indirectly, any compensation or freight forwarding fee with a shipper, consignee, seller, purchaser, or their agents, affiliates or employees; nor with any person or persons advancing the purchase price of the merchandise or guaranteeing payment therefor; nor with any person or persons having beneficial interest in the shipment.

Here, as under section 16, there is simply insufficient evidence of record of any sharing by Wood Shipping and York of their forwarding fees and compensation. There is, however, a quite different situation under section 510.23(a) of General Order 4 (46 CFR 510.23 (a)). That section provides, in part:

No licensee shall permit his license or name to be used by any person not employed by him for the performance of any freight forwarding service. No licensee may provide freight forwarding services through an unlicensed branch office or other separate establishment without written approval of the Federal Maritime Commission.

The record clearly shows that the forwarding services provided by York to its clients had since 1968 for a time been performed by Zimmermann, while not in the employ of York, and some other unidentified person not employed by York. Thus, because persons not employed by York were permitted to perform forwarding services under York's license, the Examiner properly concluded, as do we, that York violated section 510.23(a) of General Order 4.

Finally, the Examiner recommended that the licenses of York and Wood Shipping be revoked. We can only partially agree with the Examiner. The record here makes it obvious that York is a freight forwarder in name only and that its dissolution would be literally without impact on the shipping public. It has no qualified personnel, and whatever the real reason for its existence it does not qualify for a forwarding license under the Shipping Act. Like the Examiner, we can see no valid reason for continuing its license. Accordingly, the license of York will be revoked. However, we find a different situation to exist in the case of Wood Shipping, and we cannot agree that something less than the rather drastic action of revocation would not satisfy the law's requirements.

Insofar as the record shows, Wood Shipping has been an established and respected forwarder since 1922. Nothing in the record would lead us to believe that during these years Wood Shipping has provided other than good and valuable services to the shipping public. Moreover, Wood Shipping employs some 25 people, and we are mindful of the hardship revocation would work on these employees. Wood Shipping's real difficulty arises from its association with York and Dr. Fuge and his various enterprises. In our opinion, were a general "house-cleaning" to occur and these associations terminated, Wood Shipping could again meet the requirements of an independent ocean freight forwarder which is fit, willing and able to perform the services required. Accordingly, if the requirements set forth below are met, Wood Shipping will be allowed to retain its license.

As conditions to the retention of its license, Wood Shipping must meet the following requirements:

1. Wood Shipping shall completely disassociate itself from any and all relationships with EFC, Albert Fuge Associates, Dr. Fuge, his wife and immediate family, the Imperial Iranian Air Force Mission, Mitradad, Agat International, and Grand Cargo; and guarantee that any of the above-named persons or officers, directors or employees of the above-named corporations or organizations are not nor will in the future become an employee, officer or director of Wood Shipping, nor will become involved in the day-to-day management of Wood Shipping;

2. As a contingent to being found fit or able to perform the required services, Wood Shipping shall collect any and all outstanding debts in the form of advances or personal loans; and in connection with the persons, corporations and organizations listed in requirement 1. above, shall settle or cancel all outstanding obligations of any kind; and

3. Wood Shipping shall purchase back all outstanding stock certificates and ownership interest from Mrs. Nora McDonnell, and completely divest Mrs. McDonnell of any interest in Wood Shipping, and guarantee that she is not now, nor in the future will be, an employee, director or officer of Wood Shipping; or become involved in the day-to-day management of Wood Shipping.

In order to insure compliance with the above, we will require Wood Shipping to submit within 90 days of service of this report and order a full report on the manner in which it has complied with the requirements. The failure to submit the report will result in revocation of Wood Shipping's license without further proceedings. An appropriate order will be entered.

[SEAL]

(S) FRANCIS C. HURNEY,
Secretary.

15 F.M.C.

FEDERAL MARITIME COMMISSION

DOCKET No. 70-4

YORK FORWARDING CORP., J. B. WOOD SHIPPING CO., INC.,
AND EDWARDS FUGE CORP.

ORDER

This proceeding was initiated by the Federal Maritime Commission to determine, *inter alia*, whether York Forwarding Corp. and J. B. Wood Shipping Co., Inc., continue to qualify as independent ocean freight forwarders and whether their licenses should be continued in effect or be revoked, and the Commission has fully considered the matter and has this date made and entered of record a Report containing its findings and conclusions thereon; which report is hereby referred to and made a part hereof. The Commission found, *inter alia*, that the license of York Forwarding Corp. as an independent ocean freight forwarder be revoked, and that the license of J. B. Wood Shipping Co., Inc., as an independent ocean freight forwarder be allowed to be retained subject to certain specific conditions.

Now therefore, it is ordered, That the license of York Forwarding Corp. as an independent ocean freight forwarder be, and it is hereby, revoked, effective this date.

It is further ordered, That J. B. Wood Shipping Co., Inc., be allowed to retain its license as an independent freight forwarder subject to the following conditions:

1. J. B. Wood Shipping Co., Inc., shall completely disassociate itself from any and all relationships with Edwards Fuge Corp., Albert Fuge Associates, Dr. Fuge, his wife and immediate family, the Imperial Iranian Air Force Mission, Mitradad, Agat International, and Grand Cargo; and guarantee that any of the above-named persons or officers, directors or employees of the above-named corporations or organizations are not nor will in the future become an employee, officer or director of J. B. Wood Shipping Co., Inc., nor will become involved in the day-to-day management of J. B. Wood Shipping Co., Inc.;

2. J. B. Wood Shipping Co., Inc. shall collect any and all outstanding debts in the form of advances or personal loans and in connection with the persons, corporations and organizations listed in 1. above, shall settle or cancel all outstanding obligations of any kind; and

3. J. B. Wood Shipping Co., Inc. shall purchase back all outstanding stock certificates and ownership interest from Mrs. Nora McDonnell, and completely divest Mrs. McDonnell of any interest in J. B. Wood Shipping Co., Inc., and guarantee that she is not now, nor in the future will be, an employee, director or officer of J. B. Wood Shipping Co., Inc., or become involved in the day-to-day management of J. B. Wood Shipping Co., Inc.

It is further ordered, That to insure compliance with this Order, J. B. Wood Shipping Co., Inc., shall submit a full report to the Commission on the manner in which it has complied with the requirements as heretofore set out within 90 days of service of this Report. If J. B. Wood Shipping Co., Inc., fails to submit the required report, its license as an independent ocean freight forwarder will be revoked without further proceedings.

By the Commission.

[SEAL]

(S) FRANCIS C. HURNEY,
Secretary.

15 F.M.C.

FEDERAL MARITIME COMMISSION

DOCKET No. 71-48

INDEPENDENT OCEAN FREIGHT FORWARDER

LICENSE APPLICATION—GUY G. SORRENTINO

Adoption of Initial Decision

March 2, 1972

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

This proceeding was instituted by a Commission-issued Order of Investigation and Hearing served on May 3, 1971, to determine whether one Guy G. Sorrentino (hereinafter Applicant) "is fit, willing, and able to carry on the business of forwarding as required by section 44 of the Shipping Act, 1916, and the Commission's rules and regulations," and whether his application as an independent freight forwarded should be granted.

By a certified letter dated March 18, 1971, the Commission notified Applicant of its intent to deny his application for an individual independent ocean freight forwarder license. Applicant, upon receipt of the Commission letter, requested a hearing be held to show that denial of the application is unwarranted. Thereafter, the Order of Investigation and Hearing issued.

A hearing was held in New York on August 4, 1971, presided over by Examiner Ashbrook P. Bryant.

In his initial decision served November 5, 1971, the Examiner found that Applicant was "fit, willing, and able properly to carry on the business of freight forwarding."

Hearing Counsel in their exceptions claim that the Examiner hedged on the facts and did not give them the legal significance to which they were entitled.

Upon review of the exceptions, we conclude that they are but a restatement of the contentions already advanced before the Examiner, and that the Examiner's findings and conclusions on these con-

tentions were proper and well founded. Accordingly, we hereby adopt the initial decision (a copy of which is attached to and made a part hereof), adding only this admonition. As we pointed out in Docket No. 66-4, *Independent Ocean Freight Forwarder License Application, James J. Boyle & Co.*, 10 F.M.C. 121 (1966), we are charged with the responsibility of maintaining the high degree of responsibility required in the profession of ocean freight forwarding. Congress has required us to review license applications and limit access to the profession to those who are "fit, willing, and able" to carry on the business of ocean freight forwarding. We have therefore established a high standard of moral conduct to which an applicant as well as a licensee must conform. Anything less than this is considered conduct unsuited to the profession and will result in our swift action to remedy the misconduct, whether by denial of a license or suspension.

COMMISSIONER CLARENCE MORSE, concurring; with whom CHAIRMAN BENTLEY joins:

Although Applicant's conduct is not defensible, I nevertheless concur in the decision of the majority for the reasons therein stated. An applicant for a license should be confronted with no more severe tests than those applied in determining whether a license should be revoked (Shipping Act, 1916, section 44(d); Administrative Procedure Act, section 9(b); General Order 4, 46 CFR Part 510).

The record discloses that the questionable methods used in describing the shipments involved may have been dictated by the shipper. For this, the shipper was charged and pleaded guilty to several counts. No action was taken against the ocean carrier.

The shipments were "Clothing Snap Fasteners." The record shows that the commodity description on the ocean bills of lading prepared by the freight forwarder was stated as "Textile Machinery Parts" and as such was rated properly by the ocean carrier as "Textile Machinery, N.O.S." The freight rate on "Textile Machinery, N.O.S." was less than the freight rate on "General Cargo, Other Than Dangerous Cargo, N.O.S." which latter rating would have been applied to "Clothing Snap Fasteners." On the shipper's export declaration, the freight forwarder typed in below the phrase "Textile Machinery Parts" the following in parenthesis "Clothing Snap Fasteners." A validated copy of the shipper's export declaration showing the commodity description "Textile Machinery Parts (Clothing Snap Fasteners)" was lodged with the ocean carrier before the latter issued its bill of lading and its freight bill for the shipments.

Hence, the ocean carrier may have acquiesced in this improper practice, for a casual comparison of the bill of lading as presented to the ocean carrier by the freight forwarder with the validated shipper's

export declaration would have put the ocean carrier on notice that the rating of the shipments should be double-checked or that the shipment should have received the "General Cargo, N.O.S." rating as "Clothing Snap Fasteners". Reasonable diligence on the part of common carriers to verify the proper rating of shipments from documents in their possession is the least that is required of common carriers under section 16 Second, Shipping Act, 1916.

I am not unaware of the holding in *Royal Netherlands Steamship Co. v. Federal Maritime Board*, 304 F.2d 938 (1962). With deference to that court, I believe it erred when it required that the "knowingly and willfully" test contained only in the first paragraph of section 16, Shipping Act, 1916, be applied when charging the common carrier under section 16 Second. Section 16 Second in plain, simple language states "That it shall be unlawful for any common carrier by water . . . either alone or in conjunction with any other person, directly or indirectly: . . . Second. To allow any person to obtain transportation for property at less than the regular rates or charges . . . by means of false billing, false classification . . . or by any other unjust or unfair device or means." The phrase "knowingly and willfully" does not appear. Instead, the test is "allow." I fail to find any reasons for reading in the more rigorous "knowingly and willfully" test.

In my opinion, cases such as *Prince Line v. American Paper Export*, 55 F.2d 1053 (1932); *Misclassification and Misbilling of Glass Articles*, 6 F.M.B. 155 at 161-166 (1960) (reversed on this point in *Royal Netherlands*); and *In re Rubin, Rubin & Rubin Corp.*, 6 F.M.B. 235 at 242-243 (1961), more logically and correctly reflect the intent of the Congress.

This is a stale matter and therefore little can now be done. For the future in-fact situations of this nature I would urge that investigations be initiated against the shipper and the ocean freight forwarder for violation of the first paragraph of section 16, Shipping Act, 1916, and against the ocean carrier for violation of section 16 Second, Shipping Act, 1916. Section 16 declares that one who violates the section is guilty of a misdemeanor punishable by a fine of not more than \$5,000.00 for each offense.

[SEAL]

(Signed) FRANCIS C. HURNEY,
Secretary.

FEDERAL MARITIME COMMISSION

No. 71-48

INDEPENDENT OCEAN FREIGHT FORWARDER LICENSE APPLICATION-- GUY G. SORRENTINO

Applicant found to be fit, willing, and able properly to carry on the business of freight forwarding. His long history of creditable performance as an ocean freight forwarder, the substantial economic loss he has already suffered in addition to his frank admission of past fault and his expressed intention fully to discharge the duties and responsibilities of a licensed freight forwarder in the future, are found to mitigate the effects of his culpability in failing to prevent violations of the Shipping Act, 1916, by a licensed ocean freight forwarder of which he was President and principal stockholder. Applicant, however, is warned of the seriousness of the conduct he has at least condoned and is cautioned that, in view of his past lapses, he should be doubly alert to avoid future deviation from strictest adherence to the requirements of the Shipping Act, 1916, the Commission's rules and regulations, and the high standards of trust and confidence which his status imposes.

Guy G. Sorrentino, for himself.

Donald J. Brunner and Ronald Lee, Hearing Counsel.

INITIAL DECISION OF ASHBROOK P. BRYANT, PRESIDING EXAMINER ¹

On December 17, 1970, Guy G. Sorrentino filed his application for a license as independent freight forwarder pursuant to General Order No. 4 ² and section 44 of the Shipping Act, 1916 (the Act).³ Applicant was notified by certified letter dated March 18, 1971, that the Commission intended to deny his application unless he requested op-

¹ This decision became the decision of the Commission March 2, 1972.

² General Order No. 4 (Rev.) 33 F.R. 12654, September 6, 1968; 46 CFR 510.

³ Section 44 of the Shipping Act, 1916; 46 USCA 941(b):

"(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 to carry on the business of forwarding and to conform to the provisions of this Act and the requirements, rules and regulations of the Commission issued thereunder, and that the proposed forwarding business is, or will be, consistent with the national maritime policies declared in the Merchant Marine Act, 1936; otherwise such application shall be denied . . ."

portunity to show that the denial was unwarranted. The reason for the action was alleged involvement of Sorrentino in misclassification, from 1964 through 1966, of export shipments by Sorrentino Shipping Inc., a licensed independent ocean freight forwarder, of which applicant was president and director, in order to obtain lower ocean freight rates, in violation of section 16 of the Act. A hearing was requested and duly held, at which applicant was advised of his right to counsel. He stated that he did not wish to avail himself of that right.⁴ At the hearing, and in the subsequent preparation and filing of briefs, applicant was afforded substantial procedural latitude to assure that his side of the story was amply reflected in the record.

FACTS

Applicant has successfully engaged in the business of ocean freight forwarding in various capacities since 1942. In that year he went to work for Bryant and Heffernan, "foreign freight forwarders," as messenger-junior clerk. He served honorably in the U.S. armed services during World War II between 1943 and 1946. In 1947 he was again employed by Bryant and Heffernan. He later transferred to another ocean freight forwarder, Distribution Forwarding Services, Inc., and was employed there until he formed Sorrentino Shipping Inc., which was then known as Confidential Overseas Forwarding, in 1951. From then until December 31, 1970, when he voluntarily severed his connection with the company, applicant was president of Sorrentino Shipping Inc., and actively engaged in the business of ocean freight forwarding. He has never engaged in any other business but foreign freight forwarding.

Applicant's technical competence as an ocean freight forwarder is not questioned.⁵ The sole issue to be decided, then, is whether applicant's connection with violations of the Act, of which Sorrentino Shipping Inc., was convicted, in and of itself, renders him unfit properly to carry on the business of forwarding and to conform to the provisions of the Act and the requirements, rules and regulations of the Commission issued thereunder. The circumstances of these violations are crucial to the application and will be considered in detail.

⁴ Tr. p. 3-4—August 4, 1971 :

Previously applicant had been fully advised of his right to counsel as indicated by the following from his letter of June 1, 1971, to the Examiner :

"I wish to confirm that I shall be pleased to attend the hearing in Washington.* Further, please be informed that I will attend without benefit of counsel. You pointed out my rights in this connection for which I thank you."

*For the applicant's convenience the hearing was later scheduled in New York.

⁵ As Hearing Counsel stated (Opening Brief, p. 2), "There is no doubt that he has the requisite technical expertise or know-how to carry on the business of forwarding."

In about September 1951, Guy G. Sorrentino, together with François Bertrand, owned in equal shares the outstanding capital stock of Confidential Overseas Forwarding, Inc., which they operated as an ocean freight forwarder under F.M.B. registration No. 1375. About June 1958, that company was renamed Sorrentino Shipping Inc.; and in January 1962: Sorrentino Shipping Inc., of which Sorrentino now owned all the outstanding 20 shares of capital stock, applied for a license as an independent ocean freight forwarder, which was issued to that company on January 3, 1964 (F.M.C. License No. 878).

In June or July 1964, Rau Fasteners Company of Providence, Rhode Island (Rau), contacted Guy G. Sorrentino to engage the services of Sorrentino Shipping Inc., in connection with Rau's export of merchandise to Unifast Manufacturing Company S.A. of Brussels, Belgium. All contacts with Rau were through its export manager, Albert N. Winegrad. The method of handling Rau's shipments was initially worked up between Guy G. Sorrentino on behalf of Sorrentino Shipping Inc., and Albert N. Winegrad on behalf of Rau. Thereafter Rau's direct contacts with Sorrentino Shipping were through one of its employees, William Huze.

Sorrentino Shipping's method of handling Rau's shipments was as follows: Sorrentino Shipping received from Rau copies of Rau's invoice and packing list on each of its shipments to Unifast. All goods were moved by truck from Providence to the piers at New York at Rau's direction and under its control. Sorrentino Shipping, using the invoices and packing lists furnished by Rau, prepared the ocean bills of lading, dock receipts, and shipper's export declarations. Sorrentino Shipping booked the freight with the ocean carriers, lodged the dock receipts at the steamship company piers, lodged the ocean bills of lading with the steamship companies and picked up the original onboard copies from them, submitted the shipper's export declarations to the Bureau of Customs and had them validated, lodged the validated copies with the steamship companies, and obtained maritime insurance on each shipment. When shipments were complete Sorrentino Shipping received the freight bills from the steamship companies for the prepaid ocean freight and paid them as agent for Rau. Sorrentino Shipping submitted its own invoices to Rau, billing it for prepaid ocean freight, marine insurance, and other monies expended as well as its own forwarding fee.

In October 1964, Sorrentino Shipping placed the first two of Rau's shipments to Unifast aboard the *American Commander*, United States Lines, using the commodity description "clothing snap fasteners" on the bills of lading, on the basis of which United States Lines assessed and collected the then prevailing freight rate of \$70.25 W/M under

Item 9161 of Tariff No. 26 of North Atlantic Continental Freight Conference applicable to "General Cargo, Other Than Dangerous, N.O.S."

Sometime after the second of Rau's shipments to Unifast, Rau, by Albert N. Winegrad instructed Sorrentino Shipping that clothing snap fasteners were to be described on ocean bills of lading from then on as textile machinery parts. This instruction was given either directly to Guy G. Sorrentino or to William Huze, who, in turn, relayed the instructions to Guy G. Sorrentino.

In handling Rau's shipments, Sorrentino Shipping prepared a ditto master for each shipment, from which copies of all necessary documents such as dock receipts, bills of lading, shipper's export declarations, etc., were run off on Sorrentino Shipping's ditto printer. After Sorrentino Shipping was instructed to describe the clothing snap fasteners henceforth on ocean bills of lading as textile machinery parts, all documents reproduced from its ditto master, including bills of lading and shipper's export declarations, bore the commodity description "textile machinery parts" to describe the clothing snap fasteners.

In order to comply with the requirements of the Bureau of Customs, William Huze was instructed by Guy G. Sorrentino to type in parantheses under the commodity description "textile machinery parts" on the shipper's export declarations the further description "clothing snap fasteners." Huze did so. However, no such steps were taken to modify or supplement the commodity description "textile machinery parts" appearing on the remaining documents, including the bills of lading.

On 16 occasions between April 23, 1965, and March 11, 1966, Sorrentino Shipping handled shipments of clothing snap fasteners for Rau, which were described on bills of lading and other necessary documents as textile machinery parts. On 14 such occasions the misclassification resulted in the shipments being assessed at a substantially lower freight rate than would have been the case had the consist of the shipment been correctly described on the bill of lading. In each such instance Sorrentino Shipping prepared the necessary papers and in each case only the export declaration included, in addition to the description "textile machinery parts," the further description "clothing snap fasteners," in order to comply with the requirements of the Customs Bureau.⁶ In the two remaining cases the same description, sub-

⁶ Guy G. Sorrentino makes the following explanation with regard to this action (Reply Brief of Guy G. Sorrentino p. 1):

"The insertion of additional information on a Shipper's Export Declaration, after a general description of merchandise is used, is not only common, but absolutely necessary in order to comply with the Export Control Laws of the United States Department of Commerce. While it is common practice to describe merchandise on shipping documents as "Machinery Parts", or "Road Machinery Parts" or "Textile

mitted on Rau's shipment by Sorrentino Shipping, was challenged by the carrier and the higher rate was charged and collected.

On April 22, 1970, Sorrentino Shipping was found guilty in the U.S. District Court, Southern District of New York, on 16 counts of violation of the Act involving the misclassified shipments described above. On June 17, 1970, Sorrentino Shipping was fined a total of \$1,600—\$100 on each count.

DISCUSSION AND CONCLUSIONS

Under section 44 of the Act, one who would become a licensed ocean freight forwarder should not only possess and display the required qualifications, but, in addition, must conduct his affairs and maintain his business relationships with a high degree of professional integrity and responsibility. The Act provides that the Commission shall issue such a license to a qualified applicant, but only after it affirmatively finds that such applicant '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 . . ." Before a license shall issue, the record must establish that applicant is not only technically competent but of such moral character as to reasonably insure that he will act honestly and effectively in the capacity of ocean freight forwarder. (Where applicant is a corporation or other impersonal entity, it must appear that those natural persons who will assume responsibility must meet these standards.) An important matter to be considered in determining an applicant's fitness is the fact that the prospective licensee will be a fiduciary for clients and, in addition, will occupy a unique position of trust in dealing with carriers and the public. Hence, it must appear that, as licensee, applicant will maintain a standard of professional conduct reflecting the highest degree of business responsibility and integrity, not only with clients but also with carriers and with the public. This latter duty is imposed in part because, in many instances, ocean freight forwarders have the practical ability to grant or withhold clients' freight moneys which, of course, are part of the lifeblood of the highly competitive business which they serve. As a result, by the grant of a license, an ocean freight forwarder gains the opportunity to use his experience and technical knowledge of the ocean freight business to enhance his own competitive and economic position at the ex-

Machinery Parts, it is necessary, *in all instances*, to specify on the Shipper's Export Declaration, the description of the part or parts being shipped under the general nomenclature. Otherwise Customs will refuse to authenticate the Shipper's Export Declaration. Consequently, the "method" used is an accepted practice in shipping circles, and certainly [was] not used by my former office or myself to deviate from the law, but to comply with it."

⁷ Sec. 44 ; 46 USCA 841 (b), as amended ; see note 3 *ante*.

pense of the carriers and the public. Such opportunities, while they are frequent and tempting, must be resisted. The customs of their high calling, as reflected in the statute and the Commission's rules and regulations, require freight forwarders to be ever mindful of their responsibility to the carriers and the public they serve as well as their duty to their clients.

As the Commission has said:⁸

The freight forwarder occupies a position of enormous competitive and economic power as to carriers and enjoys a fiduciary relationship with shippers. He is in a position to do grave economic harm to both. (p. 116)

* * * * *

(p. 118) The business integrity of one who occupies the position of freight forwarder should be above reproach, and he should *clearly demonstrate* a complete awareness of and a willingness to accept the responsibilities that the preferred position imposes. (emphasis supplied)

* * * * *

. . . the philosophy of section 44 is such that the shipping public should be entitled to rely upon the responsibility and integrity as well as the technical ability of a freight forwarder.

In the investigation which led to the issuance of General Order 4,⁹ the Commission, after an exhaustive inquiry, described with some particularity the powerful position occupied by forwarders in the economics of the ocean freight industry. Among other things, the Commission said (p. 335):

With respect to a substantial portion of the shipments handled by forwarders, they are authorized by their shipper clients to arrange for the booking of the cargo, and to select the carrier over whose line the shipment will move. . . . It is clear . . . that the forwarders are in a position with respect to shipments for which they have booking authority to favor one carrier over another where there is competitive service to the destination port. For this reason, the forwarders are regularly solicited for business by the carriers.

Despite his relationship as fiduciary to his shipper-clients, acts or conduct which do not comport with the freight forwarder's responsibility to carriers and the public may not be justified or excused by the plea that they were engaged in to forward the client's interest or, in deed, to retain his favor. Nor may a manager or executive of a licensed freight forwarder avoid responsibility by claiming lack of knowledge of or actual participation in improper acts or conduct by his subordinates or employees. He must see to it that the licensed freight forwarder assumes the responsibility and displays the integrity required of it.¹⁰

The standard of conduct of freight forwarders must be above reproach. They will not be permitted to cut corners or engage in ques-

⁸ Application for License No. 8, F.M.C. 109, Dixie Forwarding

⁹ Freight Forwarder Investigation, etc., 6 F.M.B. 327 (1961).

¹⁰ See section 510.4(b) Gen. Order 4 (46 CFR 510.4(b)).

tionable practices at the expense of their shipper-clients, of carriers, or of the public. This is particularly true where, as here, the record supports the conclusion that the applicant at least condoned, if he did not actually participate in, serious violations of the Act. It is the prime duty of a licensed freight forwarder to acquaint himself with, and scrupulously adhere to, the law and the rules and regulations of the Commission thereunder. In this case, applicant's burden to "clearly demonstrate a complete awareness of and willingness to accept the responsibilities that the preferred position imposes" is, indeed, a heavy one. But it is not insurmountable. In making a determination as to applicant's "fitness," i.e., whether he can be relied upon and trusted to carry on the profession of freight forwarder in an honorable and responsible fashion, we should look at all the circumstances of the applicant's case as they presently exist and not only at that part of his overall conduct and business operation which failed to meet the required standards.

As above stated, on April 22, 1970, Sorrentino Shipping Inc., was convicted in the U.S. District Court, Southern District of New York, on 16 counts of misclassification of export shipments in violation of the Act, and on June 17, 1970, duly fined \$1,600 (\$100 on each count). Applicant was not named as a defendant in the criminal action. However, he was president and principal executive officer of Sorrentino Shipping Inc., during the entire period from April 1965 to March 1966, in which all the instances of misclassification took place. There is not much doubt that applicant was at least aware of the course of dealing between Sorrentino Shipping Inc., and Rau through which the misclassification of these shipments was arranged and carried out.

It also appears that applicant was aware that the "method" used by Sorrentino Shipping to prepare shipping documents, and the description of the merchandise was calculated to and did result in obtaining lower freight rates for Rau's shipments. However, there is no evidence that Guy G. Sorrentino personally benefited from these deceptions apart from his share of whatever fees Sorrentino Shipping received for its freight forwarding services.

As Hearing Counsel says in his brief, if Guy G. Sorrentino is found not to be fit and willing and able to carry on the business of freight forwarding his application must be denied. Such action in turn will have the effect of removing him from a field of endeavor in which he has engaged for nearly 30 years.

Applicant, on his part, does not deny responsibility as principal officer of Sorrentino Shipping Inc. for these acts of misclassification. He readily admits that he should have used "better judgment" and

should have scrutinized more carefully "the shipper's instructions" to use the description "textile machinery parts." But, he says:¹¹

I realize I did not use good judgment in not scrutinizing more carefully the shipper's instructions to us to use the description textile machinery parts. I realize it is the forwarder's obligation to ascertain the proper description of merchandise exported. I also realize that as chief officer of my company I was responsible for the actions of my employees. * * * This is the only instance in my experience of approximately thirty years where I was reprimanded in any form or fashion for such a violation.

Applicant asserts, however, that denial of his license would, in effect, pronounce an economic death sentence on his productive life. He says:¹²

* * * After being gainfully and happily employed for approximately thirty years, a denial action would have the effect of ending my productive life. At age 47 and with an entire life devoted to one field I find it impossible to start a new career at this time. With the business recession in our country there are practically no jobs for middle management level in my field. Even menial occupations are being denied me in this field as prospective employers find it easy to say "this job is not for you."

The record indicates that applicant has not engaged in any phase of the freight forwarding business since his separation from Sorrentino Shipping the first of this year. Also, as above stated, he has severed his connection and disposed of his financial and proprietary interest in Sorrentino Shipping, the freight forwarding business which he built up over the years of activity in the shipping business.¹³

On October 27, 1970, the Commission served an order pursuant to section 44(d) of the Act requiring Sorrentino Shipping Inc., to show cause why its license should not be suspended for 60 days because it had been in violation of section 16 of the Act. The violations of law upon which the order to show cause was based were those of which Sorrentino Shipping Inc., had been convicted and which constitute the basis for the Commission's order herein.¹⁴ The order to show cause was published in the Federal Register on October 31, 1970.¹⁵ After Guy G. Sorrentino disassociated himself from Sorrentino Shipping, the show cause proceeding was discontinued. (February 2, 1971).

¹¹ Letter entitled Brief of Guy G. Sorrentino, September 14, 1971, p. 1.

¹² *Ibid.*, p. 4.

¹³ See Minutes of Special Meeting of Board of Directors of Sorrentino Shipping Inc., October 5, 1970, Sorrentino resigned as of December 31, 1970, with all salary and other compensation terminating at that date. He agreed to "surrender his twenty shares of stock, ten to Mr. Risch and ten to Mr. Visone. . . . The present policy maintained by the corporation on the life of Guy Sorrentino . . . in the amount of \$75,000 will be turned over to Mr. Sorrentino free as of December 31, 1970, with no liens by the corporation."

¹⁴ Docket No. 70-40—Independent Ocean Freight Forwarder License No. 878—Sorrentino Shipping, Inc.

¹⁵ Vol. 85 F.R. No. 213, p. 16867.

Applicant argues with some plausibility that had he refused to divest himself of his interest in and control of Sorrentino Shipping Inc., the maximum penalty assessed against that enterprise (in which he retained a principal's status) would have been a 60-day suspension of its license.¹⁶

He says, in effect, that he has been sufficiently punished by his voluntary removal from the freight forwarding business for a period longer than would have been the case under the Commission's proposed order; that the seriousness of the violations of law by Sorrentino Shipping has been thoroughly impressed upon him; that the Commission's regulatory purpose has been achieved; and that to deny him a license to engage in the only profession which he knows, with the consequent disastrous effects on his ability to earn a livelihood would be excessive and unfair.

Hearing Counsel points out in his reply brief that the Commission might well have taken a more stringent position in its order to show cause had it not also been dealing in that action with the rights and economic interests of innocent third parties who had no part in the violations of law by Sorrentino Shipping. However, the practical result of the show cause proceeding, had applicant not divested himself of his interest in Sorrentino Shipping, apparently would have been no more severe in its effect on applicant than a sixty-day suspension of Sorrentino Shipping. The result might well have been that, after a brief interval, applicant would have continued as a third owner and, perhaps, manager of Sorrentino Shipping, a licensed freight forwarder. This is not, of course, to say that the fact that the show-cause proceeding might have resulted in a lesser penalty ought to dictate the result in this proceeding. The actions are different and the determinations to be made are not identical. However, on balance, the applicant's connection with the sixteen instances of misclassification herein pleaded does not appear to have been so culpable as forever to bar him, when all the circumstances are considered, from pursuing the trade which has occupied all of his mature life and which as a real matter is probably his only means of gaining a livelihood. He has not engaged in any phase of the shipping business since he severed his connection with Sorrentino Shipping the first of the year. Since then he

¹⁶ "In this 'show cause order' there never was the mention of revocation of license. Consequently, it appears to me that if I had remained with Sorrentino Shipping Inc. the maximum penalty the firm (of which I was a member) would have suffered would have been a 60 day suspension. I cannot justify in my own mind why a more drastic penalty is being sought against me personally by means of denying me a license as per my application." Brief of Guy G. Sorrentino, p. 8.

has been without gainful employment. Obviously, he has already suffered substantial economic loss as a result of his transgressions.¹⁷

Applicant has a long history of useful and profitable service in the shipping industry and is technically well qualified to serve shippers, carriers, and the public. This long, fruitful history of creditable service in his profession, coupled with his frank admission of his fault, in addition to the fact that he had suffered substantial economic and professional loss by his voluntary self-exclusion from the freight forwarding profession for 11 months, tends to mitigate the effects of his culpability. Applicant is cautioned, however, that the violations of law which he at least condoned were serious and involved the essence of the high responsibility which he must assume as a licensed freight forwarder. Applicant should be extremely jealous of his privileged status as ocean freight forwarder, and particularly in view of his past lapses, should be doubly alert to avoid any future deviations from strictest adherence to the requirements of law, the Commission's rules and regulations, and the position of trust and confidence which his license imposes. Any future violations by applicant of the Act or the Commission's applicable rules and regulations, such as those involved herein, would warrant action to revoke applicant's license.

Under the foregoing circumstances, Guy G. Sorrentino is found to be fit, willing, and able to carry on the business of forwarding within the meaning of section 44 of the Act, and the Commission's rules and regulations, and qualifies as a freight forwarder.

The application of Guy G. Sorrentino is granted.

(Signed) ASHBROOK P. BRYANT,
Presiding Examiner.

Washington, D.C.

Date: November 5, 1971

¹⁷ TR. p. 16.

" . . . I certainly realize I have had plenty of time to understand the extent of the law on which infractions were based and I realize I had been negligent in that particular matter but it is the only one in approximately thirty years in acting as an independent ocean freight forwarder."

FEDERAL MARITIME COMMISSION

DOCKET No. 71-72

WALL STREET CRUISES, INC. FAILURE TO QUALIFY FOR PERFORMANCE CERTIFICATE

Wall Street Cruises, Inc. found in violation of section 3 of Public Law 89-777 and section 540.3 of Commission General Order 20 for failure to establish its financial responsibility and to obtain from the Commission a Certificate of Financial Responsibility for Indemnification of Passengers for Nonperformance of Transportation prior to publishing a series of advertisements offering cruises from United States ports.

Respondent ordered to cease and desist from arranging, offering, advertising, or providing cruise passage until after it has complied with financial responsibility requirements of P.L. 89-777 and General Order 20.

Maurice Matalon for Wall Street Cruises, Inc.
Donald J. Brunner and *Joseph B. Slunt*, Hearing Counsel.

March 2, 1972

REPORT

BY THE COMMISSION: (Helen Delich Bentley, *Chairman*; Ashton C. Barrett, *Vice Chairman*; James V. Day and George H. Hearn, *Commissioners*).*

On July 19, 1971, we ordered Respondent Wall Street Cruises, Inc. to show cause why it should not be found to be in violation of section 3 of Public Law 89-777 and section 540.3 of Commission General Order 20 for advertising a series of cruises from United States ports on the *S.S. Independence* without first having qualified for and received from the Commission a Certificate of Financial Responsibility for Indemnification of Passengers for Nonperformance of Transportation, and why it should not be ordered to cease and desist from arranging, offering, advertising, or providing passage on the *S.S. Independence* until after it has complied with the financial responsibility requirements of P.L. 89-777 and General Order 20.

*Commissioner Clarence Morse did not participate.

Respondent, through the person of Mr. Maurice Matalon, its president and principal stockholder, filed an "affidavit in response to the Order to Show Cause" to which Hearing Counsel replied. We have heard oral argument.

BACKGROUND

In May, June and July, 1971, Respondent, a New York corporation purporting to have an option¹ to purchase the *S.S. Independence* from American Export Isbrandtsen Lines, Inc., published a series of advertisements in the *New York Times*² offering cruises from United States ports on the *S.S. Independence*.

Section 3(a) of P.L. 89-777 provides that:

No person in the United States shall arrange, offer, advertise, or provide passage on a vessel having berth or stateroom accommodations for fifty or more passengers and which is to embark passengers at United States ports without there first having been filed with the Federal Maritime Commission such information as the Commission may deem necessary to establish the financial responsibility of the person arranging, offering, advertising, or providing such transportation, or in lieu thereof a copy of a bond or other security, in such form as the Commission, by rule or regulation, may require and accept, for indemnification of passengers for nonperformance of the transportation.

Section 540.3 of Commission General Order 20 provides as follows:

No person in the United States may arrange, offer, advertise or provide passage on a vessel unless a Certificate (Performance) has been issued to or covers such person.

Since Respondent advertised for and offered cruises from United States ports on a vessel having passenger accommodations for more than fifty passengers, without having qualified for and received from the Commission a Certificate (Performance), as required by P.L. 89-777 and Commission General Order 20, the present Order to Show Cause was issued.

DISCUSSION AND CONCLUSIONS

In its response to the Commission's Order, Respondent denies any violation of P.L. 89-777 on the grounds that it did not request nor collect any money from any prospective passenger as a result of its advertised cruise program on the *S.S. Independence* and that the sole purpose of the advertisement was, in its words, to "test the market."

Hearing Counsel would reject the suggestion that the advertisements at issue constitute a "market test" and, while admitting that section 3

¹ This option, which originally was to expire in August 1971, was later reportedly extended to October 15, 1971.

² These advertisements appeared on May 30, June 13, June 20, June 27 and July 4, 1971.

of P.L. 89-777 was primarily designed to protect cruise passengers from *loss of money* due to the nonperformance of the transportation contracts, they point out that it is clearly "preventive in nature" and by its clear terms bars *all advertising* prior to the establishment of a person's financial responsibility. Hearing Counsel's position is correct. To hold otherwise would not only frustrate the language of P.L. 89-777 but the intent of the law as well.

At the outset, we find Respondent's characterization of the advertisements in question as "market tests" to be unconvincing. As Hearing Counsel have pointed out, the advertisements which appeared in the *New York Times* quote specific fares and name specific dates and purport to solicit business for actual cruises. These advertisements are similar to regular advertisements published by established passenger lines, and clearly invite response by the public to either Respondent or travel agents. The advertisements which Respondent published in the *New York Times* do not indicate that their purpose was merely to determine the potential traveling public's reaction to the proposed cruise program.

Nor does the fact that the advertisements in question incorporated caveats stating that the "offer of the above program is based on an Option Agreement" for the purchase of the vessel upon which the transportation offer was to be performed dissuade us from this view. They did not clearly condition the sailing of the cruises offered upon the exercise of the option agreement or otherwise effectively serve notice on prospective passengers of the uncertain status of the cruises. The notices, which Respondent caused to appear in the Sunday editions of the *New York Times* on several occasions during the months of May, June and July 1971, constituted "advertisements" within the real meaning of the word rather than merely reflecting a "market test", as Respondent would have us believe.

Under section 3 of Public Law 89-777, oftentimes referred to as the "Safety of Life at Sea" legislation, however, no person is permitted to arrange, offer, *advertise*, or provide passage on a vessel having berth or stateroom accommodations for fifty or more passengers and which is to embark passengers at U.S. ports, without *first* establishing his financial responsibility for indemnification of passengers for non-performance of transportation. In implementing that section, the Commission itself has required in section 540.3 of General Order 20 that prior to any person arranging, offering, *advertising* or otherwise providing passage on a vessel, such person *must* have been issued a Certificate evidencing financial responsibility.

In enacting P.L. 89-777, Congress expressed its intent to insure that the traveling public be protected from financial loss at the hands of vessel owners and operators or other persons booking transportation

on oceangoing vessels. Accordingly, P.L. 89-777 is clearly designed to prevent vessel owners, operators or other persons who have not demonstrated their financial soundness in advance from arranging, offering or advertising passage on specified vessels from United States ports. This fact was emphasized by Representative Maillard, the ranking minority member of the House Subcommittee on Merchant Marine, when he explained, in discussing the bill which ultimately became P.L. 89-777, that:

The way the legislation is worded, my understanding of it is that this information and the proof of financial responsibility must be on file before anyone can offer this service.³

Thus, the actual collection or noncollection of any fares is clearly not crucial to a finding of a violation of section 3 of P.L. 89-777.

Viewed in light of the above, Respondent's action in advertising for a series of cruises aboard the *S.S. Independence* without first having qualified for and received from the Commission a Certificate (Performance), establishing its financial responsibility for the indemnification of passengers, constitutes a violation of section 3 (a) of P.L. 89-777 and section 540.3 of Commission General Order 20. And while we applaud Respondent's attempt to put the *S.S. Independence* back into operation under the American flag and thereby revive, at least in part, our floundering passenger vessel service, we cannot ignore or condone violations of the law and our own regulations.

We are accordingly left with no choice but to order Respondent to cease and desist from advertising, or otherwise offering, arranging or providing passage on the *S.S. Independence*, including any collection of deposits or fares, either directly or indirectly, on its own behalf or through agents, until it has complied with the financial responsibility requirements of section 3 of P.L. 89-777 and the provisions of Commission General Order 20.

COMMISSIONER GEORGE H. HEARN, CONCURRING:

I agree with the conclusions of the majority in this case and with the supporting arguments.

As the majority opinion states, the collection or noncollection of fares is not crucial to the finding of a violation. However, based on all the evidence, I would find, in mitigation of the violation, that the Respondent had no intention to deliberately defraud the public or perform a fraudulent act.

An appropriate order will be entered.

[SEAL]

(S) FRANCIS C. HURNEY,
Secretary.

³ 111 Congressional Record 25950 (1965).

FEDERAL MARITIME COMMISSION

DOCKET No. 71-72

WALL STREET CRUISES, INC.
FAILURE TO QUALIFY FOR PERFORMANCE CERTIFICATE

ORDER

This proceeding having been initiated by an Order to Show Cause issued by the Federal Maritime Commission upon its own motion, and the Commission having fully considered the matter and having this day made and entered of record a Report containing its findings and conclusions, which Report is hereby referred to and made a part hereof;

It is ordered, That Wall Street Cruises, Inc. cease and desist from arranging, offering, advertising or providing passage on the *S.S. Independence* until it has complied with the financial responsibility requirements of section 3 of P.L. 89-777 and Commission General Order 20.

By the Commission.

[SEAL]

(S) FRANCIS C. HURNEY,
Secretary.

15 F.M.C.

FEDERAL MARITIME COMMISSION

WASHINGTON, D.C.

SPECIAL DOCKET No. 440

A.I.D.—U.S. DEPARTMENT OF AGRICULTURE

v.

STERLING NAVIGATION Co., LTD.

NOTICE OF ADOPTION OF INITIAL DECISION AND ORDER PERMITTING WAIVER OF CHARGES

March 7, 1972

No exceptions having been taken to the initial decision of the Examiner in this proceeding and the Commission having determined not to review same, notice is hereby given that the initial decision became the decision of the Commission on March 7, 1972.

It is ordered, That applicant is authorized to waive collection of \$16,014.68 of the charges previously assessed A.I.D.-U.S. Department of Agriculture.

It is further ordered, That applicant shall publish promptly in its appropriate tariff, the following notice.

Notice is hereby given, as required by the decision of the Federal Maritime Commission in Special Docket 440 that effective January 2, 1972, the rate on "Bagged Bulgar (West Coast only)" for purposes of refund or waiver of freight charges on any shipments which may have been shipped during the period from January 2, 1972 through February 7, 1972, is \$87.00 W/M including bunker surcharge of \$2.00 per revenue ton, subject to all other applicable rules, regulations, terms and conditions of said rate and this tariff.

It is further ordered, That waiver of the charges shall be effectuated within 80 days of service of this notice and applicant shall within five days thereafter notify the Commission of the date and manner of effectuating the waiver.

By the Commission.

[SEAL]

(S) FRANCIS C. HURNEY,
Secretary.

FEDERAL MARITIME COMMISSION

SPECIAL DOCKET No. 440

A.I.D.—U.S. DEPARTMENT OF AGRICULTURE

v.

STERLING NAVIGATION Co., LTD.

Application to waive a portion of freight charges granted.

INITIAL DECISION OF HERBERT K. GREER, PRESIDING EXAMINER¹

Sterling Navigation Co., Ltd., a common carrier by water in the foreign commerce of the United States, has applied for permission to waive collection of a portion of the freight charges on five (5) shipments of bagged bulgar carried for the Agency of International Development, Department of Agriculture (shipper), from Seattle, Washington, to Surabaya and Djakarta, Indonesia, pursuant to four bills of lading dated January 2, 1972, and one bill of lading dated January 12, 1972. Prior to the shipments, applicant and shipper had entered into a contract for the carriage of bagged bulgar at a rate of \$37.00 per 2000 pounds, including bunkering surcharge, as evidenced by cargo booking confirmations.

Applicant inadvertently neglected to file the agreed rate with the Commission prior to the shipments but did file a rate of \$37.00 per 2000 pound effective January 13, 1972 (FMC No. 3, revised page 19). By reason of clerical error, the rate filed did not set forth the provision: "Rate includes bunker surcharge of \$2.00 per revenue ton," and when the shipments were made, the bunkering surcharge (FMC No. 3, original page 14) was applicable to the shipments. Prior to filing this application applicant corrected its tariff to include the provision inadvertently omitted (FMC No. 3, revised page 7). The aggregate weight of the shipments was 16,014,675 pounds. If the rate effective at the time of shipments was applied, the result would be total freight charges of \$16,014.68 in excess of charges at the agreed rate.

¹ This decision became the decision of the Commission March 7, 1972.

Public Law 90-298 authorizes the Commission, for good cause shown, to permit a common carrier by water in the foreign commerce of the United States to waive collection a portion of the freight charges where there is an error in a tariff of a clerical or administrative nature or an error due to inadvertence in filing a new tariff. The facts demonstrate an inadvertent failure to file the rate of \$37.00 per 2000 pounds, including the bunkering surcharge, in accordance with the agreement with the shipper, a situation within the purview of Public Law 90-298. The application was filed within 180 days of the date of the shipments and no other shipments of the same or a similar commodity moved on applicant's vessels during approximately the same time as the shipments here involved at the rate applicable at the time of these shipments. No other proceeding involving the same rate situation is now pending.

Good cause appearing and applicant having complied with the provisions of Public Law 90-298, permission to waive collection of \$16,014.68 and to apply to the shipments the agreed rate of \$37.00 per 2000 pounds, including the bunkering surcharge, is granted. Applicant shall publish notice in its tariff as required by the statute. The waiver of the charges here authorized shall be effectuated within 30 days of service of this notice and applicant shall within five (5) days thereafter notify the Commission of the date and manner of effectuating the waiver.

(S) HERBERT K. GREER,
Presiding Examiner.

WASHINGTON, D.C.,
February 15, 1972

15 F.M.C.

FEDERAL MARITIME COMMISSION

WASHINGTON, D.C.

SPECIAL DOCKET No. 441

COMMODITY CREDIT CORP.

v.

SAN ROCCO LINE

(ANCHOR SHIPPING CORP.—GEN. AGENTS)

NOTICE OF ADOPTION OF INITIAL DECISION AND
ORDER PERMITTING WAIVER OF CHARGES*March 7, 1972*

No exceptions having been taken to the initial decision of the Examiner in this proceeding and the Commission having determined not to review same, notice is hereby given that the initial decision became the decision of the Commission on March 7, 1972.

It is ordered, That applicant is authorized to waive collection of \$171,227.50 of the charges previously assessed Commodity Credit Corporation.

It is further ordered, That applicant shall publish promptly in its appropriate tariff, the following notice.

Notice is hereby given, as required by the decision of the Federal Maritime Commission in Special Docket 441 that effective December 8, 1971, the rate on "Flour N.O.S. for account of U.S.D.A." for purposes of refund or waiver of freight charges on any shipments which may have been shipped from Chicago/Milwaukee to Beirut, Istanbul, and Farnagusta during the period from December 8, 1971 through January 8, 1972, is \$85.75 W including all terminal charges and Seaway Tolls, subject to all other applicable rules, regulations, terms and conditions of said rate and this tariff.

It is further ordered, That waiver of the charges shall be effectuated within 30 days of service of this notice and applicant shall within five days thereafter notify the Commission of the date and manner of effectuating the waiver.

By the Commission.

[SEAL]

(S) FRANCIS C. HURNEY,
Secretary.

FEDERAL MARITIME COMMISSION

SPECIAL DOCKET No. 441

COMMODITY CREDIT CORP.

v.

SAN ROCCO LINE

(ANCHOR SHIPPING CORP.—GEN. AGENTS)

Permission to waive a portion of freight charges granted.

INITIAL DECISION OF HERBERT K. GREER, PRESIDING EXAMINER ¹

San Rocco Line, a common carrier by water in the foreign commerce of the United States, through its agent Anchor Shipping Corporation, has filed an application for permission to waive collection of a portion of the freight charges on two shipments carried for the Commodity Credit Corporation, agents for the World Food Program, from Kenosha, Wisconsin, to Beirut, Lebanon.

Pursuant to two bills of lading dated December 8, 1971, applicant carried a total of 7,827,543 gross pounds of all purpose flour. Each bill of lading set forth a rate of \$35.75 per 2,240 pounds, including terminal charges and seaway tolls, the rate agreed upon by the parties prior to the shipments. Due to clerical and administrative error, applicant failed to file the agreed rate with the Commission and, at the time of the shipments, the rate applicable was \$84.75 W/M on cargo, NOS, not dangerous or hazardous which, if charged, would amount to \$171,227.50 more than the agreed rate.

Prior to submitting the applications, applicant filed with the Commission a rate of \$35.75 per 2,240 pounds on "Flour, N.O.S., for account of U.S.D.A. Rates include all Terminal Charges and Seaway Tolls," (F.M.C. No. 1, revised page 25).

Public Law 90-298 authorizes the Commission, for good cause shown, to permit a common carrier by water in the foreign commerce of the United States to waive collection of a portion of the freight

¹ This decision became the decision of the Commission March 7, 1972.

charges where there is an error in a tariff of a clerical or administrative nature or an error due to inadvertence in filing a new tariff. The facts demonstrate an inadvertent failure to file the \$35.75 per 2,240 pounds rate in accordance with the agreement with the shipper, a situation within the purview of Public Law 90-298. The application was filed within 180 days of the date of the shipments. The waiver will not result in discrimination among shippers. Two additional applications for waiver of a portion of the charges on similar shipments carried by applicant for complainant have been granted (Special Docket Nos. 438 and 439).

Good cause appearing and applicant having complied with the provisions of Public Law 90-298, permission to waive collection of a total of \$171,227.50 on the two shipments and to apply the \$35.75 rate per 2,240 pounds to the shipments is granted. Applicant shall publish notice in its tariff as required by the statute. The waivers of the charges here authorized shall be effectuated within 30 days of the service of the notice and applicant shall within 5 days thereafter notify the Commission of the date and manner of effectuating the waivers.

(S) HERBERT K. GREER,
Presiding Examiner.

WASHINGTON, D.C.,
February 15, 1972

15 F.M.C.

FEDERAL MARITIME COMMISSION

DOCKET No. 71-87

ASSOCIATED LATIN AMERICAN FREIGHT CONFERENCES AND THE ASSOCIATION OF WEST COAST STEAMSHIP COMPANIES, AMENDED TARIFF RULES REGARDING WHARFAGE AND HANDLING CHARGES

March 9, 1972

REPORT

The revised rules and charges filed by the Associated Latin American Freight Conferences and the Association of West Coast Steamship Companies relating to the imposition of wharfage and handling charges are found to be in contravention of section 205 of the Merchant Marine Act, 1936, and therefore contrary to the public interest within the meaning of section 15 of the Shipping Act, 1916.

John R. Mahoney and *John J. McGonagle, Jr.* for the Associated Latin American Freight Conferences, *et al.*, respondents.

Thomas F. Harrison for the State of New York; *Louis L. Walters* for the city of New York; *Richard M. Pisacane* for the State of New Jersey; *Arthur L. Winn, Jr.* for the Port of New York Authority; *Philip G. Kraemer* for the State of Maryland; *Martin A. Heckscher* for the Commonwealth of Pennsylvania, Delaware River Port Authority, and the Port of Philadelphia Marine Terminal Association; *William A. Imhof* for the Secretary of Agriculture and Commodity Credit Corporation intervenors.

Norman D. Kline and *Donald J. Brunner*, hearing counsel.

BY THE COMMISSION (Helen Delich Bentley, *Chairman*; Ashton C. Barrett, *Vice Chairman*; James V. Day, George H. Hearn, and Clarence Morse, *Commissioners*):

On November 19, 1971, the Commission ordered the Associated Latin American Freight Conferences and the Association of West Coast Steamship Companies and their member lines¹ to show cause why the Commission should not find the conferences' concerted action

¹ For a list of these conferences and the member lines see appendix A to this report.

in publishing revised tariff rules relating to wharfage and handling charges to be in violation of section 205, Merchant Marine Act, 1936,² and therefore contrary to the public interest within the meaning of section 15, Shipping Act, 1916,³ and accordingly order such rules and charges stricken from the tariffs. Petitions for leave to intervene were filed and granted in behalf of the Port of New York Authority, the Delaware River Port Authority, the city of New York, the U.S. Department of Agriculture, the State of Maryland, the State of New York, the Commonwealth of Pennsylvania, the Port of Philadelphia Marine Terminal Association, the State of New Jersey, and the Port of New Orleans.

The proceeding was limited to affidavits of fact and memoranda of law. Memoranda were filed by the respondent conferences (jointly), hearing counsel, and all of the intervenors. In addition, the respondents and five of the intervenors filed supporting affidavits. Oral argument was held on January 12, 1972.

BACKGROUND

The Associated Latin American Freight Conferences represents a group of 10 active conferences. The Association of West Coast Steamship Companies is a conference operating in trades between United States Atlantic and gulf ports and ports in Central and South America pursuant to Commission approved agreements. These conferences publish separate outbound and inbound tariffs which contain rules relating to the assessment of wharfage and handling charges. Prior to the revised tariffs in question, the relevant wharfage and handling charge provisions limited the cargo's cost for such service to the tollage, wharfage, handling and/or other charges assessed against the cargo.

In late May 1971, these conferences revised their tariff rules so as to fix wharfage and handling charges and generally to shift their assessment from carrier to cargo at U.S. Atlantic and gulf ports. Tariffs initiating these changes were filed with the Federal Maritime Commission on June 28, 1971, to become effective approximately 90

² Section 205 of the Merchant Marine Act, 1936 prohibits ". . . any common carrier by water, either directly or indirectly, through the medium of an agreement, conference, association, understanding, or otherwise, to prevent or attempt to prevent any other such carrier from serving any port designed for the accommodation of ocean-going vessels located on any improvement project authorized by the Congress or through it by any other agency of the Federal Government, lying within the continental limits of the United States, at the same rates which it charges at the nearest port already regularly served by it."

³ Section 15 of the Shipping Act, 1916, in part, directs the Commission to ". . . disapprove, cancel, or modify any agreement, or any modification or cancellation thereof, whether or not previously approved by it, that it finds to be . . . contrary to the public interest . . . and shall approve all other agreements, modifications, or cancellations . . ."

days thereafter, or on October 4, 1971. Subsequent to that filing, the President issued, on August 15, 1971, Executive Order No. 11615, which in effect froze all prices, including freight rates and charges, through November 12, 1971. Accordingly, the respondent conferences deferred the effective date of their revised wharfage and handling charges to November 15, the first business day after the conclusion of phase I of the wage/price freeze program.

Protests and petitions from the Governors of the States of New York and New Jersey were then filed with the Commission. On November 14, 1971, the U.S. District Court for the Eastern District of New York granted a temporary restraining order to expire November 24, 1971, restraining collection of the revised charges at the port of New York.

On November 18, 1971, a stipulation and order was signed which extended the temporary restraining order for 180 days from November 24, 1971, or "until such earlier date prior thereto as the Federal Maritime Commission shall have issued a final decision and order on the issues raised by the Protests and Petitions of the Governors of New York and New Jersey filed with the Federal Maritime Commission on or prior to November 11, 1971."

Subsequently, additional protests and petitions similar to those of New York and New Jersey were filed by the States of Pennsylvania and Maryland. In reply thereto, the respondent conferences stipulated and agreed to refrain from assessing the charges in issue at the ports of Philadelphia and Baltimore for the same period provided in the stipulation and order involving the port of New York.

The conferences' amended wharfage and handling charge tariff provisions would include in the cost to be borne by the cargo the charges for such service previously assessed against the carrier as set forth in the pertinent terminal tariffs. The conferences' tariffs publish exceptions thereto for service at Baltimore, Philadelphia, and New York. At New York, a wharfage charge of \$1 per short ton is published, together with a handling charge of \$3 per short ton with specified exceptions. At Philadelphia and Baltimore, wharfage and handling charges are as set forth in governing terminal tariffs, with the exceptions that at both ports shipper loaded containers and cargo delivered to carriers in rail boxcars will pay a handling charge of \$1.50 per short ton. The same exceptional conditions on "handling" are applied to New York for these two classes of traffic, except that at New York there will be no "handling" charge on cargo delivered by shippers within reach of ship's tackle, free of expense to the vessel. Therefore, the implementation of these revised tariff rules will re-

sult in the assessment of individual charges by the conferences which vary in amount from port to port within the continental United States.

DISCUSSION AND CONCLUSIONS

The Commission in this proceeding is presented with a single legal issue involving the applicability of section 205 of the Merchant Marine Act, 1936 (46 U.S.C. 1101, *et seq.*) to the Commission's exercise of its powers under section 15 of the Shipping Act, 1916 (46 U.S.C. 801, *et seq.*). The question is whether the provisions of section 205 of the 1936 act constitute a blanket prohibition against any conference taking concerted action which results in the assessment of varying rates and charges among federally improved continental U.S. ports, thereby rendering such action "contrary to the public interest" under section 15 of the 1916 act, and beyond the power of the Commission to sanction by its approval.

For the reasons set forth herein, we think it clear that not only is it proper to consider and give heed to section 205 in deciding cases arising under the Shipping Act but also that we are obligated to conform our decisions to the congressional policy expressed in section 205.

The point made by hearing counsel but missed by respondents is that section 205 and section 15 are both part of a coordinated regulatory scheme designed to regulate conferences and protect ports from potential or actual harmful discrimination. The fact that different agencies may bear primary responsibility for enforcing the two sections does not mean that the substantive or policy content of those sections exists in a vacuum independent of each other. In implementing section 15, the Commission is not free to ignore section 205 or any other relevant policy of Congress as expressed into law.

Accordingly, we must conclude that section 205 of the 1936 act has removed from the Commission's jurisdiction all authority to approve under section 15 of the 1916 act any activity proscribed by section 205 and requires the Commission to disapprove such activity. To conclude otherwise is in our opinion to ignore both the plain meaning of the language used and the authoritative interpretations of section 205 rendered by both this Commission and the courts.

Prior to Reorganization Plan No. 7 of 1961 (75 Stat. 840), our predecessors found the prohibitions set forth in section 205 of the 1936 act to be relevant to the determination of section 15 violations in the proceedings before those agencies,⁴ and more recently we our-

⁴ See, e.g., *Enotina Terminals v. Pacific Westbound Conference*, 5 F.M.B. 816 (1957); *Grays Harbor Pulp & Paper Co. v. A. F. Klaveness & Co. A/S*, 2 U.S.M.C. 866, 869-370 (1940); *Sun-Maid Raisin Growers Assn. v. Blue Star Line, Ltd.*, 2 U.S.M.C. 81 (1939).

selves have recognized that notwithstanding the absence of an express delegation in Reorganization Plan No. 7, section 205 remains part of the law of the land and an expression of the "Public interest" within the meaning of section 15.⁵

This approach was quite recently sanctioned by the U.S. District Court for the Northern District of California, which in May of 1970 observed that:

Even if the FMC does not have responsibility for § 205, it must take account of it in its deliberations. . . . That which would contravene § 205 of the Merchant Marine Act would surely be grounds for disapproval under § 15 of the Shipping Act. *Sacramento-Yolo Port District v. PCEC*, 8 SRR 20,569, 20,570 (1970).

Respondents' suggestion that the Commission must accede to the Department of Commerce's action (or inaction) under section 205 because of the terms of Reorganization Plan No. 7 of 1961, or some "Doctrine of Administrative Abstention", cannot override the force of the above decisions and the clear intent of Congress as expressed in the legislative history. The purpose of Congress in enacting section 205 was to remove from the then U.S. Maritime Commission the power to legalize conference restrictions against federally improved ports on a case-by-case basis under sections 15 and 16 of the Shipping Act, 1916, and to make all such restrictions illegal per se. See, e.g., hearings before the Committee on Commerce, U.S. Senate, pursuant to S. 5035, 72d Cong., 2d Sess. (1933), pp. 30, 33, 39, 82, 84, 87-90, 114.

The fact that section 205 was not assigned to the Commission by Reorganization Plan No. 7 affords no indication whatsoever that it was the intent of Congress to dilute, in any manner, the policy and proscriptions set forth in that section. Whatever may have been the reason for failing to specifically transfer the section to the Commission in the reorganization, it cannot be seriously argued that this failure now leaves the Commission free to do that which Congress enacted section 205 to expressly prohibit. The real question here is not one of the primary responsibility for the administration of section 205 of the 1936 act. That section, and section 15 of the 1916 act, and other relevant sections, are all part of a coordinated regulatory scheme which was put together by Congress and remains the law of the land. Certainly, various agencies perform functions within that scheme but each cannot operate in its own statutory vacuum oblivious to the overall policy or objectives of Congress. Neither its predecessors nor this Commission have operated this way. We have consistently given con-

⁵ See, e.g., *Sacramento-Yolo Port District v. Pacific Coast European Conference, et al.*, 15 F.M.C. 15, served Aug. 10, 1971; *Pacific Coast European Conference—Rules 10 and 12, Tariff No. FMC 14*, served June 15, 1971; *Stockton Port District v. Pacific Westbound Conference, et al.*, 9 F.M.C. 12 (1965).

sideration to the will of Congress as expressed in other statutes when administering section 15 of the 1916 act. The most obvious example is the antitrust laws wherein the Commission has had to consider policies set forth in those laws in determining whether to approve agreements filed pursuant to section 15. See, e.g., *Isbrandtsen Co. v. United States*, 211 F. 2d 51 (D.C. 1954). Section 8 of the Merchant Marine Act, 1920 (46 U.S.C. 861, 867), is yet another example of congressional policy embodied in a statute which is not specifically administered by the Commission but which nevertheless has played a part in deliberations under the 1916 act. The policy of section 8 is to promote the development of ports and transportation facilities on a natural tributary basis. This policy has been given weight by the Commission in determining questions of discrimination or prejudice toward a port. See, e.g., *Investigation of Overland/OCP Rates and Absorptions*, 12 F.M.C. 184 (1969); *Reduced Rates on Machinery and Tractors to Puerto Rico*, 9 F.M.C. 465, 476 (1966); *Stockton Port District v. Pacific Westbound Con., et al.*, 9 F.M.C. 12 (1965); *City of Portland v. Pacific Westbound Conference*, 4 F.M.C. 664 (1955). In the *Reduced Rates to Puerto Rico* case, *supra*, at 476, the Commission summed up its treatment of section 8:

This right [the right of a port or carrier serving that port to cargo from naturally tributary areas] is codified in section 8 of the Merchant Marine Act, 1920, which, as a statement of congressional policy, although not one specifically appearing in the statutes we administer, should be, and has been, followed by this Commission whenever possible.

Little would be left of the concept of the "public interest" were we to exclude from it that clear interest of the public in the just application and enforcement of those statutes enacted by Congress which are relevant considerations in the overall regulatory program for the waterborne commerce of the United States. We think it by now beyond doubt that the prohibitions of section 205 of the 1938 act form an essential part of any consideration of the public interest under section 15 of the 1916 act.

Respondents would however exclude section 205 from our deliberations in this case for yet another, but we think equally invalid, reason. They urge that the history of that section clearly establishes that its prohibitions were intended to be applied only to small west coast ports and to conferences operating in the intercoastal and coastwise trade when serving those ports.

The language in section 205 clearly makes it applicable to all ports, regardless of size, if they lie within the continental United States. To suggest a more limited meaning through reliance on excerpted legislative history violates, as pointed out by hearing counsel, the

fundamental principle of statutory interpretation which calls for the use of legislative history only to resolve doubts and ambiguities in the meanings of words used by the legislature. See *Fairport P. and E.R. Co. v. Meredith*, 292 U.S. 589 (1934). Moreover, respondents' selective treatment of the legislative history ignores testimony which clearly indicates that the language in question was intended to apply to all ports, regardless of size, or the particular coast on which they are located. See, e.g., hearings before the Committee on Merchant Marine and Fisheries, House of Representatives, pursuant to H.R. 7521, 74th Cong., 1st sess. (1935), pp. 97, 483-490, 493, 1153; hearings before the Committee on Commerce, U.S. Senate, pursuant to S. 5035, 72d Cong., 2d sess. (1933), pp. 6, 9, 31, 74, 76, 77, 79, 80, 88, and 93.

Respondent's attempted restriction of section 205 to the coastwise and intercoastal trade⁶ ignores the existence and purpose of section 2 of the Intercoastal Shipping Act 1933 (46 U.S.C. 843, *et seq.*), which provides in part that:

. . . It shall be unlawful for any such carrier, either directly or indirectly, through the medium of any agreement, conference, association, understanding, or otherwise to prevent or attempt to prevent any such carrier from extending service to any publicly owned terminal located on any improvement project authorized by the Congress at the same rates which it charges at its nearest regular port of call. . . .

Section 2 was specifically designed to regulate common carriers in the intercoastal trade. Thus, respondents would reduce section 205 of the 1936 act to sheer congressional redundancy and surplusage. Aside from the difficulties inherent in attributing any such design to Congress, the limitation urged by respondents will simply not square with either the language of the section or any complete analysis of the legislative history of section 205.⁷

Finally, respondents assert that by our reliance herein on section 205 as constituting a complete prohibition against differences in rates as between ports, we are in effect emasculating sections 16 and 17 of the 1916 act, a result obviously never intended by Congress. Again,

⁶ At least one group of conferences, the Trans-Atlantic Associated Freight Conferences, thought the section's applicability to foreign commerce clear enough to warrant opposing its passage.

⁷ See, e.g., hearings before the Committee on Merchant Marine and Fisheries, House of Representatives, pursuant to H.R. 7521, *supra*, 486-487, and particularly p. 488, wherein Congressman Burnham, representing the 20th District of California, stated in reference to what became the substance of section 205 that: "14. The Congress recognized the policy of providing for equalization of rates to new or additional ports with rates applying at the nearest port of call in passing the Intercoastal Shipping Act of 1933 but the law does not apply to foreign and coastwise operations. The proposed amendment is designed to correct this evil and lack of regulation 15. . . . the proposed amendment which simply makes effective the amendment already incorporated in the Intercoastal Shipping Act of 1933, applicable to foreign and coastwise lines." [Emphasis ours.] Also see hearings before the Committee on Commerce, U.S. Senate, pursuant to S. 5035, 72d Cong., 2d sess. (1933), p. 32.

respondents' analysis ignores the existence of a coordinated regulatory scheme wherein a single activity may violate several laws simultaneously, and in this we agree with hearing counsel who view sections 16 and 17 as broad in scope, applying to a number of things besides discriminatory conference rates. If there is any "shortcut" owing to section 205, it is because Congress specifically prohibited one particular type of concerted action and has removed from the Commission any discretion to approve it under section 15.

Our action herein does not in any manner demean sections 16 and 17 of the 1916 act, and the conference activities in question may be equally violative of the broader and more general preference and prejudice provisions of those sections. But this does not relieve us of the obligation to apply section 205 in considering whether respondents' actions are contrary to the public interest within the meaning of section 15 of the 1916 act.

Accordingly, and for the foregoing reasons, we find that the rules and charges relating to the wharfage and handling costs at issue are in contravention of section 205 of the Merchant Marine Act, 1936, and are therefore contrary to the public interest within the meaning of section 15 of the Shipping Act, 1916.

Any argument not specifically dealt with in this report has been considered and found to be either irrelevant, immaterial, or unnecessary to our decision herein.

An appropriate order will be issued.

[SEAL]

(S) FRANCIS C. HURNEY,
Secretary.

APPENDIX

Atlantic and Gulf/West Coast of South America Conference.
 Atlantic and Gulf/West Coast of Central America and Mexico Conference.
 East Coast Colombia Conference.
 U.S. Atlantic and Gulf-Haiti Conference.
 U.S. Atlantic and Gulf—Jamaica Conference.
 Leeward and Windward Islands and Gulanas Conference.
 Atlantic and Gulf/Panama Canal Zone, Colon and Panama City Conference.
 U.S. Atlantic and Gulf Santo Domingo Conference.
 U.S. Atlantic and Gulf—Venezuela and Netherlands Antilles Conference.
 West Coast South America Northbound Conference.
 Association of West Coast Steamship Companies.
 Caribbean Trailer Express Ltd.
 Lykes Bros. Steamship Co., Inc.
 Azta Shipping Co. (Azta Line).
 Marine Mercante Nicaraguense, S.A. (Mamenic Line).
 Sea-Land Service, Inc.
 Gulf-Puerto Lines, Inc.
 United Fruit Co. (a division of United Brands Co.).
 Atlantic Lines, Ltd.

Booth Steamship Co., Ltd.
 Lamport & Holt Line Ltd.
 L. Figueiredo Navegacao S.A.
 Linea Amazonica S.A.
 Pan American Mail Line, Inc.
 The Honduran Line (Empresa Hondurena de Vapores, S.A.).
 Hapag-Lloyd AG (Hapag/Lloyd Magellan Service).
 Colombiana Internacional de Vapores.
 Compania Sud-Americana de Vapores (Chilean Line).
 Flota Mercante Grancolombiana, S.A.
 Gulf & South American Steamship Co., Inc.
 Kawasaki Kisen Kaisha, Ltd. ("K" Line).
 Nippon Yusen Kaisha Lines (N.Y.K. Line).
 Prudential-Grace Lines, Inc.
 Vaasa Line Oy.
 Westfal-Larsen & Co., A/S (Westfal-Larsen Line).
 Compania Peruana de Vapores (Peruvian State Line).
 Alcoa Steamship Co., Inc.
 Compania Anonima Venezolana de Navegacion (Venezuelan Line).
 Delta Steamship Lines, Inc.
 Koninklijke Nederlandsche Stoomboot Maatschappij N.V. (Royal Netherlands
 Steamship Co.).
 Nopal Lines (The Northern Pan-American Line A/S).
 15 F.M.C.

FEDERAL MARITIME COMMISSION

DOCKET No. 71-87

ASSOCIATED LATIN AMERICAN FREIGHT CONFERENCES AND THE ASSOCIATION OF WEST COAST STEAMSHIP COMPANIES, AMENDED TARIFF RULES REGARDING WHARFAGE AND HANDLING CHARGES

ORDER

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

Therefore, it is ordered, That the rules and charges relating to the wharfage and handling costs in issue which were filed by the Associated Latin American Freight Conferences and the Association of West Coast Steamship Companies are to be stricken from the tariffs relating thereto.

By the Commission.

[SEAL]

(S) FRANCIS C. HURNEY,
Secretary.

FEDERAL MARITIME COMMISSION

WASHINGTON, D.C.

DOCKET No. 70-21

DILLINGHAM LINES, INC.—INCREASE IN FREIGHT CHARGES IN THE
U.S. PACIFIC COAST/HAWAII TRADE

March 16, 1972

NOTICE OF ADOPTION OF INITIAL DECISION

This proceeding was instituted by the Commission to determine whether certain increased rates of respondent Dillingham Lines, Inc. (Dillingham), in the U.S. Pacific coast/Hawaii trade,* applying to the port of Honolulu and effective as of September 7, 1970, are lawful under section 18(a) of the Shipping Act, 1916, and sections 3 and 4 of the Intercoastal Shipping Act, 1933. The State of Hawaii intervened in the proceedings. Hearing counsel also participated. Examiner Charles E. Morgan issued an initial decision in which he concluded and found that Dillingham's increased rates were just and reasonable, and not shown to be unlawful.

No exceptions having been taken to the initial decision of the Examiner in this proceeding and the Commission having determined not to review same, notice is hereby given that the initial decision became the decision of the Commission on March 16, 1972.

Therefore, it is ordered, that the proceeding be, and hereby is, discontinued.

By the Commission

[SEAL]

(S) FRANCIS C. HURNEY,
Secretary.

*The Commission has now been advised that Dillingham has recently ceased its U.S. Pacific coast/Hawaii service. If that be so, we would expect Dillingham to cancel forthwith the appropriate tariffs on file with the Commission.

FEDERAL MARITIME COMMISSION

No. 70-21

DILLINGHAM LINES, INC.—INCREASE IN FREIGHT CHARGES IN THE U.S. PACIFIC COAST/HAWAII TRADE

Increased rates in the U.S. Pacific coast and Hawaii trade found just and reasonable and not shown to be unlawful.

Amy Scupi and *James N. Albert* for respondent Dillingham Line, Inc.

Bertram Kanbara, *Jeffrey N. Watanabe*, *John T. Rigby*, and *George Pai* for petitioner the State of Hawaii.

Donald J. Brunner and *Ronald D. Lee* as hearing counsel.

INITIAL DECISION OF CHARLES S. MORGAN, PRESIDING EXAMINER¹

This proceeding was instituted by the Commission to determine whether certain increased rates of the respondent Dillingham Line, Inc. (Dillingham), in the U.S. Pacific coast/Hawaii trade are lawful under section 18(a) of the Shipping Act, 1916, and sections 3 and 4 of the Intercoastal Shipping Act, 1933. The increased rates in issue apply to the port of Honolulu, and they became effective September 7, 1970.

No longer in issue are certain so-called outport "arbitraries" or rates and charges on cargo loaded or discharged at certain ports in Hawaii other than Honolulu. These outport arbitraries were canceled by Dillingham prior to the hearing in December 1970.

The three parties to the proceeding are the petitioner, the State of Hawaii (the State), which contends that the increased rates are unlawful, and Dillingham and hearing counsel who contend that the increased rates are lawful. Direct testimony was mainly in the form of written exhibits, and the oral testimony was mainly cross-examination. One of the main contentions of the State is that Dillingham has

¹ This decision became the decision of the Commission March 16, 1972.

not met its burden of proof to show what rate of return is lawful in this trade.

Dillingham's service in this trade is by means of tugs and barges, with each tug towing one or two barges. The barges generally are loaded and unloaded by the roll-on-roll-off method. Some cargoes, such as earth-moving, road-grading, and construction machinery and equipment, automobiles, trucks, and buses, are self-propelled. Other cargoes, such as steel and steel products, wallboard, household goods, and cement/asbestos clay pipe are loaded and unloaded by fork lift trucks.

The movement is preponderantly westbound. On one round trip voyage Dillingham may handle about 5,500 revenue tons westbound and about 900 revenue tons eastbound.

Dillingham provides a regular fortnightly service, with each tug making its round trip voyage in about 28 days, including port times. Often a tug will tow two barges in tandem, if the cargo offerings justify. In rough winter weather it is more likely that only one barge will be towed.

Dillingham's service is not nearly so fast as is the service of a containership carrier such as Matson Navigation Co., and therefore most of the commodities handled by Dillingham are believed to be those which are not suitable for transportation in containers. These commodities include fabricated and structural steel in large widths, large heights, or large lengths, long steel reinforcing bars, 8-foot wide wallboard which is difficult to place in 8-foot wide containers, self-propelled vehicles, and oversized construction and roadmaking equipment. Additional cargoes are those which do not suffer from the longer transportation time element, when there is proper planning by shippers and consignees, including some construction commodities.

A witness for the State, employed by the State's Public Utilities Commission, considered Dillingham to be one of the dominant modes of transportation available in this trade for the type of cargo transported by Dillingham.

Dillingham has operated in the trade for only a few years. It began its service in this trade in May 1966 with one barge, between San Diego and Honolulu on a monthly turnaround. In April 1968, the California port of call was changed to Long Beach, and since then Dillingham's service has been between Long Beach and Hawaii. A second barge was put in service in August 1968, when the present fortnightly service was inaugurated.

Tugs and barges used by Dillingham have been owned or chartered from affiliated companies. Presently, three barges are owned. The two

principal barges are the *Maukana* and the *Makahani*, which have steel decks, and are 268 feet long and 60 feet wide. A third barge, the *DL-29*, was purchased in May 1970 and is utilized as the second barge in a double tow when needed. The *DL-29* is about one-third the size of the other two barges.

Both the *Maukana* and *Makahani* are single-deck barges offering underdeck stowage in a hold as well as in a deck house. On deck, stowage is abaft of the deck house. These two barges usually are operationally full when loaded with 5,000 to 5,500 measurement tons of cargo.

The number of measurement tons loaded on any one voyage depends upon the stowage characteristics of the cargo. Broken stowage is high for commodities such as automobiles, trucks, and earth-moving and roadmaking machinery, because other cargoes cannot be stowed on top of or immediately adjacent to these articles.

Other carriers in the trade, such as Matson Navigation Co. and Seatrain Lines, Inc., primarily provide services for container cargoes, but with some space for conventional cargo and vehicles. States Steamship Co., which offers a monthly service between California and the Far East with an intermediate call in Honolulu, provides a combination container and conventional cargo service. Pacific Hawaiian Line, Inc., offers barge service between San Francisco, the Pacific Northwest, and Honolulu. Its barges are equipped with cranes for lift-on and lift-off loading and unloading, and it is primarily a lumber carrier.

In 1969, Dillingham operated a C-2 vessel, the *Surfer*, between Portland, Oreg., San Francisco, Calif., and Guam, Marianas Islands, with an intermediate call at Honolulu for three round trip voyages. Separating out these three *Surfer* voyages from the usual tug and barge operations of Dillingham results, for 1969, in a rate base of \$2,769,680, a net profit after Federal income taxes and loss of related companies of \$120,349, and a rate of return of 4.3 percent.

Another computation for 1969, allocating a portion of the *Surfer's* rate base, revenues, and expenses, insofar as this vessel carried cargo to and from Hawaii, results in a total Dillingham Hawaiian trade rate base of \$2,774, 850, a net profit after taxes and related companies' loss of \$115,787, and a rate of return of 4.2 percent.

For 1970, based on revenue through September 15 and on expenses through August 31, and with projections for revenues and expenses for the balances of the year, results in a rate base of \$4,131,629, a net income after taxes and profit of related company of \$191,668, and a rate of return of 4.6 percent.

For the year 1971, Dillingham projects a rate base of \$3,938,060, a net profit after taxes and profit of related company of \$334,945, and a rate of return of 8.5 percent.

There is some question raised as to whether the third barge, the *DL-29*, should be included in the rate base on a year-around basis, because the *DL-29* had not obtained certain insurance certification year around. It was used during the winter of 1969 and it was the intent to use it in the winter of 1970. In the projected year 1971, Dillingham attributed a net after depreciation of \$446,115 in investment in the *DL-29*. Assuming that the *DL-29* is usable for only 6 months of the year, hearing counsel suggested a net value for the *DL-29* of \$223,057, and a resulting reduced 1971 rate base of \$3,715,003. Also making an adjustment for 6 months depreciation on the *DL-29*, and on taxes, hearing counsel reaches a net profit after taxes, etc., of \$344,451, and a rate of return on the adjusted rate base of 9.27 percent. The record shows that some shippers apparently would use the *DL-29* in the winter in this Hawaiian trade regardless of the insurance problem, and since the *DL-29* was used in winter months, therefore it appears proper to leave the *DL-29* in the rate base for the whole year. In any event, the computed rates of return of 8.5 percent and 9.27 percent are not so different as to significantly affect the ultimate conclusions herein as to a proper rate of return.

The tugs used by Dillingham are chartered from affiliates. In the past as many as four tugs and as many as six barges have been used by Dillingham in the trade in a single year. In calculating rate bases, the investment in tugs and barges has been apportioned to Dillingham on the basis of the days of a year the equipment has been used by Dillingham. Among the divisions, subsidiaries, affiliates, etc., of Dillingham Line, Inc., are the parent company, Dillingham Corp.; Young Brothers, Ltd., an inter-Hawaiian Islands carrier; Hawaiian Tug and Barge Co., an owner of tugs and barges, and charterer; Dillingham Shipyards; Oahu Railway and Terminal Warehousing Co., which includes an accounting department, traffic department, and steamship agency; Foss Tug and Barge Co.; Pacific Tow Boat Co.; and Albina Engine Machine Works.

The State is concerned that there may have been a lack of "arms length" dealings between and among Dillingham Line and its affiliates. The tug *Malanae* was built by the Albina Engine Machine Works for Hawaiian Tug and Barge, which in turn charters the *Malanae* to Dillingham Line.

The *Malanae* is a larger vessel than other tugs used by Dillingham. It has 2,660 horsepower. The *Malanae* replaced the *Mikimiki* which

had only 1,600 horsepower. The *Malanae* cuts 1½ days off the round trip voyage. The quarters, galley, and crew facilities are modern. Its first voyage was in March 1970. the *Malanae* is designed to cope more efficiently with rough winter waters, and to tow two barges in tandem. The *Mikimiki* could not handle a double tow properly.

Besides providing a faster, more dependable service and towing two barges, the *Malanae* is the most economical tug in Dillingham's service, in operating expenses per day. In the first 6 months of 1970, it cost \$1,336 per day to operate the *Malanae*, whereas in the 12 months of 1969, it cost \$1,580 per day to operate the *Mikimiki*. Other tugs operated by Dillingham from time to time ranged in operating expenses per day from \$1,585 to \$2,334 in 1969, and from \$1,688 to \$1,797 in 1970. These tugs were the *Eleu*, *Mikio*, and *Moi*. For 1971, Dillingham contemplated using the tugs *Malanae* and *Pacific Ranger*. The latter tug was being repaired and refitted in 1970 so as to be ready in 1971 with the necessary horsepower to provide the same service as the *Malanae*.

The State would use the four tugs in service in 1969 rather than those used in 1970 in calculating Dillingham's rate base for 1970 and 1971. The State believes that Dillingham was not justified in using the newer and more costly tugs. However, on cross-examination, the State's witness responded that if the *Malanae* will be dedicated to that service, it ought to be included in the rate base.

In 1969, the amounts in Dillingham's rate base for related companies included for tugs \$265,897 (*Eleu*), \$502,794 (*Mikio*), \$201,522 (*Mikimiki*), and \$59,134 (*Moi*), or a total of \$1,029,347 for tugs. The barge total for related companies was \$930,487, which was for the barges *HTB-29*, *HTB-27*, *YB-26*, and *YB-30*. This made a total of tugs and barges for related companies of \$1,959,834, less depreciation of \$405,883, or a net for property and equipment of related companies of \$1,553,951. For 1969, Dillingham had an investment in its own barges, the *Maukana* and *Makahini*, of \$992,788 less depreciation of \$22,602, or a net of \$970,186.

The above figures of \$1,533,951 for tugs and barges of related companies, of \$970,186 for Dillingham barges, plus \$42,820 for office and terminal equipment, and \$202,723 for working capital, result in the total rate base for 1969, referred to previously, of \$2,769,680.

For 1971, as projected, the net investment in vessels of Dillingham (the three barges *Maukana*, *Makahini* and *DL-29*) is \$2,172,316; office and terminal equipment is \$46,233; working capital is \$269,778; and property and equipment of related companies (the tugs, *Malanae* \$1,019,141 and *Pacific Ranger* \$486,986, less depreciation of \$56,367

for both tugs) is \$1,449,733, or a grand total of rate base for 1971, as referred to previously, of \$3,938,060.

The State is concerned with the fact that the tug *Malanae* contributes significantly to the increase in Dillingham's rate base from 1969 to 1970. The State would use the tugs *Eleu*, *Mikio*, *Moi*, and *Mikimiki* for the days used in 1969 to compute the rate base in 1970 for tugs of \$692,441, including \$115,664 for the *Mikimiki* for 124 days. On the other hand, Dillingham computes a 1970 rate base for tugs (same tugs above except *Malanae* instead of *Mikimiki*) of \$1,824,356 total, including \$768,968 for the *Malanae* for 249 days in 1970. It is concluded that Dillingham properly included the *Malanae* in its rate base for 1970 and for 1971, primarily because the *Malanae* was used in 1970 and the *Mikimiki* was not used in 1970. This issue would have been very clear if a very high-valued tug were to have been included in the rate base but had not been used in the year in question. It is equally improper to include in a rate base any tug not used, whether a high-value or a low-value tug.

The voyage days used in calculating rate base, operating expenses and revenues must be the same for any one year. Investment in vessels in 1 year should not be calculated on the number of voyages in an earlier year, while using the later year's voyages to determine operating revenues. Some of the State's calculations were on this mixed basis.

Careful consideration of the entire record leads to the conclusion that the rate base and net profit figures for 1969, 1970, and 1971 submitted by Dillingham and listed above are substantially correct and justified by the evidence of record.

The State expresses concern about increases in the rate base of Dillingham over the 1969 rate base attributable to intercompany transfers of barges and increased investment of related companies in tugs, and the State concludes that the increased investments in tugs and barges were imprudent and unreasonable. The State also contends that the chartering or purchase of tugs or barges from affiliates results in a fluctuating rate base, which base allegedly is improper for ratemaking purposes. In particular, the State protests the purchases of the barges *Makahani* and *DL-29*, and the chartering of the tug *Malanae*. The State insists that if the rate increases are approved, there will be nothing to prevent the diversion of the expensive equipment now utilized to other more lucrative purposes in the Dillingham Corp.'s empire, along with the substitution of less costly and less efficient equipment in the Hawaiian trade here in issue. The matter of possible diversion of equipment is, of course, speculation, and only

when and if such diversion occurs and if there is a resulting change in the rate base, only then can appropriate findings be made.

The State also contends that Albina Engine-Machine Works did not transfer such a large and valuable asset as the tug *Malanae* at its cost with no profit to Hawaiian Tug and Barge Co., and insists that any net profit realized by Albina should be excluded from Dillingham's rate base. But, there are no facts of record to show what, if any, profit Albina may have realized, and the State's arguments rest mainly on speculation without factual foundation.

All of the contentions of the State concerning the proper rate bases of Dillingham have been considered carefully and generally these contentions appear to be without factual support or to be unjustified by the proper interpretation of those facts which are of record. The same conclusion is justified concerning the State's arguments regarding Dillingham's charter expenses. Again we must accept the facts and figures of record of actual operations and the allocations made of overhead expenses. We appreciate the State's concern that cost allocations as between affiliated companies makes for certain difficulties in interpreting financial results, but again we must rely on record data.

The State projects a 10 percent annual growth factor in revenue tons of Dillingham between Long Beach and Hawaii. In 1969, there were 20 round trip voyages and 121,800 revenue tons, and in 1970, there were 22 voyages and 136,087 revenue tons. Tons per voyage in 1969 were about 6,065, and in 1970 were about 6,186. The percentage increase per voyage was about 2 percent. For 1971, Dillingham projected 137,526 revenue tons for 21 voyages, or about 6,549 tons per voyage, about a 4-percent increase per voyage. In 1970, the construction industry in Hawaii experienced a somewhat downward adjustment in the last part of the year. During the first 9 months of 1970, Dillingham's barges were generally operationally full on the westbound movements. The *DL-29* generally was used in tandem tow all of the time during these 9 months. Considering the capacities of the barges used by Dillingham and other facts of record, it is concluded that the Dillingham projection of revenue tons for 1971 was based on reasonable expectations.

One argument of the State on brief is that the rate increases in issue are on widely varying percentage bases, that the increases were selective, and that they result in discriminatory relationships between commodities. This issue was not brought up at the prehearing conference, nor at the hearing. No evidence was introduced of specific examples of discriminatory relationships, nor are any such examples cited on brief. Inasmuch as Dillingham has made a substantial evi-

dentiary record in support of its increases, and has met its initial burden of proof, it is concluded that the burden of going forward and showing any examples of the discriminatory relationships between commodities shifted to the State. It is concluded that the matter of any discriminatory rate relationships either was not an issue, or that if it were in issue that no unlawfulness with respect thereto has been shown.

The remaining issue is whether the rate of return of 8.5 percent or 9.27 percent, as supported respectively by Dillingham and hearing counsel, is within the zone of reasonableness for a rate of return for Dillingham in this trade. There is no specific evidence of record as to the particular risks inherent to Dillingham's service in the Pacific waters, as contrasted to the risks inherent in other trades in other waters. There is evidence that the parent Dillingham Corp. wanted Dillingham to realize a net return after taxes, etc., of about 9 or 10 percent, so as to justify the use of a new piece of equipment in Dillingham's trade.

In *Alcoa Steamship Co., Inc.—General Increase in Rates*, 9 F.M.C. 220, 239, decided in 1966, the Commission approved a rate of return of 10 percent for Alcoa in the Puerto Rican trade, and stated that it appeared reasonable to approve a rate of return for Alcoa no higher than those approved for other carriers in other trades with similar risks. The Commission indicated also that the risks attendant to the Puerto Rico trade were more akin to those of the Hawaii and Alaska trades than to the Guam trade, in which latter trade a more stable situation appeared to exist and risks of operation were lower based upon the number of carriers in the Guam trade.

The number of carriers presently in the Hawaii trade is not large, but there are enough carriers apparently to constitute brisk competition and to entail risks which would seem to justify a 10 percent rate of return on rate base.

In *General Increases in Rates (1961)*, 7 F.M.C. 260, 291, 292, decided in 1962, the Commission found to be not excessive rates of return for 1960 and 1961 of 8.32 percent and 10.59 percent respectively in the Pacific coast/Hawaii trade. It was noted that there are no laws preventing a diminution or abandonment of service by the transfer of ships anywhere in the world where the rate of return is greater, and that the sale or transfer of ships would be disadvantageous to shippers and to the economy of Hawaii. Also, it was noted that other carriers are free to enter the trade, so that competition is a factor affecting a carrier's ability to attract capital.

In view of the past decisions of the Commission, and in view of the ability of the parent corporation of Dillingham apparently to shift equipment such as tugs and barges among Dillingham's affiliates, as well as the parent corporation's desire to realize 9 or 10 percent net profit after taxes, etc., it is concluded and found that Dillingham has met its burden of proof as to a proper rate of return in this trade, and it is concluded that a rate of return of either 8.5 percent or 9.27 percent is not excessive.

It is concluded and found that the increased rates of Dillingham in the U.S. Pacific coast and Hawaii trade in issue herein are just and reasonable, and not shown to be unlawful. The proceeding will be discontinued.

(S) CHARLES E. MORGAN,
Presiding Examiner.

WASHINGTON, D.C., *February 15, 1972.*

FEDERAL MARITIME COMMISSION

DOCKET No. 70-12

COMMODITY CREDIT CORPORATION AND UNITED STATES
AGENCY FOR INTERNATIONAL DEVELOPMENT

v.

AMERICAN EXPORT ISBRANDSTEN LINES, INC., ET AL.

Action by carriers reducing rates to meet independent competition while members of one conference does not as a matter of law require similar action by these carriers as members of a different conference where transportation and competitive situations are different. Complaint dismissed.

B. Stanley Harsh for complainants, Commodity Credit Corporation and U.S. Agency for International Development.

Stanley O. Sher for respondent, American Great Lakes Mediterranean Eastbound Freight Conference, et al.

Howard A. Levy for respondent, American Export Isbrandsten Lines, Inc.

March 17, 1972

REPORT

BY THE COMMISSION: (Helen Delich Bentley, *Chairman*; James V. Day, *Commissioner*)*

This proceeding is before us on exceptions to the Initial Decision of Herbert K. Greer, Presiding Examiner, issued May 19, 1971. Exceptions were filed, and oral argument was held on November 5, 1971.

This proceeding arises out of a complaint brought by the Commodity Credit Corporation and the United States Agency for International Development against the American Great Lakes Eastbound Freight Conference and its member lines, alleging certain violations of sections 15, 16, 17 and 18 of the Shipping Act, 1916. The Examiner issued an Initial Decision, finding no violations of the Act, and dis-

*Vice Chairman Ashton C. Barrett did not participate.

missed the complaint. Complainants excepted to the Initial Decision, to which respondents replied.

The complainants in their exceptions urge procedural as well as factual error, arguing that the Examiner slanted the facts in favor of the respondents and omitted pertinent points in his discussion and determinations.

We find that the exceptions of complainants and the replies of respondents are essentially a reargument of contentions which were exhaustively briefed and considered by the Examiner in his Initial Decision. Upon careful consideration of the record, the exceptions, briefs and argument of counsel, we conclude that the Examiner's factual findings and his conclusions with respect thereto were well supported and correct. Accordingly, we adopt the Initial Decision as our own and make it part hereof.*

COMMISSIONER CLARENCE MORSE, CONCURRING AND DISSENTING; WITH
WHOM COMMISSIONER GEORGE H. HEARN JOINS

I concur with the majority in concluding the rate disparity was justified on the facts. In so doing I wish to disassociate myself from that part of the Initial Decision which suggests, as to the United States Government or its agencies, that there exists a necessity of showing a competitive relationship between shippers to support a violation of sections 16 First and 17. Such a requirement would usually preclude the Government from establishing sections 16 First and 17 violations or from securing reparations, for seldom does the Government ship in competition with any other shipper. In all events a prudent commercial shipper would have shipped via Canadian ports if its delivered costs would have been less and, while for good and valid policy reasons complainants elected to ship via United States ports rather than Canadian ports, the resultant higher delivered costs may be disallowable as reparations.

(SEAL)

(Signed) FRANCIS C. HURNEY,
Secretary.

*In adopting the Examiner's decision we consider the Examiner's discussion of the need for a competitive relationship between shippers to be unnecessary to the decision—a point which the Examiner himself makes—consequently the adoption here is not to be taken as expressing either agreement or disagreement with his views. We would not ordinarily consider it necessary to make this point, and we do so only in view of the concurring and dissenting opinion of Commissioner Morse, with whom Commissioner Hearn joins.

FEDERAL MARITIME COMMISSION

DOCKET No. 70-12

COMMODITY CREDIT CORPORATION AND UNITED STATES
AGENCY FOR INTERNATIONAL DEVELOPMENT

v.

AMERICAN EXPORT ISBRANDTSEN LINES, INC., ET AL.

ORDER

This proceeding was instituted upon complaint of the Commodity Credit Corporation and the United States Agency for International Development. The Commission has fully considered the matter and has this date made and entered its report adopting the Examiner's initial decision, which report and initial decision are made a part hereof by reference.

Therefore, it is ordered, That the proceeding be, and it is hereby, dismissed.

By the Commission.

(SEAL)

(Signed) FRANCIS C. HURNEY,

Secretary.

INITIAL DECISION OF HERBERT K. GREER, PRESIDING EXAMINER ¹

Commodity Credit Corporation (CCC) and United States Agency for International Development (AID) seek reparation from respondents, American Export Isbrandtsen Lines, Inc. (AEIL), Niagara Line, Fabre Line, Montship-Capo Great Lakes Service (Montship), Orient Mid-East Lines (Orient), Yugoslav Great Lakes Line (Yugoslav), Zim Israel Navigation Company, Ltd. (Zim Israel), and Concordia Line Great Lakes Service (Concordia), alleging violation of sections 15, 16 First, and 17 of the Shipping Act, 1916 (the Act), by reason of being subjected to the payment of rates which were and are unduly and unreasonably prejudicial and disadvantageous, unjustly dis-

¹ This decision became the decision of the Commission on March 17, 1972.

criminy, and contrary to the public interest; and, violation of section 18(b)(5) of the Act because respondents charged rates so unreasonably high as to be detrimental to the commerce of the United States. Also sought is an order requiring cancellation or modification of the tariff of respondent American Great Lakes Mediterranean Eastbound Freight Conference (respondent conference).

International Association of Great Lakes Ports and Great Lakes Terminal Association intervened.

THE FACTS

1. Complainant CCC is an agency and instrumentality of the United States created by Act of Congress, its capital stock being owned entirely by the Government.

2. Complainant AID is an agency of the United States with responsibility to administer the provisions of the Foreign Assistance Act of 1961, as amended (75 Stat. 424, 22 U.S.C. 2151-2407).

3. Respondent conference is an organization of common carriers by water operating under an agreement on file with the Federal Maritime Commission (No. 9000), its members being engaged in the transportation of property from United States Great Lakes and Saint Lawrence River ports to Atlantic coast ports of the Iberian Peninsula, European, Asian, and African ports on the Mediterranean Sea (including Black Sea ports), and Atlantic coast African ports including, but not south of Casablanca, either direct or by transshipment. The members of the conference establish the conference rates.

4. Between March 1, 1968, and April 21, 1969, AEIL, Niagara, Fabre, Montship, Concordia, Yugoslav, and Zim Israel were the sole members of the conference. On April 21 1969, Orient became a member of the conference and on June 22, 1969, AEIL withdrew from membership.

5. The Canada-Mediterranean Freight Conference (Canadian conference) is an association of steamship lines engaged in the transportation by water of property in the trade from Canadian Great Lake ports and Canadian Saint Lawrence River ports to ports of discharge of the respondent conference, under its own rates and charges.

6. From March 1, 1968, through June 30, 1969, AEIL, Niagara, Concordia, Yugoslav, and Montship (operating as two separate lines, Montship Lines and Capo Line), Zim Israel, and Fabre, were members of the Canadian conference with sufficient votes to establish rates. (for AEIL, see Finding 4)

7. The shipments involved in this proceeding were made under Title II of the Agricultural Trade Development and Assistance Act of 1954, 7 U.S.C. §§ 1721-1724 (P.L. 480). Programs carried out under this Act are usually called the Food for Peace Programs, through which food and other agricultural commodities are made available on special terms to nations that cannot afford to pay cash for them and for the purpose of thwarting hunger and meeting human needs in foreign countries.

8. There are three major segments to the P.L. 480 program. The largest, accounting for about half of the donations, involves donations of commodities to religious and charitable voluntary agencies such as CARE, Church World Services, and others, which distribute to needy persons overseas. The next largest is the government-to-government program under which commodities are furnished to other nations to provide emergency food assistance to victims of disasters and to carry out other economic development programs. The third is the World Food Program (WFP), involving the United Nations and in which 74 countries participate, the United States providing about 40% of the budget, chiefly in the form of commodities.

9. Within the United States, WFP is administered much like other Title II programs. Requests come from WFP headquarters in Rome and are considered by an inter-agency group in Washington, primarily AID and the Department of Agriculture (USDA). If a project is approved, commodities are supplied by USDA and ocean transportation is paid for out of CCC funds.

10. USDA is responsible for supplying all U.S. Title II commodities. The commodities come either from CCC inventories or are purchased from commercial sources on a competitive bid basis. In the latter case, invitations for bids are issued with sales terms FAS ports. Evaluation of the bids includes the lowest landed cost at destination, and considered are ocean transportation costs from all ports designated by the bidders. Frequently, loading ports designated may be on more than one coast of the United States. In the case of commodities taken from CCC inventories, USDA decides which storage location will supply the commodity by considering the lowest total transportation cost to the country of destination. Transportation costs are paid from funds allocated to the program.

11. Either CCC or the voluntary agency concerned contracts for the transportation of the commodities made available under the programs. Cargo bookings by the government agency are made pursuant to the Cargo Preference Act (46 U.S.C. 1241(b)) which requires at least 50% of the cargo to move on U.S.-flag vessels if available at fair

and reasonable rates. The policy of AID, which is followed by CCC as its agent, is to move 100% of such cargo on U.S.-flag vessels. If such vessels are not available, first consideration is given to carriers accepting full payment in local currency, then to carriers accepting part payment in local currency, and finally foreign-flag vessels insisting on full payment in dollars. When commodities are made available through voluntary relief agencies, the agency performs its own booking functions. AID policy is followed to include the use of U.S.-flag vessels where available at fair and reasonable rates. AID, with funds made available by COC, administers a freight reimbursement program for the benefit of the voluntary agencies.

12. There is no prohibition as to the use of ports for shipment of U.S. relief cargo, and although U.S. ports are used as a matter of policy, Canadian ports may be utilized.

13. The shipments involved in this proceeding were made predominately by the voluntary relief agencies CARE and Catholic Relief and consisted principally of flour (bread, wheat and all purpose), corn meal and non-fat dry milk.

14. Prior to April 1, 1968, the rates of respondent conference and the Canadian conference for relief cargoes were in general parity on shipments out of Great Lakes ports; however, the Canadian conference rates for shipments out of Montreal, the port as to which that conference "automatically" used to establish rates, were lower than the rates of respondent conference. Comparative rates are hereinafter set forth as they relate to specific issues.

15. Prior to April 1, 1968, WFP twice negotiated with the Canadian conference for reductions in rates; both times the conference voted not to make the drastic reduction requested. WFP issued instructions to its Canadian agents to ship exclusively on a Russian-flag line which had been operating in the trade. Members of the Canadian conference, faced with the loss of substantial cargo, reopened negotiations with WFP and as a result WFP gave the conference first refusal on its relief cargoes and the conference reduced its rates under the conditions and in the amounts hereinafter set forth in detail.

16. The agreements between the Canadian conference and WFP for reduced rates was premised on the shipment of relief commodities out of ports east of the Saint Lawrence Seaway (the Seaway), and during the relevant period all but approximately 2% of WFP cargoes carried by respondents as members of the Canadian conference moved out of those ports.

17. The transportation conditions at ports east of the Seaway differ to a significant extent from such conditions at U.S. Great Lakes ports.

Transportation conditions at ports east of the Seaway are more favorable to carriers than at Great Lakes ports, the cost difference being approximately \$17.15 per tariff unit.

18. During March 1968 a Russian-flag line joined the Canadian conference and that conference, in two steps, raised its rates to a level which restored the former relationship between the rates of the two conferences.

19. Recently there has been a serious drop in volume, both commercial and relief cargoes, in the trade served by respondent conference.

POSITIONS OF THE PARTIES

Complainants

A prima facie violation of sections 16 First, 17, and 18(b) (5) of the Act is said to have been established by the evidence that at the time of the shipments involved there was a substantial disparity between the rates of the Canadian conference and the rates charged by respondents and that such identical relief commodities as wheat flour and powdered milk were carried by respondents in both trades on the same outbound voyage. They contend that a legal obligation was imposed upon respondents to lower their rates on U.S. relief cargoes at the time they lowered the rates on Canadian relief cargoes as the competition in the U.S./Mediterranean trade was as great or greater than in the Canadian/Mediterranean trade. They argue that the reduction of rates in the Canadian trade was "destructive" and unlawful as it was made for the purpose of driving a competitor, the Russian-flag line, out of the trade.

As to the transportation conditions in the two trades, the only significant difference is alleged to be that ten times more relief cargo moved from U.S. ports than from Canadian ports during 1968 and that during that first half of 1969 the ratio was six to one; and that as the volume favored U.S. ports, those ports should have charged lower rates. They argue that any difference which might exist in carrier costs due to different ports of loading or the distances involved was more than compensated for by the differentials set forth in the Canadian conference tariff for ports on the Great Lakes. While agreeing that most of the Canadian relief cargoes were loaded at Montreal and east of the Seaway, they contend that although U.S. relief cargoes were loaded at U.S. Lakes ports, the carriers incurred no additional out of pocket expense as the Lakes ports were on their normal voyage pattern in accordance with the MEDCHI Inbound Pooling Agreement, which required calls at distant Lakes ports regardless of whether outbound cargo was available for loading.

A presumption of the unreasonableness of respondents' rates and the rate disparity is said to have arisen because for a long period the rates of the two conferences were in general parity, then for a short time made disparate, and finally restored to parity.

A competitive shipper relationship is said to be unnecessary to support a violation of sections 16 First and 17 of the Act under the circumstances shown and that, although there is no shipper competition, section 17 has been violated because of the competitive port situation. Additionally, it is contended that the rate disparity served to deprive shippers of natural routings. A violation of section 15 is based upon the alleged fact that respondent carriers had agreed to adopt the rates of competing conferences for the transportation of U.S. relief cargoes which was beyond the scope of respondents' basic conference agreement.

Damage is computed by comparing the Canadian conference rates at Montreal to the higher rates paid by complainants to respondents, with adjustments in the Canadian conference rates based upon differentials set forth in the tariff for ports on the Great Lakes and for variations in terminal charges which were included in respondent conference rates but not in the Canadian conference rates. Other adjustments said to reflect actual costs and conditions were made.

Respondents (other than AEIL)

These respondents deem complainants' position highly academic. As the alleged rated disparities have now been eliminated, they contend there is no basis for future relief. They see in complainants' argument an assumption that the Russian-flag competition was used only as an excuse for the Canadian conference rate reduction when in fact the competition was actual and necessitated the reduction. Complainants' attempt to compare the Canadian and U.S. trades is said to ignore respondents' evidence that the disparity is justified on the basis of costs and distances, and by rate comparisons with more comparable trades (U.S. Atlantic and Gulf rates). They take the position that from April 1, 1968, through July 1, 1969, the Canadian relief rates were sharply depressed due to severe competition. They point out that after WFP officials were not successful in obtaining an agreement with the Canadian conference for a sharp reduction in rates, WFP gave instructions to its Canadian agents to ship exclusively on the Russian-flag line, Artic; and, that this line had previously carried 12,000 tons of WFP cargo in the trade. They refer to the real concern as to Russian-flag competition and the failure of the Canadian conference to persuade the Russians to coexist with them in the trade prior to the

rate reduction. The fact that the reductions made were not below the nonconference rate is cited, as well as the fact that the reduction was not as drastic as WFP had originally requested.

Using flour as illustrative of the differential, that being the most frequently carried commodity, they show that the respondent conference rate was \$43.25 as compared to the Canadian rate of \$25.58 out of Montreal, or a differential of \$17.67. Additional costs per tariff unit in serving Great Lakes ports over Montreal costs are said to be :

(a) Loading (stevedoring, terminal, etc.)-----	\$3. 94
(b) Seaway insurance-----	1. 12
(c) Seaway and Lakes pilotage & vessel tolls-----	1. 47
(d) Seaway cargo toll-----	. 45
(e) Agency commissions-----	2. 80
(f) Vessel operating-----	6. 43
(g) Bunkers -----	. 94
Total -----	17. 15

Respondents find a failure by complainants to prove a violation of the Act. A competitive situation between shippers is said to be required if a violation of section 16 is to be found and no competition between shippers is shown. Section 17 is said to require a comparison of transportation between the same points but the record demonstrates that the loading points and discharge points were different in each trade. The allegations of violation of section 18(b) (5) are said to be moot because in December 1969 rate adjustments by respondents eliminated the alleged disparity in the rates of the two conferences.

Additional differences between the U.S. Great Lakes trade and the Canadian trade are cited. Montreal generates as much commercial cargo as do all of the U.S. Great Lakes ports combined. In the Canadian arrangement with WFP, the conference is granted first refusal on all relief WFP cargo, a situation not found in the respondent conference's trade. Canadian cargo may be transshipped or unloaded onto lighters while U.S. relief shipments may not be so handled. The U.S. cargo moves only during two peak periods while the Canadian ports of Montreal and Halifax permit year-round service. A number of U.S. ports have only relief cargoes to offer, and at Green Bay, Duluth, and Buffalo, no inbound cargo is discharged and additional costs of serving these ports must be prorated against only relief cargoes.

Respondents point out that of the relief commodities carried, six of the ten (cornmeal, butter oil, canned butter, formula 3, bulgar wheat, and formula 2) did not move out of Canada. During the period covered by the complaint and as to the remaining four commodities

(bread flour, wheat flour, all purpose flour, and milk) there is no evidence to show whether they are comparable to Canadian relief cargoes.

Respondent AEIL

This respondent contends that there is justification for the rate disparity. The Russian rate-cutting competition and the fair interest of this respondent is said to have made the reductions necessary to preserve its WFP cargoes, and also to deny the rate cutter of a base from which to slash commercial rates as well. The higher and completely offsetting cost of service in the United States-Mediterranean trade is cited. It is argued that the substantial losses sustained by this respondent, even though it was almost an exclusive carrier of USDA cargo in the trade, would show that the rates were not high, unjustly discriminatory, or prejudicial. A vast difference is seen in the USDA and WFP as customers, which is exemplified by the WFP providing a patronage commitment and accepting carrier ocean bills of lading while USDA required shipper-favorable Government bills of lading on numerous shipments and gave preference to certain flag carriers because of willingness to accept soft nonconvertible currency. They contend that the USDA used both conference and nonconference lines to whipsaw respondent conference against U.S. North Atlantic and Gulf conferences. They point out that AEIL carried none of the WFP cargoes covered by the complaint out of Canada at any time. Reference is made to the hazards and difficulties incident to serving the U.S. Great Lakes ports west of Montreal, factors nonexistent in the Canadian trade which is centered predominately in the Eastern ports; further, that Canada's chief ports, Montreal and Halifax, operate all year round while most of the U.S. Great Lakes ports cannot operate during the long ice-locked winter. They see advantage to the United States from the reduced rates as it contributes 40% to the WFP budget and thus benefits by the lower rates available to that program out of Canada. No injury is seen to complainants nor any impairment to its mission by virtue of the rates because funds spent on the Title II program as authorized by Congress and budgeted by the Executive Branch were unaffected and so long as the rates paid were fair and reasonable, complainants were not subjected to undue or unreasonable prejudice or disadvantage.

As a general comment, AEIL finds a portion of complainants' brief superfluous as it relates to an alleged unfiled section 15 agreement, an issue which complainants had raised and abandoned but had sought to pursue under a new theory during the hearing and in their brief. A

competitive relationship between shippers is seen as lacking proof, but such a relationship is deemed necessary to a finding of a violation of section 16 First.

Intervener

The International Association of Great Lakes Ports supports respondents' position. Intervener refers to the fact that cargo is declining in the U.S. Great Lakes-Mediterranean trade and that a prerequisite to the growth of the trade is the continuing existence and viability of a regular and dependable liner service. A competitive relationship between U.S. and Canadian Great Lakes ports is said not to exist, the real competition to members of the association emanating from Atlantic and Gulf ports. Complainants' argument that inland carriage to Canadian ports would have resulted in an overall saving is seen as unrealistic except for the possibility that when U.S. Great Lakes ports are closed during the winter season, other Canadian ports (Montreal and Halifax) might be used. Reference is made to the statement in complainants' brief that the policy is to use only U.S. ports to ship relief cargoes, and complainants' position is seen as a veiled threat to change this long standing policy, which is unsettling, particularly when the association members look to the Government as an important force in fostering the development of U.S. Great Lakes ports. The record is said to disclose that the Lakes carriers and ports have been holding rates down and that on December 1 generally the closing date of Lakes operations, East coast and Gulf rates were increased. The holding down of rates in the face of extra costs due to charges and requirements of the Seaway, not applicable to Gulf and Atlantic carriage, is seen as a major contribution to the relief programs. Intervener expresses concern as to the effect of an award of substantial reparation against respondent carriers in relation to their ability or desire to serve the trade in the future.

Intervener Great Lakes Terminal Association did not file a brief.

DISCUSSION

Complainants contend that a prima facie case of violation of sections 16 First, 17, and 18(b) (5) of the Act has been established by the evidence that respondent lines named the rates in both the Canadian and respondent conferences, put into effect lower rates on Canadian relief cargoes than on similar U.S. relief cargoes, and carried both U.S. and Canadian relief cargoes on the same outbound voyages.

Section 16 First provides that it shall be unlawful for any common

carrier by water, either alone or in conjunction with any other person, directly or indirectly:

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, in pertinent part, provides:

That no common carrier by water in foreign commerce shall demand, charge, or collect any rate, fare, or charge which is unjustly discriminatory between shippers or ports, or unjustly prejudicial to exporters of the United States as compared with their foreign competitors.

Section 18(b) (5) provides:

The Commission shall disapprove any rate or charge filed by a common carrier by water in the foreign commerce of the United States or conference of carriers which, after hearing, it finds to be so unreasonably high or low as to be detrimental to the commerce of the United States.

Complainants do not contest the lawfulness of respondents' rates prior to the rate reduction effected by the Canadian conference but take the position that:

... having reduced Canadian rates under a claim of carrier competition, respondents were then under a legal obligation to treat like shippers equally by adopting like rate reductions on the same commodities from U.S. ports.

There is no allegation in the complaint that like cargoes were carried under similar transportation conditions. Apparently, complainants rely principally on a "legal obligation" which they contend is imposed upon respondent carriers to maintain a general rate parity between the rates of the two conferences without regard to differing transportation conditions.

The Commission dealt with a comparison between foreign-to-foreign and U.S.-to-foreign rates in *Outbound Rates Affecting Export High-Pressure Boilers*, 9 F.M.C. 441, 458 (1966), holding that a disparity between such rates should be justified by:

... showing that transportation conditions in the two trades are not the same in material respects or that the attendant transportation circumstances require that the rate be set at that level.

In *North Atlantic Mediterranean Freight Conference*²—(Household Goods) 11 F.M.C. 202, 209 (1967), the Commission stated:

This prohibition against undue or unreasonable preference or prejudice is designed to deal with two or more competing shippers or localities receiving dif-

² The Commission's order was modified in *American Export Isbrandtsen Lines v. Federal Maritime Commission*, 409 F. 2d 1258 (2d Cir., 1969), the Court holding that as the two Government agencies involved were responsible for the difference in rates, section 17 had not be violated.

ferent treatment which is not justified by differences in competitive or transportation conditions.

And at page 210:

All this, however, is not to say that a case of undue prejudice is made out by a mere showing of lower rates between competing shippers. Other factors may work to make a preference or prejudice reasonable or due. For instance, competition from another carrier at the allegedly preferred point of destination or of origin may justify the difference in rates. *Texas & Pac. Railway v. I.C.C.*, 162 U.S. 197 (1896); *East Tenn. & Ry. Co. v. I.C.C.*, 181 U.S. 1 (1901).

In *Phila. Ocean Traffic Bureau v. Export S.S. Corp.*, 1 U.S.S.B.B. 538, 541 (1936), it was held:

The uniformity of treatment contemplated by the Shipping Act is a relative equality based on transportation conditions only. To justify an order compelling exact equality of rates a complainant must show a substantial similarity in the conditions surrounding the transportation under the rates sought to be equalized. Among factors to be considered are: the value of the service to the shipper; the interest of the carrier; the relative volume of traffic; the relative cost of the service; the competition as between carriers; and the advantages or disadvantages which inhere in the natural or acquired position of the shippers or localities concerned.

In *Iron and Steel Rates, Export-Import*, 9 F.M.C. 180, 191 (1965), it was held:

Our experience shows that the existence of a rate disparity, in and of itself, has no conclusive legal significance. This is so because only with reference to other facts can we determine whether either rate is harmful.

See also *Alaska Livestock v. Aleutian Marine*, 7 F.M.C. 387, 391 (1962), wherein it was recognized that rate comparisons depend on the circumstances surrounding the rates.

Rate comparisons must be considered on the basis not only of similarity in commodities but also on comparative transportation conditions. Without one or both methods of comparison, it cannot be determined whether the shippers in the two trades are receiving comparable treatment.

In support of their "legal obligation" concept, complainants take the position that respondent lines could not lawfully reduce their rates as members of the Canadian conference because of competition unless they also reduce their rates on relief commodities in the U.S. trade where competition was "substantially as great." They cite *Fine Coal to Eau Claire and Chippewa Falls, Wis.*, 309 I.C.C. 583 (1959), *Oklahoma Corp. Comm. v. Kansas, O. & G. Ry. Co.*, 266 I.C.C. 495 (1946), and other I.C.C. decisions to support this contention. But the premise of the argument that the competitive situation in the two trades was

comparable is not borne out by the facts as they relate to the relief cargoes with which this proceeding is concerned.

It appears that respondent carriers competed with carriers of U.S. relief cargoes operating out of U.S. Atlantic & Gulf ports but that at material times the rates were at the same level. If there was competition for U.S. relief cargoes from independent carriers, it does not appear that such competitors offered rates so far below respondents' rates that a drastic reduction was necessary to avoid the loss of relief cargoes. As members of the Canadian conference, Respondent lines were in a different competitive situation. Prior to the rate reductions, a Russian-flag line had carried 12,000 tons of WFP cargoes out of Canadian ports east of the Seaway. On August 28, 1967, WFP with offices in Rome, Italy, and administering a program to which many nations, including the United States, contributed, wrote to the Canadian conference requesting a reduction in the rate on flour from \$31.50 to \$20.00-\$22.00, on powdered milk from \$57.50 to \$33.00, and on cheese from \$58.95 to \$35.00. WFP did not address a similar request to respondent conference. The letter further advised that as there was no flag preference for Canadian relief shipments, WFP could make their cargoes available to any member of the conference. Twenty thousand tons of cargo was anticipated during the next two years, predominantly wheat and wheat flour.

The Canadian conference met to consider the request but decided that it was impossible to grant such a drastic reduction. WFP persisted in its efforts to obtain the reduction, contacting the member lines individually. But again, the conference met to decline the requested reduction. During the spring of 1968 a Russian-flag line advertised a service from Montreal and Quebec to the Mediterranean. The record is not clear on whether the rates offered by the Russians were at the level proposed by WFP, but there is testimony that nonconference rates were substantially below conference rates. The Canadian conference received word that WFP had issued instructions to its Canadian agents to ship relief cargoes exclusively on the Russian line. Realizing the gravity of the competitive situation and faced with the possibility of losing substantial amounts of cargo, the Canadian conference reopened negotiations with WFP, which resulted in an agreement that WFP would grant conference vessels first refusal on relief cargoes and that the conference would substantially lower the rates. The rates were established on the basis that the shipments would be loaded at ports east of the Seaway. Although loading at Halifax was not contemplated, a \$2.00 differential was agreed upon for that port.

Pursuant to the agreement with WFP, and on April 1, 1968, the Canadian conference reduced its rates on the following commodities (expressed in Canadian dollars from Montreal) :

	Existing rate	Reduction to	Percent
Flour.....	\$31.50	\$25.00	21
Beans.....	35.75	30.00	16
Milk Powder.....	57.60	45.00	22
Cheese.....	58.95	45.00	22
Vegetable Oil.....	54.00	38.50	29

The shipments set forth in the complaint were made between March 1, 1968, and July 1, 1969. During March 1969, the Russian line joined the Canadian conference. The conference, no longer faced with Russian-flag competition, decided that the rates should be restored to normal levels and the following changes were made :

	Apr. 1, 1969	July 1, 1969	Dec. 1, 1969
Flour.....	\$27.50	\$30.25	\$35.25
Beans.....	33.00	33.00	33.00
Milk Powder.....	47.00	51.75	59.75
Cheese.....	51.00	45.00	51.00
Vegetable Oil.....	42.50	45.50	51.25

During this period, respondent conference rates were :

	1968	1969
Flour.....	\$39.50	\$43.25
Beans.....	40.50	40.50
Milk Powder.....	63.75	68.75
Cheese.....	62.75	62.75
Vegetable Oil (etc.).....	54.00	59.25

Although the Canadian rates above set forth were for loadings east of the Seaway, the conference tariff included a differential of \$6.50 per ton for cargoes loaded at Great Lakes ports west of Sarnia, Canada, and \$3.50 for cargoes loaded east thereof.

Complainants compare the rates at U.S. and Canadian Great Lakes ports, using the Canadian conference differentials to demonstrate the breadth of the disparity. However, in their amended complaint they allege :

During the period of March 1, 1968, through June 30, 1969, the respondent steamship lines who were members of respondent Conference charged ocean transportation rates for the shipment of relief cargoes from United States ports on the Great Lakes to ports on the Mediterranean which were substantially greater than those charged for shipment of identical or nearly identical relief cargoes from Canadian ports on the Great Lakes and Saint Lawrence River to Mediterranean ports of discharge.

The thrust of the complaint is that complainants were injured because respondents charged them, and they paid, "substantially greater" rates than, as members of the Canadian conference, respondents charged Canadian shippers of similar cargoes. It appears that all but approximately 2% of the WFP shipments during the relevant period were loaded at ports east of the Seaway at the rates applicable at those ports. All U.S. relief cargoes were loaded at U.S. Great Lakes ports. To determine whether complainants were in fact subjected to undue prejudice or disadvantage by the imposition of unreasonably high, or otherwise unlawful, rates, it is necessary to compare the rates and the transportation conditions as of the actual ports of loading.

The alleged preferred point of origin was east of the Seaway. As held in *Household Goods, supra*, competition at the alleged preferred point may justify a difference in rates. It appears that respondent lines as members of the Canadian conference encountered competition at ports out of which Canadian relief cargoes were carried that was not present at ports out of which U.S. relief cargoes were carried. The competition for relief cargoes at Canadian ports was not as complainants variously designate it, a "mere glimmer" or "substantially as great" as at U.S. ports. There is no reason to doubt that had not the Canadian conference reduced its rates, its members would have been deprived of WFP relief cargoes because WFP would have carried out its arrangement with the Russian-flag line and the instructions issued to its Canadian agents.

In view of these circumstances, which demonstrate the substantial difference in the competitive situation for obtaining Canadian and U.S. relief cargoes, it cannot be found that respondents, as members of respondent conference, were under a legal obligation to reduce their rates. As members of the Canadian conference, they reduced the rates substantially and thus created a rate disparity, but the reduction was not below the level necessary for the retention of WFP cargoes.

Inasmuch as complainants rely on the disparity as establishing a prima facie case of unlawfulness, it is proper to consider the additional evidence adduced by respondents to demonstrate that the rate disparity was justified by the differences in the transportation conditions in the two trades. Evidence was presented to show that carrier costs at U.S. Great Lakes ports exceeded costs at ports east of the Seaway by \$17.15. Complaints challenge this computation, and referring to the differentials set forth in the Canadian conference tariff, contend:

In the ordinary situation it would appear that conclusions as to port cost differentials derived from long established carrier rating practices would be en-

titled to greater probative weight than any cost data assembled and submitted by carriers for the sole purpose of defending a rate discrimination and prejudice practiced against shippers.

Nevertheless, the figures adduced by respondents represent the only evidence of record as to the additional costs. They reflect Seaway charges which are greater than the rate differentials set forth in the tariff of the Canadian conference. It has been shown that the tariff differentials were not applied to Canadian relief cargoes, and further, that they were minimum charges which varied as to commodities. No evidence was adduced to contradict the computation of additional costs other than the Canadian conference rate differentials which were not applied to relief shipments, thus not to be considered for the purpose of determining whether Canadian shippers of relief cargo actually received preferential rates.

Additional variances between shipping conditions in the two trades appear. Carriers of U.S. relief cargoes assume greater responsibility than do carriers of Canadian relief cargoes, as to whom responsibility begins and ends at ship's tackle. United States relief cargo may not be transhipped or discharged onto lighters, restrictions not imposed on Canadian relief cargoes. Canadian relief cargoes are predominantly loaded at ports east of the Seaway, those ports being geographically desirable, while the loading of U.S. relief cargoes necessitates serving a large number of ports. In serving U.S. Lakes ports for relief cargoes, respondents' calls are subjected to certain disadvantages. At Green Bay, Duluth, and Buffalo, no inbound cargo is discharged and practically no outbound commercial cargo loaded, thus relief cargo must be charged for additional costs incurred by carriers calling at those ports. Relief shipments do not move from Cleveland or Detroit although those ports receive most of the inbound cargo. The Great Lakes service is seasonal and hazardous. Special equipment is required by Seaway regulations and conditions. U.S. relief cargo is subject to carrier preference, first to U.S.-flag vessels and then to carriers accepting local currencies. While WFP relief cargo loaded at Canadian ports is subject to the Canadian conference first refusal, there is no flag preference or currency limitation.

Complainants view these circumstances as failing to show a reasonable relationship between the rate disparity and the difference in transportation conditions, and cite *Eden Mining Co. v. Bluefields Fruit & S.S. Co.*, 1 U.S.S.B. 41, 45 (1922), and *Am. Tobacco Co. v. Compagnie Generale Transatlantique*, 1 U.S.S.B. 53, 56 (1923), to support the necessity for such a relationship. If the \$17.15 additional cost of serving Great Lakes ports is added to the Montreal rates, there

is no significant disparity. A comparison between Canadian and U.S. Great Lakes transportation conditions and costs would show a lesser justification as of the \$17.15, only the additional loading and terminal costs of \$3.95 and agency commissions of \$2.80 would apply. As to such factors above set forth relating to restrictions imposed upon U.S. relief cargoes not applicable to Canadian cargoes, the additional cost is speculative but it is evident that such factors would narrow the disparity. In any event, and as above discussed, the complaint is founded on the allegation that complainants were damaged because they paid more for shipments of relief cargoes than Canadian relief shippers paid and the rate comparison is to be made in relation to transportation conditions at the actual ports of loading.

. Complainants' contention that respondent carriers incurred no additional costs in serving U.S. Great Lakes ports because such ports were regularly served seeks to impose upon cargoes loaded at ports east of the Seaway charges incident to serving Lakes ports. This contention is not consonant with rate-making principles. Geographical advantages or disadvantages may be properly reflected in rates. *Sharp Paper & Speciality Co., Inc. v. Dollar Steamship Line, Inc., Ltd., et al.*, 2 U.S.M.C. 91, 92 (1939). See also *Phila. Ocean Traffic Bureau, supra.*

Of significance to the issue of the reasonableness of respondents' rates is the experience of AEIL during the period covered by the complaint. At least 90% of its outbound cargo was loaded at U.S. Lakes ports, of which approximately 80% was Government cargo, principally Title II relief shipments. The 10% loaded at Canadian ports was taken on east of the Seaway and consisted of low-rated commercial cargo. This respondent did not carry out of Canadian ports any of the relief cargo upon which the claim for reparation is based. Although a preferred U.S.-flag line and receiving substantial subsidy from the Government, and charging rates complainants contend were unreasonably high, a loss was experienced. Whether other respondent lines profited or lost cannot be ascertained, but the experience of AEIL would not warrant a finding that the rates charged for the carriage of relief cargoes were unreasonably high. Of the \$738,070.12 sought as reparation, complainants seek to recover \$293,744.45 from AEIL, which would add to its loss incurred in handling relief cargo.

Respondents raise the issue of actual damage to complainants, arguing that even if a violation of sections 16 First and 17 had been shown, complainants were not injured. In *Eden Mining Co. v. Bluefields, supra*, the Commission rejected the contention that mere proof of the amount by which rates charged a complainant exceeds rates

charged others establishes injury and the amount of damage. Here, complainants compute their alleged damage in relation to the amount paid and the amount they would have paid at the lower rates, allowing certain adjustments. In *I.C.C. v. United States*, 289 U.S. 385, 390 (1933), the Supreme Court held:

The question is not how much better off the complainant would be today if it had paid a lower rate. The question is how much worse off it is because others have paid less.

See also *Gillen's Sons Lighterage v. American Stevedores*, 12 F.M.C. 328, 347 (1969). Complainants would indeed have been better off had they paid the lower rates. But they were no worse off than they would have been had not the Canadian conference reduced its rates. Complainants continued to pay the rates they had paid prior to such reduction, and the subsequent increases in those rates, rates which were not shown to be in themselves unreasonably high. Fundamentally, complainants seek to derive benefit from a situation which did not have an effect on the basic reasonableness of the rates charged and paid to respondents. To award reparation under the circumstances here appearing would be inequitable. See *Parsons & Whitmore, Inc. v. Johnson Line, et al.*, 7 F.M.C. 720, 731 (1964).

To be considered is the situation which would have occurred had the respondent conference reduced its rates to the Canadian conference level. The rates then would have been lower than the rates of the carriers serving the U.S. Atlantic and Gulf trades for carrying relief cargoes. In the absence of any competitive justification relating to the trade served by respondents, the lawfulness of such a reduction would have been questionable. Certainly, respondents had no legal obligation to place themselves in that position; or, as a witness testified, to take action which would generate a rate war.

Complainants' contention that as members of the Canadian conference, respondents:

... instituted rate reductions for the "destructive purpose" of threatening the traffic or financial position of another carrier. Accordingly, the rate reductions were "neither just nor reasonable."

needs but brief mention as this position, as well as any other argument relating to the lawfulness of the Canadian rates, is premised upon the assumption that the provisions of the Act extend to foreign-to-foreign commerce. The Canadian conference rates are here relevant only for the purpose of comparison and determining whether respondent lines, as members of both conferences, prejudiced, disadvantaged, or discriminated against complainants by charging higher rates on U.S.

relief cargoes than on Canadian relief cargoes under similar transportation conditions.

The issue of the necessity to show a competitive relationship between shippers to support a violation of sections 16 First and 17 has been discussed in the briefs. The Commission has applied the competitive-relationship doctrine in cases concerning rates for ocean transportation. *West Indies Fruit Co., et al. v. Flota Mercante*, 7 F.M.C. 66 (1962). In *Investigation of Freetime Practices—Port of San Diego*, 9 F.M.C. 525, 547 (1966), and *New York Foreign Frgt. F. & B. Ass'n. v. Federal Maritime Commission*, 337 F. 2d 289 (5th Cir., 1964), cited by complainants, a competitive relationship was found not required; however, those cases did not concern freight rates for transportation by sea.

As precedent now stands, it is required that in a proceeding such as this one, shipper competition is a necessary element of proof.

Complainants additionally contend as to competition:

Even though devoid of a competitive shipper relationship, the instant case is not without a very important competitive relationship. This is the competitive relationship between U.S. and Canadian ports.

There is no statutory requirement that the subject Title II relief commodities must be shipped from U.S. ports. Complainants are entitled under the law to route the subject relief cargoes out of Canadian ports if the rates and charges are more favorable. Department of Agriculture regulations specifically authorize recipient nations to route sales shipments under Title I of P.L. 480 through Canadian ports.

This argument is not only based on insubstantial factual ground but constitutes an attempt to establish a right to reparation because of alleged injury to someone other than complainants. Section 22 of the Act provides:

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.

If reparation could be awarded, it must be founded upon a violation of the Act which caused injury to complainants. No actual competition between U.S. and Canadian ports has been demonstrated. There was no deviation of relief cargo from a U.S. port to a Canadian port. It was complainants' policy to ship through U.S. ports, not a statutory requirement. The fact that this policy could be changed would not support a finding that competition between U.S. and Canadian ports did exist. Intervener representing both U.S. and Canadian ports denies the competition. On this record, it appears that respondents' competition for relief cargoes was principally from U.S. Gulf and Atlantic

ports. It further appears that U.S. Lakes ports have experienced a sharp decrease in loadings of both commercial and relief cargoes due to competition from U.S. eastern ports.

The question of competitive relationships is not, however, determinative of complainants' rights to reparation. In summary, the manner in which the case was presented raised two primary issues: first, is there a requirement in law on respondent lines to reduce their rates on U.S. relief cargoes when reducing their rates on Canadian relief cargoes; and second, complainants having shown a rate disparity, have respondents demonstrated a justification for the difference in the rates because of differing transportation conditions. The first issue must be decided in the negative because the competitive situation required a reduction in the rates of the Canadian conference on relief commodities, which reduction was not below the level necessary to retain those cargoes, a competitive situation which was not present as to U.S. relief cargoes. As to the second issue, respondents adduced evidence to demonstrate that transportation conditions in the two trades, including the competitive situation, warranted a higher rate for U.S. relief cargoes loaded at Great Lakes ports than for Canadian relief cargoes loaded at ports east of the Seaway, where substantially all WFP cargoes were loaded.

Even had it been shown that respondents' rates were unreasonably high, complainant may not rely on a violation of section 18(b) (5) as a basis for reparation under the circumstances here appearing. There had not been a determination by the Commission that respondents' rates were violative of that section prior to the assessment of such rates. Only after the Commission has determined that a rate serves to violate section 18(b) (5), may its assessment constitute a violation for which reparation may be awarded. *Federal Maritime Commission v. Caragher*, 364 F. 2d 709, 717 (2d Cir., 1966). Moreover, no evidence was adduced to support a conclusion that the rates paid by complainants to respondents were unreasonably high by the application of the usual rate-making factors.

An additional issue raised by complainants in their broad approach to the question of the lawfulness of respondents' rates is that their rates were established by adopting the rates of other conferences, thus that they carried out an unwritten agreement and one not encompassed by the basic conference agreement. At the prehearing conference, counsel for complainants agreed that any issue relating to an unfiled agreement would be limited to such an agreement relating to maintaining a disparity in the rates of the Canadian and respondent conferences. The complaint includes allegations that respondents "pur-

portedly acting accordingly to said conference agreement" established the rates charged by respondent conference, and that certain respondents controlled the rates of the Canadian conference. Further:

(10) . . . the respondent steamship lines who were members of respondent Conference charged ocean transportation rates for the shipment of relief cargoes from United States ports on the Great Lakes to ports on the Mediterranean which were substantially greater than those charged for the shipment of identical or nearly identical relief cargoes from Canadian ports on the Great Lakes and Saint Lawrence River to Mediterranean ports of discharge.

(11) Because of the facts stated in the foregoing paragraphs, CCC and AID have been and are being subjected to the payment of rates for transportation and services which were, when exacted and still are unduly and unreasonably prejudicial and disadvantageous, unjustly discriminatory and contrary to the public interest in violation of sections 15, 16, and 17 of the Shipping Act, 1916.

Aside from the fact that respondents had relied upon complainants' statement at the prehearing and were surprised and unprepared to meet the issue subsequently raised by complainants, it would be an unduly broad interpretation of the allegations of the complaint to include an unfiled section 15 agreement as an issue. The complaint alleges injury due to rate disparity between the rates of the Canadian and respondent conferences. It appears that complainants' counsel correctly stated at the prehearing conference that, if an unfiled agreement was to be included, would be limited to an alleged agreement to maintain this rate disparity. No evidence was adduced to warrant a finding that such an agreement was carried out. The fact that the disparity was eliminated when the competitive situation returned to normal would negate such a conclusion. The record discloses that respondent conference rates were, with some exceptions, at the general level of the rates of conferences serving U.S. Gulf and Atlantic ports. Even if the issue was properly raised, something more than a mere inference is needed to support a finding that carriers operated under an unfiled agreement, *Rates on U.S. Government Cargoes*, 11 F.M.C. 263, 284 (1967). "Every" agreement contemplated by section 15 does not include routine operations relating to conventional rate charges. *Boston Shipping Assn. v. Port of Boston Marine Terminal*, 11 F.M.C. 1, 5 (1967). Conventional rate changes may properly include rate modifications which relate to the competitive situation between Great Lakes and other U.S. ports. It is concluded that the issue of an unfiled agreement between respondent lines to adopt the rates of other conferences was improperly raised and even had it been, it could not be supported by the facts of record.

Under the circumstances here appearing, it cannot be found that complainants suffered actual injury from undue or unreasonable pre-

judice or disadvantage or from unjust discrimination between shippers or ports. Nor can it be found that the rates of respondent conference were or are unlawful.

All issues raised have been considered but further discussion is unnecessary to determine that complainants are not entitled to reparation. The rate disparity complained of no longer exists and as there is no evidence to support a finding that respondents' present rates are unlawful, a cease and desist order or other Commission action is not required.

ULTIMATE CONCLUSION

No violation of section 15, 16 First, 17, or 18(b) (5) has been shown. The complaint is dismissed.

HERBERT K. GREER,
Presiding Examiner.

FEDERAL MARITIME COMMISSION

DOCKET No. 71-11

MIDLAND METALS CORPORATION, NEW YORK, N.Y.

v.

mitsui O.S.K. LINE, NEW YORK, N.Y. AND ITS SUBCONTRACTOR, THE
LUCKENBACH STEAMSHIP COMPANY, PHILADELPHIA, PA.

Assessment of penalty demurrage charges during that period of strike by steel haulers from bona fide unsuccessful attempt at pickup of goods until first successful pickup found to be unreasonable. But assessment of penalty demurrage during period of strike from first pickup until completion of removal of goods held to be reasonable. Reparation awarded.

Sam F. deVries for complainant, Midland Metals Corporation.

Francis A. Scanlan for respondent, The Luckenbach Steamship Company.

G. A. Murphy for respondent, Mitsui O.S.K. Line, Ltd.

April 6, 1972

REPORT

BY THE COMMISSION: (Helen Delich Bentley, *Chairman*; Ashton C. Barrett, *Vice Chairman*; James V. Day, George H. Hearn and Clarence Morse, *Commissioners*)

By a complaint filed with the Commission, Midland Metals Corp., a New York company engaged in the import and export of steel and other metals, claimed it was thwarted in its bona fide attempt to pick up a shipment of steel by a group of striking steel haulers who threatened Midland's truckers. Free time expired before Midland was able to remove its goods and consequently respondent Luckenbach, operator of the terminal at which the shipments were located, assessed first, second, and third period demurrage charges against Midland. It is Midland's position that the penalty element in the assessment was unreasonable. Midland seeks reparation in the sum of \$316.60 and an

order directing respondents to cease and desist from asserting a claim for any demurrage charges. Examiner Ashbrook P. Bryant, in his Initial Decision served October 20, 1971, denied the complaint on the ground that the assessment was not shown to be unreasonable. Midland excepted, but no replies to exceptions were received.

FACTS

Respondent Mitsui O.S.K. Line is a common carrier by water involved in transportation between Japan and the United States. Luckenbach Steamship Company operates a terminal facility, pier, and warehouse in the Port of Philadelphia, and is "an other person" subject to the Shipping Act, 1916.

Mitsui's *S.S. Sacramento Maru* arrived at Philadelphia on April 4, 1970, with a shipment of 599 coils of steel wire consigned to Midland. The shipment was to be oncarried by truck from Philadelphia to Waterbury, Connecticut. Pursuant to instructions issued by Midland's freight forwarder in Philadelphia, Jones Motor Co. of Spring City, Pennsylvania (Jones), had been retained to pick up and deliver the steel wire to Midland's customer in Waterbury. The cargo was released by Customs on April 6, 1970. The foregoing just about exhausts the supply of uncontroverted facts in the record before us.¹ For the chain of events leading to the assessment in question, we first take Midland's version.

On April 9, 1970, one day prior to the expiration of free time, Jones sent two flat bed trailers to Pier 84 South, Philadelphia, operated by Luckenbach as a terminal, where cargo from the *Sacramento Maru* had been discharged and was ready for delivery to the consignee.

At that time there existed a national steel haulers strike, carried out by a group of steel truckers belonging to the Teamsters Union. This group of strikers (as reported in the press) did not limit itself to striking, but picketed ports and trucking terminals and involved itself in intimidation of carriers and violence.

Thus it was that on April 9, 1970, the Jones Co. drivers, upon their arrival were told by the strikers not to go in past the main gate of the terminal "if they didn't want to get hurt or have their equipment torn up." The drivers never entered the terminal on that day.²

Midland next attempted to secure railcars to move the cargo. This proved futile since all available railcars had been ordered out to move steel from the steel mills to the fabricators due to the steel haulers

¹ Because the amount in controversy was nominal (\$316.60 sought in the complaint), both sides agreed to have the case decided on the basis of the "documents and petitions" submitted by them.

² These events of April 9, 1970, were set out in a statement from the Jones Motor Co. placed in the record by Midland.

strike. On April 15, 1970, part of complainant's cargo was removed from the terminal by vans on complainant's request, and the drivers were not bothered by the pickets. The remaining cargo was removed between April 16 and April 21.

After removal of the cargo, Luckenbach applied first, second, and third period demurrage on the cargo. Midland let Luckenbach know that it objected to that assessment. Midland then brought its problem to our Division of Terminals, which at Midland's request contacted Luckenbach and proposed the assessment of first period demurrage only. Luckenbach refused and Midland ultimately filed its complaint.

Luckenbach's version of events differs from Midland's in several important respects. While acknowledging the existence of a strike, Luckenbach insists that it in no way interfered with pickups on Pier 84. To "prove" this, five bills of lading were submitted to show that cargo was indeed delivered during the period in question.³ Luckenbach's terminal was not tied up due to "strikes or workstoppages of longshoremen, or personnel employed by the terminal operator." Since these are the only conditions under which Luckenbach's tariff authorizes the extension of free time, Luckenbach feels its refusal to compromise even on the basis of first period demurrage is fully justified. Luckenbach's ultimate position is that its terminal was open for business during the entire period of the strike and that there were no teamster pickets outside its terminal. Quite simply, Midland should have picked up its cargo; and since it did not, Midland is liable for the full amount of the demurrage.

DISCUSSION AND CONCLUSIONS

Finding the record "at best somewhat sketchy", the Examiner concluded that ". . . on balance, the record fails to establish that complainant was in fact prevented from removing his cargo from Luckenbach's pier by factors beyond his control, namely the steel haulers' strike which affected all or a substantial part of the port of Philadelphia." Therefore, he concluded that there was "no unjust or unreasonable regulation or practice under section 17 . . ." Additionally, the Examiner concluded that the record was "wholly inadequate to permit comparison of conditions and practices in the ports of New York and Philadelphia for the purposes of section 16 First."

Midland, in its exceptions, states three objections to the Initial Decision:

³ Midland, however, in a letter to the Examiner points out that of the five shipments documented by the "exhibits", only one was a steel shipment of "(less than a truckload) [which can hardly be] compared to the movement of six full (open) trailerloads of steel of which our shipment consisted."

1. The burden of proof required by the Examiner places an unreasonable burden upon complainant, in that requiring witnesses to attest to the extent of the strike would be unduly expensive;

2. The acceptance of Luckenbach's statement that there were no pickets outside its terminal, from which it was implied that there were no obstacles to the removal of the cargo. Midland claims Luckenbach submitted no evidence in support of its statement, which raises two questions; i.e., if there were no pickets, why was the attempt at pickup thwarted, and if the pickets were not outside Luckenbach's gate, at what point did the Jones truckmen encounter them; and

3. The written statement from Jones did not receive proper consideration.

We find that the Examiner's ultimate conclusion that there was no unjust or unreasonable regulation or practice under section 17 is in error. Turning to the interpretative rules for demurrage assessment, there are several basic precepts essential to the resolution of any dispute on the matter. In *Southern Ry. Co. v. Aluminum Co. of America*, 119 F. Supp. 389 (E.D. Tenn. 1951), aff'd 210 F. 2d 139 (6th Cir. 1954), these rules of construction for demurrage charges were set forth at 396:

The demurrage rules promulgated by a carrier must in all instances be construed most favorably to the shipper. 18 C.J.S. Carriers, § 343.

* * * * *

No demurrage can be exacted by a carrier unless the delay in loading is clearly attributable to the fault of the shipper or consignee

This was iterated in *St. Louis, Southwestern Ry. Co. v. Robert H. Mays*, 177 F. Supp. 182 (E.D. Ark. 1959), where the court stated at 184:

. . . demurrage cannot be collected where the delay is not due to the fault of the shipper or consignee or where it is caused by the fault of the carrier. . . .

In the first Commission investigation of demurrage practices, *Free Time and Demurrage Charges at New York*, 8 U.S.M.C. 89 (1948), the Commission stated at page 107 with respect to demurrage charges:

. . . When property lies at rest on a pier after free time has expired, and consignees, through reasons beyond their control, are unable to remove it, the penal element of demurrage charges assessed against such property has no effect in accelerating clearance of the pier. To the extent that such charges are penal—i.e., in excess of a compensatory level—they are a useless, and consequently unjust burden upon consignees, and a source of unearned revenue to carriers. The levying of such penal charges, therefore, constitutes an unjust and unreasonable practice in connection with the storing and delivering of property and should be forbidden. The carrier is entitled, however, to fair compensation for sheltering and protecting a consignee's property during the period of involuntary bailment after expiration of free time.

To provide this compensatory level of charges, when through no fault of its own the consignee is unable to remove its goods, either first period demurrage charges are applied or as in the instant Philadelphia tariff, particular charges are specified. Here, these charges are one cent per one hundred pounds; however, the conditions under which these charges are applicable are limited to the conditions set out in the tariff, i.e., "strikes of longshoremen or personnel employed by the terminal operator or water carrier." In addition, if the cargo was on free time when the specified condition(s) arose, free time will be extended for the duration of the existence of the condition(s).

Putting aside for the moment the Examiner's emphasis on the "unsworn" nature of the statement from Jones Motor Co., it is to be noted that this statement was uncontroverted; from the tenor of the papers filed by the parties, including the correspondence between the Director, Bureau of Enforcement of the Commission and the Philadelphia Port Association, there can be no question that there was in existence at the time in question a steel haulers strike. Rule 10(p) of the Commission's Rules of Practice and Procedure (46 CFR § 502.156) states that "all evidence which is relevant, material, reliable and probative . . . shall be admissible." Although the Examiner did admit the unsworn statement of Wilkinson, terminal manager for Jones Motor Co., it was not given much weight. We conclude, under the circumstances of the instant situation and especially inasmuch as the statement went unchallenged, that it must follow that Midland, through its agent Jones Motor Co., did in fact make a bona fide attempt to pick up its goods, which attempt was thwarted by the strikers. This conclusion is supported by the fact that when the goods were finally removed on April 15, 16, 17, 20 and 21 (the 18th and 19th fell on Saturday and Sunday), they were placed in vans and not flatbed trucks, presumably to avoid the wrath of the strikers.

The courts, in dealing with demurrage reparation matters, have referred the cases to the appropriate agencies. Thus, in *Penn R.R. Co. v. Moore-McCormack Lines, Inc.*, 370 F. 2d 430 (2d Cir. 1966), at 432: Where demurrage charges are unreasonable, a shipper may apply to the ICC for a reparation; and the ICC has ordered reparations in cases similar to the one here.

That case involved a strike of third party employees which prevented the consignee from picking up its goods. Cited as authority for the court's statement were several ICC cases which laid the groundwork for that agency's general rule that where circumstances beyond the control of the consignee prevent it from releasing equipment of carriers, the assessment of penal demurrage charges is unwarranted.

We have often looked to the Interstate Commerce Commission to see how that Commission has resolved matters which are common to both agencies. In *F. D. Croces & Co., Inc. v. N. Y. Central R.R. Co., et al.*, 272 I.C.C. 1 (1948), railroad cars with fruit and vegetables were detained for complainant because of a truck drivers strike which prevented it from picking up its goods. The tariff provided for assessment of nonpenalty demurrage when employees of the consignor or consignee were on strike; hence, the tariff was not applicable.

The Commission stated at page 3:

The purpose of the penalty element in demurrage charges is to impel prompt release of equipment by shippers. That purpose falls whenever the release of equipment by the shipper is made impossible by circumstances beyond its control. Consequently in such circumstances the principle has become established that the exaction of a penalty charge is unreasonable. [Citing ICC cases in which] the Commission found unreasonable the collection of the usual demurrage charges for detention of cars on account of strikes beyond the control of complainants therein, and prescribed a lower basis of charges to cover such periods.

The facts in the instant case are on all fours with the above ICC case. There, the defendant claimed that the conditions attending the strike were not such as to prevent the unloading of the cars within the free time had complainant made an earnest effort to do so. The testimony of witnesses for the parties differed and little of it was based on firsthand knowledge. Complainant's vice president testified—his information was obtained by word of mouth from the company's drivers who did not appear. At 272 I.C.C. 5:

The testimony of the vice president was that picket lines were formed adjacent to defendant's property, that the pickets sometimes encroached upon it, that they threatened complainant's drivers and "chased them away" and that the unloading was finally accomplished in a piecemeal manner by sending the drivers to the yards early in the morning and at lunch time when the pickets were less alert.

Defendant claimed that the picket lines were stationed on public streets and did not trespass on the railroad property, that there was no violence or even interference with the shippers' drivers or vehicles. Defendant showed that most of the cars received at the railroad station during the strike period were unloaded, from which he inferred that there was no stoppage of business activity.

Little objection was made by either side to the hearsay character of the evidence presented by the other.

. . . The evidence may therefore be given consideration and is entitled to such probative effect as the circumstances may warrant. . . .

In our opinion the evidence warrants the conclusions that complainant's drivers were threatened and intimidated by the strikers and were thus prevented from unloading the three cars in question within the free time allowance and that this was the proximate cause of the accrual of the demurrage. We are of the view that

in the circumstances complainant exercised due diligence. This, we believe, is shown by the surreptitious and piecemeal manner in which the unloading was accomplished. [272 I.C.C. 5]

The ICC ordered assessment for demurrage at a "reasonable amount" to compensate the carrier; thus, no penalty element was assessed.

Likewise, in the instant case we find that Midland was thwarted in its bona fide effort to pick up its goods. This situation was brought about through no fault of its own. Therefore, the assessment of the penalty element in its demurrage charges is an unreasonable practice. However, the circumstances of this case do not justify the assessment of no demurrage at all as requested by Midland. Although the attempt at pickup was made while the goods were still on free time, the actual pickups did not begin until April 15, with additional pickups on April 16, 17, 20 and 21.

Therefore, we conclude that for the period from the expiration of free time on April 10 to the first successful pickup on April 15, Midland be required to pay a compensatory sum to Luckenbach as compensation for keeping the goods and providing services incidental thereto. We find that just compensation would be the amount specified in the tariff, one cent per one hundred pounds per day. However, for the period from April 16 to April 21, the last day of pickup, we conclude that a penal element should be assessed for those remaining goods. There is nothing in the record to indicate why Midland was unable to remove its entire consignment on the 15th, its first successful pickup date when presumably it would have removed all its goods on the 9th, the day of its unsuccessful pickup attempt.

Thus, the total demurrage to which Luckenbach is entitled is \$218.24, calculated as follows:

For period April 11-15 (5 days), entire consignment to be compensated for at 1 cent per hundred pounds per day: Total Consignment=199,079 pounds. Compensation at 1¢/CWT/day=\$99.54.

For period April 16-20, remainder of consignment on first period demurrage (0.05 per CWT)

Pickup date	Weight (#)	Bill of lading	Demurrage charge
April 16.....	39,882	0017, 0020	\$19.94.
April 17.....	39,882	0023, 0024	19.94.
April 20.....	40,335	0018, 0025	20.17.

For period April 21-25, remainder of consignment on first period demurrage plus second period demurrage (0.10 per CWT).

Pickup date	Weight (#)	Bill of lading	Demurrage charge
April 21.....	39,096	0018, 0022	\$19.55 + \$39.10 = \$58.65.

Therefore, total penal demurrage charges are: \$118.70 added to the compensatory charge of \$99.54, the total amount to which Luckenbach is entitled is \$218.24.

Consequently, Midland, having been billed and having paid \$816.60 to Luckenbach, is entitled to reparations in the amount of \$98.36.

For purposes of this decision, we need not form any conclusions with respect to the comparison of conditions and practices in the Ports of New York and Philadelphia in light of section 16 First. An appropriate order will be entered.

(SEAL)

FRANCIS C. HURNEY,
Secretary.

ORDER

The Federal Maritime Commission has this day served its Report in the subject proceeding, which we hereby incorporate herein, in which we found that the assessment of penalty demurrage charges during that period of a strike by steel haulers from bona fide unsuccessful attempt at pickup of goods until first successful pickup was unreasonable.

Therefore, for the reasons enunciated in said Report,

It is ordered, That the demurrage charges assessed and collected be reduced to the sum of \$218.24 and that reparations be awarded in the sum of \$98.36, with interest at six percent per annum if not paid within thirty days of the date of this Order.

By the Commission.

(SEAL)

(signed) FRANCIS C. HURNEY,
Secretary.

15 F.M.C.

FEDERAL MARITIME COMMISSION

WASHINGTON, D.C.

No. 71-24

MID-PACIFIC FREIGHT FORWARDERS—INCREASES IN FREIGHT, ALL
KINDS RATE IN THE U.S. PACIFIC COAST/HAWAII TRADE

April 6, 1972

NOTICE OF ADOPTION OF INITIAL DECISION

No exceptions having been taken to the initial decision of the Examiner in this proceeding and the Commission having determined not to review same, notice is hereby given that the initial decision became the decision of the Commission on April 6, 1972.

It is ordered, That this proceeding is hereby discontinued. By the Commission.

[SEAL]

(S) FRANCIS C. HURNEY,
Secretary.

15 F.M.C.

FEDERAL MARITIME COMMISSION

No. 71-24

MID-PACIFIC FREIGHT FORWARDERS—INCREASES IN FREIGHT, ALL KINDS RATE IN THE U.S. PACIFIC COAST/HAWAII TRADE

Increased rates in the U.S. Pacific coast/Hawaii trade found just and reasonable and not shown to be unlawful.

Milton W. Flack for respondent Mid-Pacific Freight Forwarders.
George Pai and *Walton D. Y. Hong* for intervener the State of Hawaii.

Donald J. Brunner and *Paul J. Kaller* as Hearing Counsel.

INITIAL DECISION OF STANLEY M. LEVY, PRESIDING EXAMINER ¹

Respondent Harry H. Blanco & Co. d.b.a. Mid-Pacific Freight Forwarders (Mid-Pacific), a nonvessel operating common carrier by water (NVOCC), filed Supplement No. 2 to Tariff FMC-F No. 2. This supplement increased its rates on freight, all kinds, between U.S. Pacific coast ports and Hawaiian ports, to become effective on April 1, 1971. By order served March 24, 1971, the Federal Maritime Commission instituted this proceeding to investigate the lawfulness of said rates and charges and suspended the effective date of those rates until August 1, 1971. By Supplement No. 4 the effective date was further suspended until September 20, 1971.

The State of Hawaii petitioned and was granted leave to intervene. Hearings were held in Los Angeles, Calif., on December 7 and 8, 1971. Thereafter, revised financial exhibits were submitted by respondent and received into evidence on January 12, 1972. Hearing Counsel cross-examined respondent with respect to those exhibits by written interrogatories. In conjunction with its answers thereto, respondent again submitted revised financial exhibits which were received into evidence on February 17, 1972.

¹ This decision became the decision of the Commission Apr. 6, 1972.

Prior to the rate increase under investigation, the rate structure of Mid-Pacific in the Hawaiian trade was 72¢ per cubic foot or \$1.44 per 100 pounds. The rate increase under investigation provides for a rate of 81¢ per cubic foot, shipments with a density exceeding 50 pounds per cubic foot to be assessed on the basis of one cubic foot per 50 pounds. Minimum charges per shipment increased from \$5 to \$8 per shipment.

Respondent is a wholly owned subsidiary of Signal Trucking Service, Ltd. (STS). STS is a California-based contract motor carrier operating solely within the State of California, with operating rights issued by the California Public Utilities Commission and the Interstate Commerce Commission. STS provides ground transportation services on a local basis.

As an NVOCC, Mid-Pacific receives LCL freight at one of its two terminals, assumes responsibility for the goods, coordinates and consolidates the freight into container loads, prepares the proper documentation and delivers the containers to underlying ocean carriers, and at the end of the voyage breaks the freight down for delivery to the consignee.

In addition, Mid-Pacific also engages as a licensed ocean freight forwarder with FMC License No. 303. In California, Mid-Pacific has terminal facilities located at Long Beach and Oakland. The Long Beach facilities consist of 12,000 sq. ft. with 2,000 to 3,000 sq. ft. of office space. The Oakland facility has approximately 20,000 sq. ft. with about 5,000 sq. ft. of office space. Both facilities are located on pier or within the port area. Both terminals are leased and contain a dock, dispatching office and a normal across-the-dock terminal facility operation. The total Los Angeles terminal facilities are exclusively used by Mid-Pacific and are subleased by STS, or a subsidiary of STS, to Mid-Pacific. The total rental is paid by Mid-Pacific. In Oakland, the terminal facility is leased by Mid-Pacific from the Port of Oakland. Prior to November 1971, a portion of the facility was used by STS and Paxton Trucking Co., a subsidiary of STS. Rental use for the fair share used by Paxton and STS was paid to Mid-Pacific. However, since November of 1971, the affiliates moved out and Mid-Pacific exclusively uses the Oakland terminal. In addition to the terminal facilities utilized by Mid-Pacific as aforesaid, it also utilizes corporate office facilities for which it is charged by the parent company.

Mid-Pacific in its NVOCC operation has 11 employees which are exclusively used by it. They are paid by STS under one payroll and then charged by the parent company to Mid-Pacific. In addition, re-

spondent also employs Harry H. Blanco who devotes his time exclusively to its licensed freight forwarder operation. The basis for compensation of these employees is either under union contract, if union employees, or salary basis, if management personnel. Various physical activities of the NVOCC operation, such as physical handling and loading of the containers, are conducted by STS or its employees, and billed by STS to Mid-Pacific. In addition, STS provides such services to respondent as salesmen, accounting and billing, corporate office facilities, claims, officer employees, container handling and stuffing, supervision and clerical personnel, and surface transportation between terminal and dock. These costs are billed by STS based upon either a negotiated charge, allocated on the basis of time devoted to Mid-Pacific operations, or a direct charge.

Cargo is delivered to the Mid-Pacific terminal by either local or interstate carrier. The transportation charges for this transportation is either prepaid or collect. As an accommodation to its customers, this transportation charge may be advanced by respondent and then separately billed to the customer.

Transportation of the cargo from the Mid-Pacific terminal in Long Beach or Oakland to the dock or pier is transported by steamship lines where the steamship line provides the service. In some instances, however, Mid-Pacific provides the transportation from terminal to dock and an 11¢/100 wt. reimbursement is given by the steamship company. Transportation of the cargo from the container yard of the steamship line to the Hawaiian terminal of Mid-Pacific is accomplished by an Hawaiian surface carrier who acts as an agent of respondent. Where the customer or consignee requests transportation of the cargo to its store door in Hawaii, the costs of transportation are paid for by the consignee or customer or, at their request, advanced by Mid-Pacific and separately billed to the customer.

The increase in the tariff was due to increases in various costs. Increased costs have been experienced in handling, segregation and stuffing of the containers prior to placement on board ship. In addition, there have been increases in clerical and personnel costs, material purchases and ocean charges. Increases in insurance premiums, taxes, and licenses also have occurred.

Mid-Pacific projected a 20 percent increase in revenue for the year 1972 over that of 1971. This projection is based on volume only.

The purpose of this proceeding is to determine the lawfulness of the rate increase pursuant to sections 18(a) and 22 of the Shipping Act, 1916, and sections 3 and 4 of the Intercoastal Shipping Act, 1933.

The primary issue is essentially whether the rates are just and reasonable. The method of determination and allocation of costs and expenses is a subsidiary issue. Traditionally, the test of reasonableness of rates is based on the rate of return of equipment. *Alooa Steamship Co., Inc.—General Increase in Rates*, 9 F.M.C. 220 (1966); *Atlantic & Gulf-Puerto Rico General Increase*, 7 F.M.C. 87, 104, 108-109, 116 (1962); *Rates of Inter-Island Steam Navigation Co., Ltd.*, 2 U.S.M.C. 253 (1940). However, where a carrier has, as Mid-Pacific, little or no investment in equipment, it is usual to consider at least as an important factor, the "operating ratio" method to determine reasonableness of rates. *Transocean, Inc.—Consolidated Express, Inc.*, 14 F.M.C. 35 (1970).

The record discloses that based on the previous rates respondent's operating ratio for the 6 months ended June 30, 1971, was either 115.8 percent, 101.1 percent, 112.1 percent, or 111.9 percent depending on the method utilized for allocation of expenses between Mid-Pacific's Hawaiian and other trades and treatment of revenue derived from purchased transportation charges advanced by Mid-Pacific and subsequently collected (reimbursed) from its customers. Under any of the methods of allocation or treatment of purchased transportation expenses it is demonstrated that the respondent operated at a loss in its Hawaiian NVOCC operation under the 72¢ rate.

The record further reveals that Mid-Pacific has experienced increased costs which are likely to increase further.

Under the 81¢ rate, the projected revenue and expenses for the first 6 months of 1972, show a reduction of that loss of approximately 5 percent. Although respondent's financial statements indicate that this increase in rates still does not render a profit in the Hawaiian NVOCC operation, the increased rate along with factors of competition and the adverse impact that a greater increase at this time might have on the Hawaiian economy have precluded respondent from seeking a still higher rate. There is nothing in this record, however, to show that the increased rates would be detrimental to the Hawaiian economy.

No evidence was introduced by either Hearing Counsel or the State of Hawaii which purported to show that the increased rates are unlawful or unreasonably high. The position of Hearing Counsel in its opening brief is that the rates at issue in this proceeding are neither unjust, unreasonable, nor otherwise unlawful. The State of Hawaii submitted no opening brief, but by letter stated that it does not object to the necessity for the tariff increase sought.

ULTIMATE FINDINGS AND CONCLUSIONS

Respondent's previous rates have resulted in operating losses. The rates sought herein will not produce excessive earnings and will not adversely affect the economy of the State of Hawaii.

The rates under investigation are not unjust, unreasonable or otherwise unlawful under section 18(a) of the Shipping Act, 1916, and/or sections 3 and 4 of the Intercoastal Shipping Act, 1933.

This proceeding is hereby discontinued.

(S) STANLEY M. LEVY,
Presiding Examiner.

WASHINGTON, D.C., *March 10, 1972.*

15 F.M.C.

FEDERAL MARITIME COMMISSION

DOCKET No. 71-25

UNITED NATIONS CHILDREN'S FUND

v.

BLUE SEA LINE

Assessment of higher of two tariff rates for poultry equipment when tariff is ambiguous found to be unreasonable. Refund ordered.

Jose Miranda for United Nations Children's Fund.

W. F. Latham for Blue Sea Line.

April 6, 1972

REPORT

BY THE COMMISSION: (Helen Delich Bentley, *Chairman*; Ashton C. Barrett, *Vice Chairman*; James V. Day, George H. Hearn and Clarence Morse, *Commissioners*)

By complaint filed with the Commission on March 15, 1971, United Nations Children's Fund (UNICEF) claimed that the Blue Sea Line, a common carrier by water between the United States Atlantic and Gulf ports to ports in the Republic of Indonesia, Portuguese Timor, and West Irian, and a member of the Atlantic and Gulf-Indonesia Conference (Conference) had on three occasions assessed freight rates higher than those properly applicable in accordance with the issued tariff. Examiner Ashbrook P. Bryant, in his Initial Decision served December 13, 1971, dismissed the complaint. The proceeding is before us on exceptions filed by UNICEF, to which no reply was received.

FACTS

On three shipments from New York to Belawan, Deli; Surabaya; and Djakarta, various items of poultry equipment for which Respondent had originally assessed a "machinery and parts N.O.S." rate were later reclassified by Respondent as "cargo N.O.S.", a higher rate, and UNICEF was billed for the difference.

Specifically, the items in question were egg incubators, egg candlers, chicken debeakers and feed crushers.* At the time of the shipments, February 12, 1970, there was no specific commodity rate for poultry equipment. Such a rate was established on March 16, 1970. The carrier originally assessed the "machinery N.O.S." rate of \$72.75 per 40 CFT on all shipments except that part of B/L #4 (New York/Djakarta) which was for debeakers; these were assessed the "cargo N.O.S." rate of \$93.50 per 40 CFT. However, the debeakers in the other shipments, B/L #1 (New York/Belawan, Deli) and B/L #4 (New York/Surabaya) were assessed the "machinery N.O.S." rate. On June 5, 1970, Respondent submitted to UNICEF due bills stating that all the items with the exception of feed crushers and the one exception of the debeakers mentioned above had been incorrectly assessed at the "machinery N.O.S." rate, when the correct rate to be applied was "cargo N.O.S." UNICEF was therefore charged the difference between \$957.96, the amount originally assessed, and \$1,213.18, the amount assessed by the amended bills, or a total of \$255.22.

UNICEF submits that the assessment of any of the above enumerated poultry equipment at the higher "cargo N.O.S." rate was unwarranted and claims to have been overcharged, as a result, by \$258.34. Its position is that *all* of the goods should have been assessed at the "machinery N.O.S." rate in the original assessment. Pointing out that in the original assessment the debeakers in B/L #4 (New York/Djakarta) were assessed as "cargo N.O.S.", UNICEF claims that the original assessment should have been \$954.84 instead of \$957.96. This makes the difference between what UNICEF claims to be the proper freight rate and the amount of the amended bills \$258.34, which is the refund UNICEF claims.

The time frame of events in this proceeding must be noted. The shipments were made on February 12, 1970, and the original bills of lading dated February 5, 1970. On March 16, 1970, a specific commodity rate of \$71.00 per 40 CFT for poultry equipment was effectuated. On June 5, 1970, Furness, Withy & Co., agents for Blue Sea Line, submitted due bills to UNICEF for the difference between the original assessment and an assessment on the basis of "cargo N.O.S."

Respondent's sole defense as voiced by its agents is that on April 22, 1971 (after receipt of the complaint) the subject of which rates applied was placed before the full Conference membership which

*These items are, respectively, a device for holding at constant temperature and humidity a quantity of eggs during their period of incubation; a device for examining eggs during preparation for marketing to determine any flaws within the shell; a device for removing a portion of a chicken's upper beak, thus preventing the birds from picking at one another or at their eggs; a device for crushing dried ears of corn, wheat, oats, barley, alfalfa, etc., into grain suitable in size for chicken feed.

unanimously concluded that while the feed crushers were entitled to the "machinery N.O.S." rate, the remainder of the consignment was not. The basis of Respondent's argument is that "debeakers, egg candlers and egg incubators are actually apparatus and not machinery and are not entitled to the machinery rate."

DISCUSSION AND CONCLUSION

The Examiner in dismissing the complaint relied entirely on the following proviso of the Conference tariff:

The rates (including authorized tariff interpretations), rules, regulations, out-port charges, conditions, provisions, packing requirements, or commodity descriptions which appear in this Tariff are explicit and subject *only* to Conference interpretation. [Emphasis added]

This, the Examiner felt, provided an orderly method for the Conference to resolve any tariff ambiguity.

In our opinion, the Examiner was in error as a matter of law. It is a well established rule of law that in a matter of contractual interpretation, any ambiguity is construed most strongly against the writer of the contract. More specifically, in tariff matters this rule has been utilized time and again. For instance, in *United States v. M. K. & T. R.R. Co.*, 194 F. 2d 777 (5th Cir. 1952), the Fifth Circuit Court of Appeals set out its rule for tariff interpretation:

The construction of a printed . . . tariff presents a question of law and does not differ in character from that presented when the construction of any other document is in dispute The construction should be that meaning which the words used might reasonably carry to the shippers to whom they are addressed, and any ambiguity or reasonable doubt as to their meaning must be resolved against the carriers. 194 F. 2d at 778.

This rule was applied by the Fifth Circuit shortly thereafter in *United States v. Strickland Transp. Co., Inc.*, 200 F. 2d 234 (5th Cir. 1952). Here, there was a dispute between the shipper and the carrier as to which rate was to apply to airplane internal combustion engines, "Engines, steam or internal combustion, NOI" (not otherwise indexed) under the general heading "Machinery, or Machines or Parts Named", which took a low rate, or "Aircraft Parts" which took a high rate. In agreeing with the shipper the court stated that "if it be considered that the shipment could come within either of the two classifications, the shipper was entitled to the 'Machinery or Machines' classification because the rate prescribed by it is the lower." 200 F. 2d at 235. The court decided that the tariff was ambiguous and unclear as to which rating the articles belonged under and therefore concluded "the

ambiguity must be resolved in favor of the shipper, and the lower rate must be awarded to him." *Id.*

We have heretofore had occasion to apply these principles of construction to tariffs filed with us. In *Peter Bratti Associates, Inc. v. Prudential Lines, Inc and W.I.N.A.C.*, 8 F.M.C. 375 (1965), an ambiguity in the tariff was found to exist and we concluded :

When the interpretation of a tariff is the issue, any ambiguity of the tariff provisions which in reasonableness permit misunderstanding and doubt by shippers must be resolved against the carrier, the party preparing the document Thus, although there is support for the interpretation advocated by both parties, [the shipper's] interpretation must prevail. 8 F.M.C. at 379.

Thus, it is clear from the foregoing that the threshold issue in a tariff interpretation problem is determining whether an ambiguity in the tariff does in fact exist. Once it is determined that an ambiguity does exist, then the tariff must be construed in such a manner so as to resolve such ambiguity in favor of the shipper.

From the evidence before us, there can be no quarrel with the fact that an ambiguity in the tariff did exist at the time of the shipments in question. We are drawn to this conclusion by the following factors: The tariff contained no specific commodity rate for poultry equipment; the Respondent originally assessed the goods as "machinery N.O.S."; the Conference itself was doubtful of the proper classification of the goods since it placed the matter before its full membership for resolution by vote; and most importantly, given the facts of the instant case the use of the classification "machinery N.O.S.", in our opinion, under these circumstances gives rise to a bona fide dispute over the interpretation of this tariff provision; i.e. whether poultry equipment of the instant nature could be considered to be "machinery N.O.S."

As regards the latter, respondent's position has been that the goods are not "machines" but "apparatus" and therefore cannot be classified as "machinery N.O.S." UNICEF's argument is that these particular items are in fact machines. The existence of a good faith difference of opinion among reasonable men over a tariff provision, not resulting from a strained or unnatural construction of that provision, raises an ambiguity which perforce must be resolved against the creator of the tariff.

In the present situation, it is not necessary to resort to a strained or unnatural construction of the tariff in order to classify the instant poultry equipment as "machinery N.O.S." We begin with the proposition that the classification "machinery N.O.S." covers individual machines since machinery is by definition a group of machines.

Respondent made no change in the original classification of the feed crushers as "machinery N.O.S." These devices are the most obvious form of machine—a combination of static and moving parts performing useful work.

In our opinion, Respondent's argument that the debeakers, cinders, and incubators are not machines but "apparatus" is unsound. This reasoning fails to take into account the fact that the commonly accepted usage of the word "apparatus" is as a generic term used to encompass the entire "collection or set of materials, instruments, appliances, or machinery, designed for a particular use." *Webster's Third New International Dictionary* (1964).

The *American Heritage Dictionary of the English Language* (1970) defines a machine as:

1. a. Any system, usually of rigid bodies, formed and connected to alter, transmit, and direct applied forces in a predetermined manner to accomplish a specific objective, such as the performance of useful work.

Webster's Seventh New Collegiate Dictionary (1969) defines a machine as:

... an assemblage of parts that are usually solid bodies but include in some cases fluid bodies or electricity in conductors and that transmit forces, motion, and energy one to another in some predetermined manner and to some desired end.

Synonyms listed for machine include engine, apparatus and appliances.

It is apparent that the commonly accepted definition of machine includes devices with no moving parts which have as their function the conversion of energy from one form to another for the purpose of performing useful work. Existing case law reinforces this definition. Thus, in *Foster Wheeler Corp. v. United States*, 290 F. Supp. 375, 380 (Cust. Ct. 1968), a machine was defined "as a mechanical contrivance that modifies, utilizes, or applies energy or force, provided the contrivance has a useful function or a useful objective."

In the instant case, it would appear that all three devices can reasonably be considered to be machines. The debeakers consist of both static and moving parts which acting in conjunction with one another quite clearly utilize energy and convert energy from one form into another; electrical energy is transformed into mechanical energy which in turn performs a useful function—the debeaking of a chicken. Likewise, the incubator, in this case kerosene operated, converts fossil fuel into heat energy in order to perform the function of maintaining constant temperature during the incubation period of the eggs, some

21 days. The manufacturer's literature on the incubator refers to it as a "machine". Lastly, a candler converts electrical energy into light to enable one to determine whether eggs are marketable.

Hence, it is readily apparent that given the tariff as it existed on February 5, 1970, the date of the bills of lading, a shipper and a carrier could reasonably be expected to differ on the classification of the above poultry equipment. This reasonable difference of opinion in conjunction with (1) the carrier's own original assessment of these items as "machinery N.O.S.", and (2) the Conference's own doubt as to the proper classification evidenced by its voting on the matter evidences an ambiguity in the tariff. Thus, given this ambiguity, and having resolved it in the shipper's favor, we conclude that UNICEF is entitled to a refund in the full amount of the overcharges claimed, to wit, \$258.34. Accordingly, an appropriate order will be entered.

(SEAL)

(Signed) FRANCIS C. HURNEY,
Secretary.

15 F.M.C.

FEDERAL MARITIME COMMISSION

DOCKET No. 71-25

UNITED NATIONS CHILDREN'S FUND

v.

BLUE SEA LINE

ORDER

The Federal Maritime Commission has this day served its Report in the subject proceeding, which we hereby incorporate herein, in which we found that the assessment of the higher of two tariff rates was unreasonable.

THEREFORE, for the reasons enunciated in said Report,

It is ordered, That respondent Blue Sea Line be required to refund to complainant UNICEF the amount of overcharges in the sum of \$258.34, with interest at six percent per annum if not paid within thirty days from the date of this Order.

By the Commission.

(SEAL)

(Signed) FRANCIS C. HURNEY,
Secretary.

15 F.M.C.

FEDERAL MARITIME COMMISSION

WASHINGTON, D.C.

No. 71-23

PACIFIC HAWAIIAN TERMINALS, INC.—INCREASES IN FREIGHT, ALL
KINDS RATE IN THE U.S. PACIFIC COAST/HAWAII TRADE

NOTICE OF ADOPTION OF INITIAL DECISION

No exceptions having been taken to the initial decision of the Examiner in this proceeding and the Commission having determined not to review same, notice is hereby given that the initial decision became the decision of the Commission on April 13, 1972.

By the Commission.

[SEAL]

(S) FRANCIS C. HURNEY,
Secretary.

15 F.M.C.

213

FEDERAL MARITIME COMMISSION

No. 71-23

PACIFIC HAWAIIAN TERMINALS, INC.—INCREASES IN FREIGHT, ALL KINDS RATE IN THE U.S. PACIFIC COAST/HAWAII TRADE

Increased rates of Pacific Hawaiian Terminals, Inc., are not unjust, unreasonable, or otherwise unlawful.

Carl H. Fritze for respondent, Pacific Hawaiian Terminals, Inc.
George Pai and *Walton D. Y. Hong* for State of Hawaii, intervener.
Donald J. Brunner and *Paul J. Kaller*, Hearing Counsel.

INITIAL DECISION OF STANLEY M. LEVY, PRESIDING EXAMINER¹

Pacific Hawaiian Terminals, Inc. (Pacific Hawaiian), filed seventh Revised Page No. 39 to Tariff FMC-F No. 2 to become effective on March 22, 1971, increasing its Freight All Kinds rate between U.S. Pacific coast ports and Hawaii by 12½ percent. On March 18, 1971, the Commission ordered an investigation and suspension to determine whether or not the increased rates and charges are unjust, unreasonable, or otherwise unlawful under section 18(a) of the Shipping Act, 1916, and/or sections 3 and 4 of the Intercoastal Shipping Act, 1933. Although the Commission suspended the effective date of the increase through July 21, 1971, respondent, having been inoperative for more than 1 year, formally agreed not to commence operations pursuant to Tariff FMC-F No. 2 prior to February 15, 1972.

Intervener State of Hawaii (the State) informed the Examiner that it did not intend to actively participate in hearings. Counsel for respondent and Hearing Counsel agreed to proceed upon a stipulated factual record. Resolution of the issues therefore is based on the submitted record and briefs and without oral hearing.

¹ This decision became the decision of the Commission April 13, 1972.

Pacific Hawaiian, an NVOCC, is a wholly owned subsidiary of United Drayage Corporation (United Drayage). As an NVOCC it receives LCL freight at its terminal in San Francisco, Calif., assumes responsibility for the goods, consolidates and loads into containers furnished by either Matson Navigation Co. or Seatrain Lines California, prepares the proper documentation, and arranges for delivery of the containers to the underlying carriers. At the end of the voyage the process is reversed and the containers are broken down for delivery of the individual shipments to the ultimate consignees. In Honolulu the services are performed by an agent of respondent whose charges to Pacific Hawaiian are pursuant to tariffs filed with the Hawaii Public Service Commission.

Pacific Hawaiian has no written leases, notes, mortgages, encumbrances, or other evidence of indebtedness covering property and equipment owned or used by respondent in its domestic offshore operations pursuant to the tariff here under investigation. It leases its terminal facility from Honolulu Freight Service (Honolulu Freight), another wholly owned subsidiary of United Drayage. The reason for this is that Pacific Hawaiian was a new corporation and it was impossible to obtain a favorable lease for Pacific Hawaiian Terminals, Inc., and accordingly the terminal facility was leased by Honolulu Freight. The full rental is charged to respondent without any add-ons or subtractions therefrom by Honolulu Freight. No written agreement has been entered into between the two corporations for this property.

United Drayage performs the container loading at San Francisco for the price of 43 cents per 100 pounds, providing all labor therefor. This is equivalent to \$125.00 per container paid by Honolulu Freight in Portland, Ore., to a nonrelated company.

Honolulu Freight provides service for collection and disbursement of cash, maintaining corporate books, and handling of claims for cargo damage. There are no charges to Pacific Hawaiian for these services.

Respondent's shipments averaged 28,509 pounds per container from 1966 to 1970, but during the period 1969-1970 the average weight was reduced to 24,168 pounds per container. The reason for this decrease in weight factor is that, at the inception of the operations, heavier freight predominated. As the operations became more established, and through growth, respondent received a larger share of the light and bulky traffic which is vital to lower cost operations. It is anticipated that this trend will continue.

It is estimated that there will be a deficit in the first year of projected operations but respondent projects a growth rate of 10-15 percent. This rate should have the effect of reducing losses and ultimately returning a slight profit. This should occur because increased volume

would allow a greater spread of administrative costs, and the greater the volume the lower the actual per-container loading costs. Also, as volume increases, the freight mix reaches a more desirable level, namely, not quite the preponderance of heavy freight and a larger proportion of the valuable light and bulky freight.

Hearing Counsel supports the rate increase because the evidence demonstrates that even with it the operations will result in a loss for the projected year 1972.

The State contends that respondent has failed to sustain its burden of proof in showing with reliable, probative, and substantial evidence that it is entitled to the increase. Pacific Hawaiian's case primarily is based on a projection for a typical year. The State argues that the evidence is not indicative or representative of a typical year based on expenses and revenues for the years 1968, 1969, and 1970. In 1968 Pacific Hawaiian had an operating ratio of 93.6 percent; in 1969, 85.87 percent; and in 1970, 94.04 percent.

The total expenses for 1968, 1969, and 1970, divided by the total revenues for the same years, indicates an average operating ratio of 93.1 percent (\$814,663.92 divided by \$887,996.55). The projected year, however, shows an operating ratio of 106.2 percent. The State suggests that it is unreasonable that the operating ratio should increase so drastically in the projected year. To this end it points to the projected year increases in salary expenses and administrative salary expenses, and the fact that there is no explanation why these two categories should be increased so drastically. It concludes that these two categories are not representative of the expenses to be attributable to 1972, in view of Pacific Hawaiian's past performance, and the slight increase (3.1 percent) in container revenues from 1970 to 1972.

A recomputation by the State shows that, with all other figures remaining the same, a 20-percent increase in the two categories of salaries and administrative office salaries will result in an operating ratio of 94.1 percent. A 30-percent increase in the two categories, again with the other figures remaining exactly as stated by respondent, results in an operating ratio of 95.7 percent. A 50-percent increase in the two categories, the other figures remaining the same, results in a 98.9 percent operating ratio. Assuming that a 20 or 30 percent increase in these two categories is reasonable, Pacific Hawaiian's operating ratio is still within the reasonable range of operating ratios for NVOCC's without increasing the rates.

The State also attacks the projected revenue from loading and cubing. Pacific Hawaiian projects it at \$776.00 and says it is based on the average of the last 4 years, but the only figure in respondent's exhibits

is \$3,104.00 for 1970. The State fails to see how the \$776.00 projected figure can be an average of the last 4 years.

Pacific Hawaiian's reply brief suggests that the State's position is based on an inadvertent misunderstanding of the nature of the cost statement submitted by respondent. The year 1970 was not a complete year, covering only the approximately 9 months respondent was operational. As such, respondent contends, the projections for 1972 cannot be compared with 1970. In addition, current costs and wages have been used in the projection.

Hearing Counsel supports respondent's contention and disputes the State's analysis and maintains that the data submitted appears to be a reliable projection of a typical year. They point out that respondent suspended operations in September 1970, and in conjunction with this investigation agreed not to commence operating until after February 15, 1972. Hearing Counsel argues that respondent having been dormant for 1½ years, its projected typical year cannot be expected to compare favorably with the results of operations during a period of sustained activity. Hence even though the projected return is out of line with the results of operations for 1968 through 1970 it should not be indicative of an unreasonable or unreliable projection.

The expense figures referred to by the State for calendar year 1970 actually pertain only to the period January–August, after which operations were suspended. Annualizing these figures, traffic and salary expense would be \$14,175 rather than \$9,450, representing an increase of 18.5 percent over 1970 rather than 78 percent, as indicated by the State, and office salary and administrative expense would be \$18,160 rather than \$12,107, representing an increase of 38 percent over 1970 rather than 108 percent as indicated by the State. On this basis, the apparent discrepancy between past operation and projected year is significantly diminished.

Office salaries and administrative expense of \$25,215 is based upon the wages of 2½ persons at the present teamsters' scale. Nothing in this record would indicate that an annual salary of \$10,200 is unreasonable for one office staff member. Traffic and salaries expense of \$16,800 is computed from 1970 salaries of \$950 per month, increased by 23 percent based on union increases, plus \$3,000 in bonuses. There is no indication that these figures are unreasonable.

A review of respondent's revenues from loading and cubing reveals that it realized income from that source in only one of the 4 years that it has operated. In that year, 1970, it received \$3,104.00. The average income from loading and cubing over the years of its existence has been \$776.00 and it is this amount that respondent utilizes in the

projected year. For the projected year gross revenue is \$133,008.00. If loading and cubing is increased from \$776.00, as respondent depicts, to \$3,104.00, as suggested by the State, revenues would increase to \$135,326.00. This increase would reduce the projected deficit to \$5,958.00 and would improve the operating ratio slightly but would not change respondent's financial picture materially.

Operating ratios often are a matter of dispute when comparisons are made between past actual results and projected results. In addition, the weight which should be given to NVOCC operating ratios as well as to the area of permissible ratios has never been quantitatively determined by the Commission. The Commission has said that it has been usual to consider, at least as an important factor, in proceedings relating to the reasonableness of rates of carriers with little capital investment in comparison with their total costs of operation, the "operating ratio" of such carriers, i.e., the margin between revenue and expenses of operation.²

In allowing a rate increase where the evidence indicated that the operating ratio did not exceed the 93 percent which the Interstate Commerce Commission appears frequently to have approved, the Commission went on to say that there was no showing that a 93-percent operating ratio is necessarily proper or a standard for NVOCC's, and that "nothing we say here is to be construed as implying that such operating ratio is in fact proper, or a standard." *Transocean, Inc.—Consolidated Express, Inc.*, 14 F.M.C. 35, 45 (1970).

With the Commission's caveat in mind, the Examiner cannot conclude that any operating ratio which is reflected in the various positions is such as to require a disapproval of the rate increase. Even if the projected operating ratio of 106.2 percent is unduly pessimistic, the record does not reveal that the average operating ratio of 93.1 percent or the 1970 ratio of 94.04 percent exceeds the 93 percent ratio found in the *Transocean* case to be no bar to approval of rate increases. The record is devoid of any basis to establish an operating ratio in excess of 93 percent, hence there is no reason to conclude that if projected figures are in error that such error would be sufficient to change the operating ratio from the projected 106.2 percent to the 93 percent level.

In addition to the factor of operating ratios, considering the adjustments necessary to properly compare a 9-month operation in 1970 with a projected typical year, and taking into account present pay scales and other cost increases to which the NVOCC is subject, the

² The greater the margin the lower the ratio. Hence, a ratio of 100 percent indicates a break-even operation; a ratio in excess of 100 percent indicates a loss operation.

record supports a finding that the increased rates are just and reasonable.

ULTIMATE CONCLUSION

It is concluded and found that the increases in the rates here under consideration are not unjust, unreasonable, or otherwise unlawful.

The proceeding is discontinued.

(S) STANLEY M. LEVY,
Presiding Examiner.

Washington, D.C.

March 15, 1972

15 F.M.C.

FEDERAL MARITIME COMMISSION

No. 72-9

POLYCHROME CORPORATION

v.

HAMBURG-AMERICA LINE-NORTH GERMAN LLOYD

NOTICE OF ADOPTION OF INITIAL DECISION

No exceptions having been filed to the initial decision of the Examiner in this proceeding, and the Commission having determined not to review same, notice is hereby given that the initial decision became the decision of the Commission on April 18, 1972.

By the Commission.

[SEAL]

(Signed) FRANCIS C. HURNEY,
Secretary.

FEDERAL MARITIME COMMISSION

No. 72-9

POLYCHROME CORPORATION

v.

HAMBURG-AMERICA LINE-NORTH GERMAN LLOYD

Reparation awarded.

Seth Cross for Polychrome Corporation.

F. J. Barry for Hamburg-America Line-North German Lloyd.

INITIAL DECISION OF STANLEY M. LEVY, PRESIDING EXAMINER ¹

Polychrome Corporation (complainant) seeks recovery of \$760.03 from Hamburg-America Line-North German Lloyd (respondent) alleging assessment of a rate that was higher than the rate published in the governing tariff, North Atlantic Continental Freight Conference Tariff No. 28 (F.M.C.-3).

The parties have consented that the proceeding may be conducted under shortened procedure without oral hearing pursuant to Rule 11 of the Commission's Rules of Practice and Procedure.

Involved is a shipment ² alleged to be "Paper, Stencil Base," which pursuant to Item 2738 of the tariff should be transported at a rate of \$86 per ton weight of 2,240 pounds. The tariff in question also has a rate under Item 2671 for "Paper, Stencil," at a rate of \$87.50 per 40 cubic feet. The carrier assessed \$1,962.19 pursuant to Item 2671 whereas the charge should be only \$1,202.16 if Item 2738 is applicable.

Examination of the bill of lading and dock receipt relating to the shipment reveals that the goods are clearly identified as "stencil base

¹ This decision became the decision of the Commission April 18, 1972.

² New York to Bremen aboard respondent's vessel *Elbe Express*, Bill of Lading No. 126, dated April 17, 1970.

paper." Nowhere on the shipping documents is there any description or language which would indicate that the commodity was "Paper, Stencils."

Complainant certifies that the goods shipped were in fact stencil base paper as described in the bill of lading and dock receipt and not stencil paper as rated by respondent. Respondent does not contend that the goods were other than stencil base paper but has declined adjustment on the basis of Tariff Rule 8 which requires prompt submission of such claims. The conference rule, however, is not barrier to recovery because the Commission has repeatedly ruled that under the Shipping Act, 1916, a claim arising out of alleged overcharges cannot be barred from a determination on the merits if, as herein, it is filed with the Commission within two years of accrual of the claim.

The evidence supports a finding that the goods shipped were stencil base paper for which the applicable rate is found in Item 2788. Complainant was overcharged \$780.03 and respondent is directed to pay this amount plus 6 percent interest per year if not paid within 30 days.

STANLEY M. LEVY,
Presiding Examiner.

WASHINGTON, D.C., *March 24, 1972.*

15 F.M.C.

FEDERAL MARITIME COMMISSION

DOCKET No. 71-80

MARITIME FRUIT CARRIERS CO., LTD., AND REFRIGERATED EXPRESS
LINES (A/ASIA) PTY., LTD.

May 3, 1972

Agreement between two carriers for coordination of sailings, sharing of expenses, etc., and which provides that each party shall remain an individual member with a separate vote in any conference found not to be contrary to the provisions of section 15, Shipping Act, 1916.

John R. Mahoney for petitioner Blue Star Line, Ltd., Ellerman Lines, Ltd., and Port Lines Ltd.

Edward Aptaker, Edward Schmeltzer, and Edward J. Sheppard IV for petitioner Farrell Lines, Inc.

Sanford C. Miller for petitioner Columbus Line.

Stanley O. Sher and Alan S. Davis for respondents Maritime Fruit Carriers Co., Ltd. and Refrigerated Express Lines (A/Asia) Pty., Ltd.

Donald J. Brunner and Patricia Byrne, Hearing Counsel.

REPORT

By THE COMMISSION: Helen Delich Bentley, Chairman, Vice Chairman Barrett, and Commissioner Morse concluded that the provision of Agreement 9944 permitting each party to remain an individual member with a separate vote in any conference is not contrary to section 15 of the Shipping Act, 1916. Their respective views are set forth below.

Chairman Bentley and Vice Chairman Barrett:

This show cause proceeding involves a dispute over the number of votes to be exercised by the Maritime Fruit Carriers Co., Ltd. (MFC) and Refrigerated Express Lines (A/Asia) Pty., Ltd. (REL) as members of the Australia/U.S. Atlantic and Gulf Conference. The Conference operates in the trade to United States Atlantic and Gulf ports from Australia pursuant to Agreement No. 9450.

REL and MFC are parties to Agreement 9944, a "cooperative working arrangement" under the terms of which MFC and REL are permitted to coordinate sailings in "the trade from Australia to ports on the East Coast of North America including St. Lawrence River and Seaway and Great Lakes Ports."¹ The agreement also permits REL and MFC to share revenue and certain expenses from these sailings and to employ a common agent in Australia. Agreement 9944 further provides that each party shall manage and operate its own service and vessels; continue to issue its own bills of lading; and where rates are not established by the Conference, REL and MFC will each establish their own rates and publish their own tariffs. Finally, each party to the agreement shall remain an independent member of any conference they belong to and shall vote independently of the other.

Agreement 9944 was first filed for approval under section 15 in April 1971, but an amended version, cancelling the original, was filed in June of that year. Protests to both the original and the amended versions were filed by Pacific Atlantic Container Express Service (PACE), Columbus Line and Farrell Lines, Inc.² The protests were confined to the question of conference voting status, and on August 23, 1971, the agreement was approved with the proviso that the issue of voting would be the subject of a subsequent proceeding. As a result of that approval, this proceeding was instituted and was limited to the submission of affidavits of fact and memoranda of law and replies. Oral argument was heard.

The Conference is presently composed of six members. Aside from REL and MFC, they are Atlantrafik Express Service, Columbus Line, Farrell Line and PACE, Atlantrafik, REL and MFC operate conventional and palletized vessels. Columbus Line has inaugurated full container service, and Farrell Line presently operates conventional ships but expects to employ full container vessels in the near future.

An unanimous vote is required to amend any of the provisions of the conference agreement, while a three-quarters' vote is sufficient for all other matters.

DISCUSSION AND CONCLUSIONS

To MFC and REL their agreement is nothing more or less than a "Cooperative working arrangement". Indeed, they have formally

¹ The agreement does not cover the outbound trade to Australia since REL does not offer a service in that trade.

² PACE is a "joint service" established under Agreement 9925 and is composed of Associated Container Transportation (Australia) (ACT(A)) and Australian National Line. (ACT(A)) is itself a "joint service" composed of Blue Star Line, Ltd., Port Line, Ltd., and Ellerman Lines, Ltd. This "joint service" is operated under Agreement 9787.

labeled it just that.³ To PACE, Columbus and Farrell, Agreement 9944 is just as emphatically a "joint service". This question of labels assumes its unwarranted importance in the eyes of parties because of certain provisions in our General Order 24, which offers guidance to persons seeking approval for agreements under the Shipping Act, 1916.

Section 522.2(4) of General Order 24 (46 CFR § 522.2(4)) defines a joint service as:

An agreement which establishes a new and separate line or service to be operated by the parties as a joint venture. The new and separate service fixes its own rates, publishes its own tariffs, issues its own bills of lading, and acts generally as a single carrier.

Section 522.6(d) (1) of General Order 24, a provision which in reality does nothing more than provide a convenient form for use in drafting joint service agreements, would limit "joint services" to acting as a "single member or party" to conference agreements. But it should be kept in mind that the definitions in General Order 24 are for guidance and convenience. They do not purport to set hard and fast relationships among parties to agreements, whatever they may be labeled.

Both sides have spent a great deal of time and effort here comparing Agreement 9944 to the definition of a joint service and to a variety of other agreements which we have approved and which restrict the parties to one vote in conferences. While we think this instructive, particularly on the question of the weight to be accorded labels, we also think these analyses miss the point.

The issue of single or multiple conference votes for parties to "joint service agreements" or "cooperative working arrangements" should not under normal circumstances be decided exclusively from the terms of the particular joint service or cooperative arrangement in question. After all, section 15 requires that we approve an agreement unless we find that it would be:

... unjustly discriminatory or unfair as between carriers, shippers, exporters, importers, or ports, or between exporters from the United States and their foreign competitors, or to operate to the detriment of the commerce of the United States, or to be contrary to the public interest, or to be in violation of this Act, and shall approve all other agreements, modifications, or cancellations.

Clearly, in the vast majority of cases the approvability of an agreement will depend upon the operational impact of the joint service or cooperative arrangement on the conference operating in the trade involved.

³ As filed for approval, Agreement 9944 was entitled a "cooperative working arrangement".

The parties here are themselves aware that the question of labels is not decisive. Other grounds for a single vote restriction are offered. Initially, the protestants saw in the multiple vote provision of Agreement 9944 an opportunity for the breakbulk carriers to dominate the Conference through "bloc voting" and thereby thwart such conference actions as were necessary to afford shippers in the trade the full benefits of completely containerized operations—all to the detriment, of course, of the now or soon to be containerized operators. Simple mathematics, however, forced the abandonment of this position.

The Conference now has six members and requires a three-quarters' majority to carry an item of business. If REL and MFC retain their individual memberships and votes, five votes will be necessary to carry a matter. At least one more than any "bloc" has. If REL and MFC are restricted to a single membership and one vote, the Conference would have five members with four votes needed to constitute the required majority. Again, the "bloc" lacks the votes.

The fears of bloc domination have now been replaced by the necessities of simply equality. The prime proponent of "equality" is PACE, who as a result of "informal discussions" at "all levels of the Commission's" staff receded from its position that "at least three votes were warranted for the individual members of PACE." Our order approving the PACE agreement provided:

It is expected that PACE Line will commence its operations in May, 1971, and will, about that time apply for membership in the Atlantic & Gulf/Australia and New Zealand Conference, Agreement No. 6200, and in the Australian/Atlantic and Gulf Conference, Agreement 9450. Presently three lines which have organized and established ACT-Australia are members of these conferences. They are Blue Star Line, Port Line, and Ellerman Lines . . . Should PACE Line join the constituent lines in the Conferences, the combination would have at its command four of nine votes in each Conference. In the light of this, the Commission is of the opinion that the constituent lines should resign from the Conferences at such time as the PACE Line becomes a member. (Order of March 30, 1971)

Whatever the subject of the "informal discussions" the order of approval makes clear the concern which prompted the expression of "opinion" by the Commission—the impact on conference operations of the retention of multiple votes by the members of PACE. At any event, the constituent lines resigned when PACE joined and presumably harmony would have prevailed had not REL and MFC entered into their "cooperative working arrangement" with its provision for individual votes. However, they did and PACE now seeks equality.⁴ But

⁴ It has been suggested that the voting restrictions upon PACE are particularly abhorrent

the equality sought by PACE belies the very arguments made against the agreement here for it is an abstract equality based on nothing more than the fact that PACE has one vote. This brings us almost full circle and is but another way of resorting to labels or pigeonholes into which all agreements are to be forced without regard to their differences. An agreement is unfair as between carriers only in a particular and given circumstance. Here, as we have said before, the circumstance is the impact voting status on conference operations.

Conference voting mechanisms are at best delicate things, presumably arrived at after due deliberation of alternatives. By and large the various procedures, and they cover a wide range, work well when considered in the light of the large number and variety of agreements existing in our foreign commerce. These considerations, when taken with the continuing change in carrier relationships, trade conditions and economic and competitive circumstances, makes us on the one hand cautious in the interference with existing voting procedures absent a showing of need; and on the other, makes it extremely difficult to formulate hard and fast rules for the governance of future voting procedures.

Caution should not, however, be confused with unwillingness and a distinction should be made between an already established procedure which is allegedly discriminatory, unfair, or whatever, and a proposed or new procedure which is attacked. The former situation arose in *Pacific Coast European Conference*, 3 F.M.B. 11 (1948), where the Conference's unanimous voting rule was under attack by shippers who had allegedly been discriminated against by the rule. The Commission there, in refusing to disapprove the rule, said:

The question here is not whether a unanimous or majority rule might be better or whether it could conceivably be abused but whether the record indicates that the rule has been abused by respondents in violation of the act.

* * * * *

There are conferences which have the unanimous, two-thirds, three-fourths, or majority voting rules. No one of these can be disapproved as an organizational procedure, but the lawfulness of any one of them must be based upon evidence as to their working in practice

Where a procedure is new and untried and there is no operational experience against which to test it, something less is of course required—

to Australia National Line, the national flag line of Australia. As the "first flag line" in the trade ANL feels that it has been reduced to the status of a "second class citizen". While we are quite well aware of the evils of second class citizenship in many areas of life, section 15 of the Shipping Act simply does not allow us to confer a particular conference status on the basis of citizenship, however sympathetic we may be with the pride of a country in its merchant marine.

at the least though there should be a reasonable showing that the particular procedure will operate unlawfully. The question here involves elements of both situations. However, the record before us contains nothing in the way of past experience which would dictate a single membership and one vote in the Conference for REL and MFC, nor does the record contain anything concerning the future which would require the imposition of such a restriction.

Accordingly, we will continue our approval of 9944. In doing so, we are not unaware of the breadth of the problems raised by protestants, but we think that perhaps the solution is to be found on another track. As we have emphasized throughout this report, the real question here is that of the effect of Agreement 9944 upon conference operations. Thus, whatever else it may be, it is a question of conference membership under equal terms and conditions. Absent the participation of REL and MFC in the Conference, the question of voting just does not arise. Perhaps the better way to approach the question of voting by parties to ancillary agreements would be under the membership provisions of conference agreements. This approach at least emphasizes the need to examine the "voting" question in the context of the operations of the particular conference involved.

There remains only the question of whether the "burden of going forward" has been sustained by REL and MFC. Everyone seems to agree that there is no burden of proof question, but PACE at least feels that REL and MFC have failed to sustain their "burden of presenting facts to the Commission which indicate why the maintenance of two votes . . . is not contrary to section 15 of the Act." There are apparently two grounds for this contention. We think the argument best expressed in the protagonists' own words:

In Agreement No. 9905, Docket 70-42 served 11/23/70, the Commission stated that it may require the proponent of a proposed agreement to come forward with information supporting approval of the agreement. Since the Commission makes reference to a hearing on the voting question in its Order of Approval for Agreement 9944, PACE Line believes that the Commission has made no initial determination of the voting issue. PACE Line furthermore believes that its own experience with the Commission in being limited to a single vote in Agreement No. 9925 establishes a prima facie case that the maintenance of dual votes by REL and MFC would be contrary to section 15.

What we have already said has disposed of the "prima facie" case made by No. 9925 vis-a-vis 9944. As for our calling into question the voting issue in our order of approval, it would seem only necessary to point out that it was the sole ground of protest by PACE. Were the question of burden decisive here, PACE as the proponent of an order

restricting REL and MFC to one vote would have the burden of going forward with facts to show why the maintenance of two votes was contrary to section 15. As for the remaining ground, we are unable to determine how our lack of prejudgment of the issue here relates to the burden of going forward. However, it is unnecessary to decide this case on questions of "burden".

For the foregoing reasons, Agreement No. 9944 is not found to be contrary to the provisions of section 15. Accordingly, this proceeding is hereby discontinued.

CLARENCE MORSE, *Commissioner* concurring:

I concur but in doing so I believe it may be helpful to express my reasoning.

I start from the basic premise expressed in section 15, Shipping Act, 1916, as amended, that:

The Commission shall by order, after notice and hearing, disapprove, cancel or modify any agreement, or any modification or cancellation thereof, whether or not previously approved by it, that it finds to be [1] unjustly discriminatory or unfair as between carriers, shippers, exporters, importers, or ports, or between exporters from the United States and their foreign competitors, or [2] to operate to the detriment of the commerce of the United States, or [3] to be contrary to the public interest, or [4] to be in violation of this Act, and shall approve all other agreements. . . . [numbering supplied]

From the foregoing it is clear that if any of the four findings specified in section 15 are made by us, we must disapprove the agreement; absent making any of the four specified findings we must approve the agreement. Let us examine the matter within the foregoing guidelines.

I find nothing in this record which enables me to make any of the findings required by section 15 as condition precedent to disapproval of the plural votes agreement. True, there has been hard negotiation and bargaining within the Australia/U.S. Atlantic and Gulf Conference between the container carriers and the break-bulk carriers. True, there may be fears that plural votes by MSC and REL may defeat full initiation and implementation of container line services. But fear alone is not substitute for proof. *Rate Agreement Exclusive Patronage System* (1968), 11 FMC 513, 523. True, PACE, which acceded to our staff's request that it restrict itself to a single vote, may feel abused if REL and MFC have plural votes. In that respect, it may be that PACE should not have been so easily dissuaded by staff and should have insisted on a section 15 Commission hearing on its right to plural votes. This is particularly true where the Commission has never issued a General Order or an interpretative ruling specifying that members of a joint service agreement are restricted to a single

vote. True, one's subjective point of view may lean strongly toward a single-vote concept. But where, from this record, is there proof that plural votes to REL and MFC affront any of the four criteria spelled out above in section 15? I find none.

Some so-called joint service agreements set up a separate corporation to conduct the joint service and its "members" are but shareholders. Other so-called joint services are in fact joint ventures. Others are but the loosest kind of cooperative working arrangements. Whether the joint service has a single vote or plural votes may turn in part on the form in which it is conducted.

An examination of those conference agreements which have a joint service or a cooperative working arrangement (hereinafter for convenience also called joint service, for the principles under discussion appear to apply to both) as one of the conference members immediately establishes that whether a joint service has but a single vote or whether each of the members comprising the joint service has an individual vote is not always dictated or covered in the voting provisions contained in the conference agreement itself.⁵ Others do impose specifically the condition that a joint service and its members are entitled to but one vote.⁶ Hence, in practice, in those conference agreements where there is no provision concerning voting by a joint service, the conference turns to the terms of the joint service agreement itself to ascertain whether there is but a single vote for the joint service or an individual vote for each member of the joint service.

Many joint services restrict themselves to a single vote for the entire membership.⁷ But this is not the uniform practice.⁸ Within the last several years this Commission has approved a number of joint service

⁵ See the following agreements as examples where there is no restriction on votes by members comprising a joint service:

- Agreement No. 57—Pacific Westbound Conference
- Agreement No. 150—Trans-Pacific Freight Conference of Japan
- Agreement No. 5200—Pacific Coast European Conference
- Agreement No. 5850—North Atlantic Westbound Freight Association
- Agreement No. 9450—Australia/U.S. Atlantic & Gulf Conference
- Agreement No. 9648—Inter-American Freight Conference

⁶ See for example:

- Agreement No. 17—Far East Conference
- Agreement No. 2744—Atlantic and Gulf/West Coast of South America Conference

⁷ See for example:

- Agreement No. 7598—Hoegh Lines
- Agreement No. 7631—Concordia Line
- Agreement No. 7658—Blue Funnel Line
- Agreement No. 9808—States Marine Lines

⁸ See for example:

- Agreement No. 9868—Blue Star/EAC Joint Service
- Agreement No. 9902—Euro-Pacific Joint Service

agreements or variations of joint service agreements which grant votes to each individual member as distinguished from a single vote for the group when voting on matters coming before a conference.⁹

In the instant matter for the record discloses that on at least one occasion the several members of the joint service (Agreement No. 9944) voted opposed to each other on matters where their interests were opposed. Is that necessarily bad or in violation of the 1916 Act? In the instant proceeding it was reported that Australian National Line is unhappy because Agreement No. 9925 denied it in a vote in the conference independent of the PACE vote.

Let us consider another aspect. Suppose an American-flag line enters into a joint service with two foreign-flag lines and the joint service becomes a member of a steamship conference which itself has no voting rule restricting the voting rights of members of a joint service. It may well be that on an occasional matter the interests of the American-flag line are opposed to the interests of the foreign-flag lines. Then, unless the joint service has a unanimity voting rule, the interests of the American-flag line would be subordinated to the views of its foreign-flag partners. And if there were a unanimity rule the joint service would lose its vote on the specific matter under consideration by the conference for inability of the joint service to reach a unanimous position on the issue.

Hence, if we are to restrict all joint services to a single vote, this necessarily means that an individual carrier must balance the advantages of being a member of a joint service as against the disadvantages which may result if its views are subordinated to the views of its fellow joint service members. Because of this, to restrict a joint service to a single vote tends to discourage the formation of a joint service even where it might be beneficial not only to the carriers but also to the commerce of the United States. The phrase "one-man, one-vote," espoused by some but taken from a different context and milieu is, to my thinking, inapposite.

Conferences and joint services have existed for many years. With the exception of the present proceeding, I am unaware of any complaints against plural votes made to this agency. Hence, there exists no "ground swell" in favor of the concept of "one-man, one-vote" which would be the case if plural votes were being used in an unfair or abusive manner. In all events, we are not "without arms" to correct any abuses that may exist under the present plural-vote practice.

To restrict a joint service to a single vote requires either a precision

⁹ In addition to the agreements listed in Footnote 8, see : Agreement No. 9935—Fjell-Fred Olsen Lines Joint Service

in definition or an all-inclusive, catch-all definition. Would one apply the one-vote restriction to "any cooperative working arrangement?" Or would one restrict it only to those agreements where there is a pooling of revenues and expenses? Or would one restrict it only to those agreements which are on all fours with section 522.2(4) of General Order 24 (46 CFR section 522.2(4))? Or would some other standard be applied?

I fail to find anything in this record or in the records of the Commission which is persuasive against the decision of the majority herein. If the single-vote principle is to be adopted by this Commission it should be done in a rulemaking proceeding wherein all facets of the problem are aired.

JAMES V. DAY, *Commissioner* dissenting:

This is an investigation to determine the legality of a portion of Agreement 9944 providing, on the one hand, for a close working arrangement between two carriers yet stating, on the other, that in any conference where the arrangement is operative that (instead of the arrangement being represented by one joint vote) each of the two carrier members shall have a vote.¹⁰

The particular issue as specified in our order is whether the individual voting provision would be unjustly discriminatory or unfair to other carriers in any conference where the arrangement was involved, or would operate to the detriment of our commerce, and be unapprovable under section 15 of the Shipping Act of 1916.

This is the first case where this issue has been precisely contested. It provides a needed landmark for our commerce over quite uncharted seas. While we should not adhere to some immutable guide for all voting agreements the instant case can indeed shed some light on what considerations are most pertinent under general circumstances such as those here present.

I note first the pertinent provisions of section 15 which state that carriers shall file every agreement providing for a preferential or cooperative working arrangement and that the Commission must disapprove any agreement that it finds to be unjustly discriminatory or unfair or to operate to the detriment of our commerce.¹¹

The Commission has formulated a principle to implement section 15 which requires that any agreement which interferes with the policies

¹⁰ The two carrier parties are Maritime Fruit Carriers Co., Ltd. (MFC) and Refrigerated Express Lines (A/Asia) Pty., Ltd. (REL).

¹¹ Section 15 also requires disapproval of any agreement which fails to provide equal terms and conditions for conference membership.

of the anti-trust laws will be approved only if there are facts to demonstrate that the agreement is required by a serious transportation need, necessary to secure important public benefits or is in furtherance of valid regulatory purpose of the Shipping Act.¹²

An agreement (1) setting up a carrier combination which in effect is a single commercial entity and (2) providing that such entity would exercise not one but two votes upon joining a conference where other entities have but a single vote doubles the potential power of the combine as opposed to the others. The very nature of such an agreement would appear to interfere with the policies of the anti-trust laws.

Thus, application of the above-noted principle to the case at bar may appropriately illuminate what result is best reached in such matters as these.

Our initial inquiry then is to determine if the subject carrier combination (per Agreement 9944) is truly a single commercial entity; judging from the terms of the Agreement and the surrounding circumstances.

The terms of Agreement 9944 provide that the carriers (1) will coordinate their service schedules to compete more effectively with other services, (2) will help each other in dividing available capacity for cargo, (3) will share profits and losses, (4) will have a single general agent in Australia to deal with shippers, and (5) will not compete between themselves.

The agreement also contains terms providing that each party (1) will manage and operate his vessels at own risk and expense and be responsible for the manning and navigation thereof, (2) issue his own bills of lading, (3) and maintain a separate agent in the United States.

The agreement further provides that each party will (1) establish its own rates and tariffs where not covered by conference agreement and (2) remain an independent member of any conference and be represented by its own representative at conference meetings [the above noted voting provision].

In addition I note a press release issued in Australia by the parties announcing their new service (relative to their above-noted arrangement). It announces the formation of "Australasian Unit Lines, Pty. Ltd.," a company jointly owned by the two carrier parties (to Agreement 9944), for the pooling of resources which will provide competitive export shipping to North America when other conference members

¹² See *FMC v. Svenska Amerika Linien*, 390 U.S. 238, 243 (1967).

are about to introduce containerships. The release further says that the system will be extended to other trade routes.¹³

The presently existing conference in the Australian-United States trade to which the parties belong is that formed pursuant to Agreement 9450. The carrier parties number six; Atlantrafik Express Service, MFC and REL (all conventional or palletized operations) and Columbus Line, Farrell Line and Pacific Atlantic Container Express Service (PACE) (all involved with container operations).¹⁴ A unanimous vote is necessary to amend any of the provisions of the conference agreement while a three-quarters vote is required for all other matters.

Of particular pertinence to here note are the further facts that the present conference (Agreement 9450) in which the combined two-carrier service (Agreement 9944) now would operate establishes rates and practices in the trade from Australia to the United States, meat comprises about two-thirds of this trade, and meat (with infrequent exception) is shipped on a prepaid basis with the Australian shipper selecting the carrier.

The terms of the Agreement 9944 which go to show the creation of a single commercial entity are those providing for coordination of service (to compete more effectively with other services), division of cargo capacity, sharing of profits/losses, having a single Australian solicitation agent, and the covenant not to compete between themselves (such covenant militating against divergent positions by the parties in their dealings and voting as members of a conference; e.g., Agreement 9450).¹⁵

Taken as a whole Agreement 9944 presents the picture of a carrier combination formed as one cooperative unit to compete with other carriers and to capture as much of the Australian export commerce as possible. The tenor of the press release (announcing the formation of Aus-

¹³ See PACE Lines' Exhibit B. Although the release was issued in connection with Agreement 9944 as originally filed and we are here passing upon Agreement 9944, as amended, the press release has not been shown on this record to have been publicly negated with respect to its general description of the proposed Australian export operations of interest to shippers.

¹⁴ PACE is actually a joint service comprised of several carriers but has only one conference vote.

¹⁵ The provision for separate solicitation agents in the United States is not pertinent when we note above the bulk of the trade originates with shippers in Australia. The provision for separate bills of lading is of little effect on shipper customers who initially arrange to give their business through contact with the single agent (Australasian Unit Lines). The clauses providing for the separate management, operation, manning and navigation of vessels are minor in comparison with the provision of ultimate economic importance—that providing for the sharing of profits and losses. The covenant to establish separate tariffs where such are not covered by conference agreement is hardly pertinent when we are here concerned with conference operations.

tralasian to pool resources to provide competitive shipping) further reveals the intent of the parties and the true nature of the arrangement as a single commercial force.

Under Agreement 9944 this single force, further, has the power, acting in unison, to cast a double vote vis-a-vis other entities in a conference. The current conference to which this provision applies is made up of carrier entities each of which has only a single vote.

Not only are we concerned with the present conference (Agreement 9450) of which the subject carriers are members but it should also be remembered that the combine's double vote is asserted to be operative in any other future conference which it may join. Any approval in this case should not imply a blank check for the future.

However, here I do not see where the double vote provision is presently required by such serious transportation needs or necessary to secure such important public benefits as would predominate and dictate approval. The existing conference requires a three-fourths vote for action under its current agreement. If the combine has two votes it can block any action by the other four separate members. The power to block action hardly weighs in favor of progress, benefit or need. In fact the power to block—as much as it entails any power to preserve—conveys a power to destroy. There is here no proven need or benefit which overrides possible detriment.¹⁶

Nor do I see the double vote for the combine as being in furtherance of a valid regulatory purpose. On the contrary, the statement of policy contained in FMC General Order 24 (46 C.F.R. § 522.6(d)(1)) suggests that a joint service should have but one vote.

I thus conclude that the provision for double votes for the service under Agreement 9944 is unjustly discriminatory and unfair as between the service and other carriers¹⁷ and under present circumstances is not approvable under section 15 of the 1916 Act.¹⁸

GEORGE H. HEARN, *Commissioner*, dissenting:

I dissent from the Commission's decision in this case because I believe the parties to Agreement 9944 should be limited to one vote in the conference in which they will participate pursuant to that Agreement.

¹⁶In fact the negative potential of the combine's double vote more probably could have an adverse affect on our commerce. Much as I recognize the enduring value of the combine's more conventional type service the newest ship-type development which will be expanding in the trade is that of containerization (note the press release, and Farrell's operations). Substantial deterrent to this development is to be regretted.

¹⁷I.e., Conference Agreement 9450 which is comprised of the combine and four one-vote carrier entities (one of which is PACE—another multiple carrier service).

¹⁸I further concur with the position of Commissioner Hearn expressed in his separate opinion that Agreement 9944 provides for conference membership pursuant to unequal terms and conditions and must be disapproved.

In the relevant conference trade, from Australia to the United States (pursuant to Agreement 9450) the two carriers (MFC and REL) will disappear as separate service entities and will provide a single service. As the parties and the Commission majority acknowledge, this case cannot be decided by adherence to labels or pre-cast forms. The true nature of the Agreement must instead be determined from its particular provisions, the surrounding circumstances and the expressed intent of the parties.

Hearing Counsel aptly described Agreement 9944 as a hybrid;¹⁹ and as a result of changes in ocean transportation, we have seen other hybrid or unconventional agreements and can expect more. Consequently, we must judge each such agreement on its merits and not be bound by rigid forms.

In this case, as in other instances, there are some factors of the Agreement which might permit the exercise of more than one vote. When, however, as here, the basic provisions of the Agreement and the accompanying circumstances establish the essential aspects of single carrier service, then the one vote limitation is required.

The primary pieces of evidence leading to this conclusion are the non-compete clause, the sharing of profits and losses, the single agency in Australia and the press release.

Section 5 of Agreement 9944 provides that MFC and REL will not compete with each other in the trade from Australia to the United States. Thus the two carriers will have a complete mutuality of economic interest in the trade and cannot realistically be expected to adopt divergent views within the conference with respect to issues concerning competition in the relevant trade. In fact, according to respondents' counsel, the "non-compete" clause is so strict as to prevent differing votes on conference matters.²⁰

Furthermore, under section 2(b) of Agreement 9944 the parties will not be operating the ships in the trade solely for their separate accounts.²¹ MFC and REL are to share the profits and losses of the combined service. It will therefore be in the interest of each party to promote the business not only of itself but also of the other.²²

¹⁹ Reply Brief of Hearing Counsel, page 6.

²⁰ Transcript of Oral Argument, pp. 74-75; Section 5, Agreement 9944. That MFC and REL have already cast differing votes is not relevant because Agreement 9944, although approved, has not been implemented. Response of Maritime Fruit Carriers Co., Ltd. and Refrigerated Express Lines (A/Asia) Pty., page 10.

²¹ Section 8, Agreement 9944.

²² Section 2(a), Agreement 9944.

Section 4 of Agreement 9944 provides that the MCF/REL service is to be represented in Australia by a single general agent. The parties will not, however, employ an existing agent in common, but instead "REL and MFC will cause to be formed a corporation to act as general agent in Australia."²³ Thus, there will be a common solicitation effort by a newly created entity in the trade for carriers who have previously carried over forty percent of meat cargoes, the largest single commodity in northbound Australia/United States trade.²⁴ That section 4 of Agreement 9944 provides for separate agents in the United States is not relevant. The type of cargo generally carried by MFC/REL is customarily shipped prepaid with the shipper selecting the carrier;²⁵ and the agreement does not apply to the southbound trade where the parties are not acting in concert, so that solicitation in the U.S. has no bearing on the agreement.

Finally, there is the press release issued by the parties announcing the new unified service. Although it is conceded that the statement was issued in connection with a filed but withdrawn predecessor agreement,²⁶ the press release has apparently not itself been rescinded publicly, especially in Australia, as to its essential parts.²⁷ In all its aspects the press release creates the image of a single carrier service to be operated pursuant to Agreement 9944.

The respondents' attempts to negate the importance of the press release because it relates to a withdrawn agreement is not convincing. The earlier agreement was not retracted, but merely rephrased. A comparison of the two forms of the agreement shows them to be the same in all significant respects.²⁸

Except for a few changes in the agreement not relevant to the issues here, the respondents rely primarily on their having added three provisions.

One is for separate agents in the United States which I discussed earlier. Another (Section 3) is for separate bills of lading. This pro-

²³ Section 4, Agreement 9944.

²⁴ Petitioner's (PACE Line) Reply to Respondents' Opening Memorandum of Facts and Law, Exhibit "B"; Transcript of Oral Argument, page 57.

²⁵ Reply Memorandum of Petitioner Farrell Lines, Inc., pp. 7-8.

²⁶ Section 9, Agreement 9944.

²⁷ See Transcript of Oral Argument, pp. 71-72.

²⁸ Agreement 9944 was entered into and filed in its original form on April 20, 1971. The filing was noticed in the *Federal Register* April 29, 1971; Vol. 36, No. 83, p. 8092.

vision seeks to accomplish in one brief phrase what the agreement as a whole cannot. All the provisions must be read together to determine the total effect.

The third provision (also in section 3) states that "each party will manage and operate its own vessels at its own risk and expense." This, however, seems at the least, inconsistent with section 2(b) which provides that the parties "shall share the profits and losses of the Coordinated Services." It is unclear what separate economic factors are likely to be or could be segregated from the elements contributing to the "profits and losses of the Coordinated Services."

Consequently, the revised agreement does not change the original filing. The agreement taken as a whole and the parties' intent as expressed in the agreement and press release warrant the conclusion that a single operating entity has been created in the trade.

No inquiry is necessary, contrary to the view of the majority report, as to applicability of the four general grounds for disapproval of a conference agreement set forth in section 15, i.e., unjustly discriminatory, detrimental to commerce, contrary to the public interest, in violation of the 1916 Act.²⁹ As the majority report aptly states, the question here involves a specific ground for disapproval in addition to the four general grounds, i.e., whether the agreement permits conference membership under equal terms and conditions; and as the Commission has said:

If, however, our first analysis of the agreement shows that any or all of the three requirements of policing, admission procedures, and shippers' complaints are not met, disapproval is warranted on that basis alone and no further inquiry as to the general effect on the agreement is necessary.³⁰

For the foregoing reasons I conclude that to permit MFC and REL to have separate votes as parties to Agreement 9450 creates unequal terms and conditions for membership in violation of section 15 by diluting the vote of other parties to Agreement 9450; and the provision of Agreement 9944 which establishes separate voting should be disapproved.

[SEAL]

(S) FRANCIS C. HURNEY,
Secretary.

²⁹ However, I agree, generally, with the views of Commissioner Day herein concerning the applicability of *FMC v. Svenska Amerika Linien*, 390 U.S. 238 (1967).

³⁰ *Outward Continental North Pacific Freight Conference*, 10 F.M.C. 349, 353; aff'd, 385 F.2d 981 (D.C. Cir.) 1967.

FEDERAL MARITIME COMMISSION

WASHINGTON, D.C.

SPECIAL DOCKET No. 442

BEKAERT STEEL WIRE CORP.

v.

HAPAG-LLOYD AG

May 25, 1972

NOTICE OF ADOPTION OF INITIAL DECISION AND ORDER PERMITTING WAIVER OF CHARGES

No exceptions having been taken to the initial decision of the examiner in this proceeding and the Commission having determined not to review same, notice is hereby given that the initial decision became the decision of the Commission on May 25, 1972.

It is ordered, That applicant is authorized to waive collection of \$15,628.67 of the charges previously assessed Bekaert Steel Wire Corp.

It is further ordered, That applicant shall publish promptly in its appropriate tariff, the following notice.

Notice is hereby given, as required by the decision of the Federal Maritime Commission in Special Docket 442 that effective January 5, 1972, the rate on "Metal Spools, Returned on Racks in Drums or Strapped on Pallets (Service 3)," for purposes of refund or waiver of freight charges on any shipments which may have been shipped during the period from January 5, 1972 through February 9, 1972, is \$72.50 W, subject to all applicable rules, regulations, terms and conditions of said rate and this tariff.

It is further ordered, That waiver of the charge shall be effectuated within 30 days of service of this notice and applicant shall within 5 days thereafter notify the Commission of the date and manner of effectuating the waiver.

By the Commission.

[SEAL]

(s) FRANCIS C. HURNEY,
Secretary.

FEDERAL MARITIME COMMISSION

SPECIAL DOCKET No. 442

BEKAERT STEEL WIRE CORP.

v.

HAPAG-LLOYD AG

Respondent is permitted to waive to complainant the sum of \$15,628.67 as part of the freight charges assessed for the transportation of empty metal spools.

Roy E. Messinger, for respondent.

INITIAL DECISION OF STANLEY M. LEVY, PRESIDING EXAMINER¹

This is an application by Hapag-Lloyd AG (respondent) for permission to waive collection² of \$15,628.67, being a portion of freight charges for the benefit of Bekaert Steel Wire Corp. (complainant) in connection with a shipment returning empty metal spools from Baltimore to Antwerp, Belgium aboard respondent's vessel *Mosel Express*, voyage 86 E.B. per bill of lading No. 8, dated January 5, 1972.

The rate applicable at the time of shipment was \$51.25 per 40 cubic feet per NACFC Tariff 29 FMC-4, effective January 1, 1972. The shipment aggregated 14,559 cubic feet for a total charge of \$22,631.63. Respondent collected \$7,002.96 and seeks permission to waive the balance.

NACFC Tariff No. 28 FMC-3 had been effective through December 31, 1971, and for the goods of the type involved in this application the rate was \$72.50 per 2,240 pounds. At that rate the shipment would have been assessed \$7,002.96.

The conference, in order to foster standardization according to S.I.T.C. concepts, compiled an entirely new tariff effective the start

¹ This decision became the decision of the Commission May 25, 1972.

² Shipping Act, 1916 section 18(b) (3), as amended.

of this year. In so doing, inadvertently and without intending to do so, the new tariff changed the rate from one computed on a weight basis to a weight or measurement basis. As a consequence, computation on a measurement basis would increase the cost for a shipment of the type involved herein by more than 300 percent. The shipper was unaware of the change and only when it was billed did it bring it to the attention of the carrier. It was then recognized that the tariff should have continued to be based on weight rather than on a weight or measurement basis. A new tariff was filed to eliminate measurement as a basis and restore weight as the sole basis for assessing charges^a and waiver was applied for.

Section 18(b)(3) of the Shipping Act, 1916, as amended by Public Law 90-298, referred to above, provides that the Commission may, in its discretion and for good cause shown, permit a common carrier by water in foreign commerce, or a conference of such carriers, to waive a portion of freight charges where it appears that there is an error in a tariff of a clerical or administrative nature, and that such waiver will not result in discrimination among shippers. The application discloses a set of facts and circumstances which fall within the purview and intent of the statute. Having complied with the requirements of the statute, and good cause appearing, applicant is permitted to waive to complainant the sum of \$15,628.67. The notice of waiver required by the statute shall be published in the conference tariff.

(S) STANLEY M. LEVY,
Presiding Examiner.

WASHINGTON, D.C.

May 3, 1972.

^a NACFC Tariff 29, (FMC-4) Item 692.2208.001, 2nd revised page 217, correction No. 571.

FEDERAL MARITIME COMMISSION

DOCKET No. 71-91

INDEPENDENT OCEAN FREIGHT FORWARDER APPLICATION
FABIO A. RUIZ D/B/A FAR EXPRESS COMPANY

ADOPTION OF INITIAL DECISION

May 25, 1972

By THE COMMISSION (Helen Delich Bentley, *Chairman*; Ashton C. Barrett, *Vice Chairman*; James V. Day, George H. Hearn and Clarence Morse, *Commissioners*)

This proceeding was instituted by the Commission-issued Order of Investigation and Hearing served on November 29, 1971, to determine whether one Fabio A. Ruiz, doing business as Far Express Company (hereinafter Applicant), "is fit, willing and able to carry on the business of forwarding as required by section 44 of the Shipping Act, 1916, and the Commission's rules and regulations," and whether his application as an independent ocean freight forwarder should be granted.

In his Initial Decision served April 14, 1972, the Examiner found that Applicant was "fit, willing, and able properly to carry on the business of freight forwarding."

No exceptions were filed. Upon review of the record, we conclude that the Examiner's findings and conclusions were proper and well founded. Accordingly, we hereby adopt the Initial Decision (a copy of which is attached to and made a part hereof), adding only this admonition.

An arbitrary denial of a license constitutes 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 freight forwarder industry before it admits an applicant. *Schwartz v. Board of Bar Examiners*, 353 U.S. 282 (1957). This matter of fitness or good moral character is a gray area where fair-minded men may

draw differing judgments from the same set of facts. As stated by Mr. Justice Frankfurter in his concurring opinion in *Schwabe*:

* * * No doubt satisfaction of the requirement of moral character involves an exercise of delicate judgment on the part of those who reach a conclusion, having heard and seen the applicant for admission, a judgment of which it may be said as it was of "many honest and sensible judgments" in a different context that it expresses "an intuition of experience which outruns analysis and sums up many unnamed and tangled impressions; impressions which may lie beneath consciousness without losing their worth."

It is within this framework of "delicate judgment" that we must test Applicant's qualifications.

In this case, concededly, Applicant was an experienced and knowledgeable freight forwarder. The sole issue here is whether Applicant's voluntary conduct of acting as a freight forwarder on 23 occasions without a license disqualifies him.

The proceeding before the Presiding Examiner was on a stipulated record in lieu of an oral hearing. The Presiding Examiner did not have the opportunity to observe Applicant and place an evaluation on his moral character and fitness based on observation of the individual. Hence, we are lacking the aid of such an evaluation.

Both Hearing Counsel and the Presiding Examiner rely in part on *Independent Ocean Freight Forwarder License Application—Guy G. Sorrentino*, Docket No. 71-48, 15 FMC 127, March 3, 1972. That was a case where we found extenuating circumstances including assessment of penalties against the holder of the freight forwarder license by whom Sorrentino was then employed, plus the extended processing time period which occurred subsequent to the filing by Sorrentino of his application for a freight forwarder license. The combination of these and other factors justified the granting of a freight forwarder license in that case. *Sorrentino* may not be used as precedent for the granting of a freight forwarder license in every case where the action of applicant in acting as a freight forwarder without a license is combined with normal delay in processing an application; for otherwise a person could frustrate the intent of the Freight Forwarder's Act by operating without a license until it suited his convenience to file an application for a license without encountering the hazard of denial of the license based on absence of fitness.

If the licensing statute is to achieve its desired ends, it necessarily follows that any applicant who conducts a freight forwarding activity without a license must do so at his peril.

[SEAL]

(Signed) FRANCIS C. HURNEY,
Secretary.

FEDERAL MARITIME COMMISSION

No. 71-91

INDEPENDENT OCEAN FREIGHT FORWARDER APPLICATION
FABIO A. RUIZ D/B/A FAR EXPRESS COMPANY

Applicant found to be fit, willing, and able properly to carry on the business of freight forwarding.

Guillermo A. Ruiz for applicant.

Donald J. Brunner and *C. Douglass Miller*, Hearing Counsel.

INITIAL DECISION OF STANLEY M. LEVY, PRESIDING EXAMINER¹

On September 8, 1971, Fabio A. Ruiz d/b/a Far Express Company filed his application for a license as an independent freight forwarder pursuant to General Order No. 4 and section 44 of the Shipping Act, 1916 (the Act).

By a letter dated October 29, 1971, Mr. Ruiz was notified of the Federal Maritime Commission's intent to deny his application for an independent ocean freight forwarder license. The reason for the intended denial was that the applicant engaged in unlicensed ocean freight forwarding activities without a license in apparent violation of the Act. Mr. Ruiz requested a hearing to show the intended denial was unwarranted.

By order served November 29, 1971, the Commission granted Mr. Ruiz's request.

Hearing Counsel and counsel for respondent agreed to proceed on a stipulated record in lieu of an oral hearing. Good cause appearing, the Presiding Examiner accepted the stipulation as the factual record in this proceeding. Accordingly, the stipulation with attachments was entered on the record and the record was closed. There are no facts at issue.

¹ This decision became the decision of the Commission May 25, 1972.

FINDINGS OF FACT

1. Mr. Ruiz was familiar with the licensing requirements of section 44 of the Act and the provisions of General Order 4 at the time he forwarded the shipments in question.²

2. Mr. Ruiz is not a newcomer to the freight industry. He has worked for various freight forwarders and exporters for the past twenty years. He also teaches "Export & Import Practices" at Lindsay Vocational School, Miami, Fla.

3. During the course of the licensing investigation Mr. Ruiz advised the investigator that he had carried on the business of forwarding from approximately August 1, 1971, through September 17, 1971. During this period he handled 23 shipments for various long time customers from which he realized a total gross profit of \$416.90.

4. In a letter dated September 20, 1971, Mr. Ruiz explained his activities as follows:

Because I was not looking for employment with any local firm in this field, and decided to be on my own, I took the liberty to handle some of these shipments. I was forced to do it, under extenuating circumstances in order to be able to support my family, and I did not wait for the issuance of my License, that I applied for.

I could handle these shipments through some of the local freight forwarders, many of them being good personal friends of mine, and perform a legal service protected by their license, or I could not to show myself as an agent and prepare all pertinent documents for my customers and make them sign the documents as if prepared by themselves. On both cases it is probably a legal circumvention of the rules. And in both cases it was a lie, and I was against these steps, contrary to my own principles. I thought: after all the licensing procedure will be so regularly fast that I will have my License while preparing some of these shipments, and decided to handle them openly showing my name. (sic)

5. All shipper and employer references contacted by the Commission investigator indicated that Mr. Ruiz is considered honest and highly reliable by his business associates.

DISCUSSION AND CONCLUSIONS

It is clear that Mr. Ruiz has violated the Act in that he engaged in the business of an independent ocean freight forwarder without having been licensed by the Commission. And it is clear that Mr. Ruiz recognized that his activities were unlawful at the time.

² Prior to going into business on his own he requested the necessary forms to file an application for an independent ocean freight forwarding license. Pursuant to his request of June 2, 1971, Mr. Ruiz was sent copies of Public Law 87-254 (Section 44 of the Act and the Commission's General Order 4 together with the necessary application forms.

The issue, however, is whether his unlicensed forwarding activities automatically render him unfit now to be licensed. An important factor to consider in determining a person's fitness to carry on the business of forwarding is whether he is willing to conform to the Act and the Commission's requirements, rules and regulation. *Application for Freight Forwarding License*, 8 F.M.C. 130-132 (1964).

Here, the record demonstrates that the violations of Mr. Ruiz were knowing and willful. However, the violations are the only evidence which has been uncovered which would tend to indicate that he is not prepared to abide by the rules and regulations of this Commission. There is considerable evidence that he possesses the requisite fitness to be licensed by this Commission. In *Independent Ocean Freight Forwarder License Application, L.T.O. Air Cargo, Inc.*, 18 F.M.C. 267 (1970), the Commission found that the applicant was fit for licensing despite the fact that the applicant had knowingly acted as an unlicensed freight forwarder on two occasions. Thus, a knowing and willful violation of the Act may not automatically result in a denial of the application.³

The Commission has recently issued a report in *Independent Ocean Freight Forwarder License Application—Guy G. Sorrentino*,⁴ which bears on the issue herein. The applicant in *Sorrentino* had been president of a firm which on April 22, 1970, had been found guilty in the U.S. District Court, Southern District of New York, on 16 counts of violations of the Act involving the misclassification of shipments, but Mr. Sorrentino himself was not named as a defendant in the criminal action although the Examiner found that "the applicant was at least aware of the course of dealing involved." However, because Mr. Sorrentino did not personally benefit from the deceptions and because he was otherwise qualified under the Act, the Examiner granted the application and the Commission adopted the initial decision.⁵

In doing so, the Commission added this admonition:

* * * As we pointed out in Docket No. 66-4, *Independent Ocean Freight Forwarder License Application, James J. Boyle & Co.*, 10 F.M.C. 121 (1966), we are charged with the responsibility of maintaining the high degree of responsibility required in the profession of ocean freight forwarding. Congress

³The violation considered in *L.T.O.* involved only two shipments which were handled as a favor to a shipper. The forwarder derived no income from the shipments. Hence it is unclear from the decision whether only relatively minor violations could be outweighed by other positive evidence of fitness.

⁴Docket No. 71-48, 15 F.M.C. 127, March 3, 1973.

⁵The discussion of the Act, the cases cited, the standards and requirements for licensing, all as set forth in detail in that Initial Decision, are incorporated in this Initial Decision as if set forth in full herein.

has required us to review license applications and limit access to the profession to those who are "fit, willing, and able" to carry on the business of ocean freight forwarding. We have therefore established a high standard of moral conduct to which an applicant as well as a licensee must conform. Anything less than this is considered conduct unsuited to the profession and will result in our swift action to remedy the misconduct, whether by denial of a license or suspension.

Clearly, the unlawful forwarding of Mr. Ruiz did not involve elements of fraud or moral turpitude. The customers of Mr. Ruiz recognized that he did not have a license and used him despite that fact. Mr. Ruiz did not bill or collect brokerage from the carriers and therefore he did not file any false certifications.

The positive evidence of fitness introduced in the *Sorrentino* case is similar to that in evidence here. Following the doctrine enunciated in *Sorrentino* the Examiner finds that the violations in question do not provide sufficient grounds for denial of the application in view of the countervailing positive evidence of fitness.⁶

This is not to say that the Examiner in any way condones violations of the Act, but he is convinced that no proper regulatory purpose would be served by denying a license now to the applicant. The delay in licensing during the pendency of the investigation herein is sufficient punishment for Mr. Ruiz's transgressions. To permanently deny a license to one who otherwise is "fit, willing and able to carry on the business of forwarding and to conform to the provisions of [the] Act" would be shortsighted.

The application is granted.

(S) STANLEY M. LEVY,
Presiding Examiner.

WASHINGTON, D.C.

April 14, 1972.

⁶ Hearing Counsel, in their brief, take a similar position.

FEDERAL MARITIME COMMISSION

DOCKET No. 70-9

BOLTON & MITCHELL, INC.—INDEPENDENT OCEAN FREIGHT
FORWARDER LICENSE No. 516

Decided June 9, 1972

- Licensed freight forwarder with shipper connections indicating interrelationships and control found not to be independent within the meaning of sections 1 and 44 of the Shipping Act, 1916.
- Licensed freight forwarder receiving compensation on its own shipments thereby obtaining transportation by water at less than the applicable rates found to violate section 16 First of the Shipping Act, 1916.
- Licensed freight forwarder failing to show license number on invoice and shipping documents found to violate section 510.5(e), General Order 4.
- Licensed freight forwarder imparting false information to its principals found to violate section 510.23 (d), General Order 4.
- Licensed freight forwarder withholding information as to actual price of merchandise found to violate section 510.23 (e), General Order 4.
- Licensed freight forwarder failing to promptly account to its principals found to violate section 510.23 (f), General Order 4.
- Licensed freight forwarder filing false documents found to violate section 510.23 (h), General Order 4.
- Licensed freight forwarder failing to use invoices which stated separately the actual amount of ocean freight, price of merchandise and insurance found to violate section 510.23 (j), General Order 4.
- Licensed freight forwarder willfully making false statement in connection with an application for license or its continuance in effect found to violate section 510.9 (c), General Order 4.
- License of freight forwarder which engaged in illegal activity upon advice of counsel and which formerly provided good and valuable service to the shipping public allowed to be retained subject to certain requirements.

Gerald H. Ullman for Bolton & Mitchell, Inc., respondent.
Ronald D. Lee and *Donald J. Brunner*, Hearing Counsel.

REPORT

BY THE COMMISSION (Helen Delich Bentley, *Chairman*; Ashton C. Barrett, *Vice Chairman*; James V. Day, George H. Hearn and Clarence Morse, *Commissioners*)

The Commission ordered this investigation into the activities of Bolton & Mitchell, Inc., a freight forwarder holding FMC license No. 516, to determine (1) whether respondent was in fact free from shipper connections; (2) whether respondent had falsified his application for license as an independent ocean freight forwarder, subsequently gave false oral answers in regard to its shipper connections, and otherwise violated pertinent and specific provisions of General Order 4; (3) whether respondent should continue to be licensed as an independent ocean freight forwarder; and (4) whether respondent violated section 16 First, Shipping Act, 1916, by willfully obtaining transportation for property at less than the rates otherwise applicable.

Hearings¹ were held before Examiner Richard M. Hartsock, who issued an Initial Decision.

Exceptions to the Examiner's Initial Decision were filed by respondent, who later moved to reopen the proceeding for receipt into evidence of certain affidavits to support the testimony of its single witness and seeking a Supplemental Decision. Hearing Counsel replied to the exceptions and urged denial of the subsequent motion of respondent.

The Commission initially denied respondent's motion, but later on its own reconsideration reopened the proceeding for the limited purpose of receiving respondent's exhibits, while denying respondent's motion for a Supplemental Decision.

¹ During the course of the hearing in this proceeding, respondent had moved, pursuant to Rule 10(aa) of the Commission's Rules of Practice and Procedure, to have the record held confidential, alleging it could not receive a full and fair hearing on a public record because its response would involve several foreign companies and individuals who would be adversely affected by respondent's disclosures. In support of the motion, BMI pointed out that in order for T. Spencer, the active head of respondent, to make a full and complete defense it would be necessary for him to testify as to various business practices of BMI's customers, who were overseas consignees. BMI advised that out of loyalty to his customers, Spencer was reluctant to disclose their business practices if this information were to become public and readily available.

The Examiner granted respondent's motion and declared the record confidential. In view of the above ruling by the Examiner, respondent through its witness Spencer testified at some length as to the various arrangements BMI had with those overseas principals whose shipments were involved in this proceeding. After the close of the hearings, the Examiner declassified the record on the grounds that it should not have been treated as confidential in the first place since all the matters which might adversely affect foreign companies and individuals had already been offered in evidence by Hearing Counsel.

Hearing Counsel replied to respondent's supplemental evidence, and respondent requested permission to file an answer to Hearing Counsel's reply, which was denied.

FACTS

Bolton & Mitchell, Inc., applied for a license as an independent ocean freight forwarder on January 15, 1962. At that time, it stated that it was not controlled, associated, or connected with any shipper, consignee, seller, or purchaser of shipments to foreign countries. On the basis of representations in the application and a pre-licensing interview with the active head of the business, Secretary Thomas A. Spencer, BMI was granted independent ocean freight forwarder license No. 516.

Subsequently, in 1967, pursuant to a complaint of a New York City exporter alleging that respondent was a competitor in a certain export transaction, the Commission conducted an investigation of respondent in which Mr. Spencer was interviewed and an examination of BMI's corporate ledgers, i.e. cash disbursement ledger, sales ledger, cash receipts ledger and check stubs, was conducted. Subsequently, a second interview was held with Mr. Spencer, at which time he was given an opportunity to comment upon the results of this investigation. Mr. Spencer averred that BMI is engaged in a unique freight forwarding business, approximately 90 percent of which involves company accounts in South America. BMI originally engaged in forwarding auto parts, but has expanded to general commodities with approximately 50 active accounts. Mr. Spencer stated that in its operation all negotiations and transactions are conducted between the consignee and the American supplier, and it merely consolidates the numerous small orders from the various manufacturers on a single bill of lading and account invoice pursuant to a copy of the purchase order forwarded to it by the consignee. In response to the fact that respondent's ledgers indicated BMI had "advanced" substantial sums² in purchase of merchandise for its consignees, Mr. Spencer established that American suppliers are reluctant to negotiate directly with South American consignees, being fearful of not receiving remuneration for their goods, and BMI merely acts as an intermediary and does not purchase commodities for its own account for resale at a profit. Mr. Spencer explained that the supplier understands that BMI acts only as a freight forwarder and not as an exporter; that no profit is realized on the transfer of the merchandise to the consignee because BMI bills the

² During the period November 6, 1964 to April 30, 1967, BMI's sales ledger showed that 66 percent of the amounts posted to that ledger represented advances for merchandise.

consignee only for the export amount advanced; that BMI takes no title to the commodities nor does it have any other beneficial interest in the shipment; and that BMI's sole remuneration is in the form of income derived from freight forwarder operations.

Certain inconsistencies between Mr. Spencer's answers in the two interviews and discovered facts became apparent. During the initial interviews, the FMC investigator was persuaded to believe that respondent's operations were wholly that of an ocean freight forwarder. Later, however, Spencer disclosed that respondent did in fact purchase commodities, mark-up the merchandise price and sell said commodities to the consignee retaining the mark-up as remuneration for various financing and "finding" services.³ These facts were borne out by the inspection of the operating ledgers.

In his Initial Decision the Examiner found that respondent BMI did not continue to qualify as an independent ocean freight forwarder, and accordingly recommended that its license should be revoked pursuant to section 44, Shipping Act, 1916, and section 510.9 of General Order 4. In reaching this conclusion, the Examiner found that respondent was not independent of shipper connections as defined by section 1 of the Act, and that it had been operating contrary to such definitions. The Examiner further held that respondent violated section 16, First Paragraph, of the Act; section 510.5(e) of General Order 4, by failing to set forth its license number in its letterhead, invoices, and shipping documents used in conducting its ocean freight forwarder operations; section 510.23(d) by reporting false information to its principals; section 510.23(e) by knowingly withholding information from its principals concerning the actual price of merchandise; section 510.23(f) by failing promptly to account to its principals; section 510.23(h) by filing false documents; section 510.23(j) by failing to use invoices which stated separately the actual amount of ocean freight assessed by the common carrier, the actual insurance rate, and the actual price of the merchandise purchased; and section 510.9(c) by willfully making false statements to the Commission. Respondent at the oral hearing has urged the Commission to review de novo the entire record and make its own decision. Following an extensive review of the record, we are in general agreement with the Examiner and make our own findings as follows:

³ Respondent explained these "services" as "finding" and securing the required American suppliers, obtaining quotations, technical data and samples, to permit the overseas consignee to decide upon a product and issue instructions to the respondent to purchase the item. Spencer entitled this a "start-up" service, and testified that the consignee agreed to BMI retaining a mark-up or cash discount for the start-up service or for the separate service of purchasing the commodities in addition to the forwarding fee.

Six transactions form the basis of the Examiner's decision. In the E. S. DeLaney, S/A file, no pertinent papers indicate respondent's ocean freight forwarder's license number. Also, in this file a "finders" fee of \$76.10 is included, and considered by respondent to be its profit on the transaction; however, terms of the agreement establish a confidential 2½ percent resale discount with a notation "do not show discount on your invoice." Total billing in the invoice was \$1,529.68, but only \$1,483.98 was paid to the supplier. Respondent admitted that it retained the additional income, and later testified that E. S. DeLaney agreed to this procedure. The Mial S.P.A. Italy file establishes that respondent charged his client \$925 for a "purchasing service" for services rendered, and also retained a 3 percent resale discount which was not set out on the seller's invoice, amounting to \$586.50 and which was not posted on the income account. Respondent contended its client did not wish to have the three percent discount shown on the invoice because this would prevent the foreign importer from obtaining the full dollar exchange on the total value of the shipment. No correspondence in this file contained respondent's ocean freight forwarder's license number.

The Lee Filter de Peru S.A. file shows technical services and finders fee of \$336.73, a financing fee of \$202.04, and among others, a special handling fee of \$523. Respondent's ocean freight forwarder license number does not appear anywhere on the documents supporting this transaction. A notice on the purchase order reads "Please invoice at prices shown and allow confidential discounts as shown under terms. Please *do not* show these special discounts on your invoice." The many monetary gyrations in this transaction fail to hide the fact that respondent retained \$336.73 as "technical services and finders fees". Furthermore, respondent cannot adequately account for the secrecy surrounding the confidential discount other than to profess that its client instructed that the transaction be so handled.

In the Invictus Radio e Televisao Ltda, Sao Paulo, Brazil, transaction, respondent again failed to utilize its ocean freight forwarder license number on the purchase order. Here also respondent withheld two percent of the invoice figure, explaining that such sum was retained for purchasing and other services.

The transaction concerning the Industrial Brawns S.A. Lima, Peru, again contains no FMC license number. In this transaction, no confidential discount was requested, but by the use of Blandy Paper Company blank invoice forms it was made to appear that the suppliers cost more than invoiced by Blandy and that the return to respondent on the transaction vis-à-vis the merchandise aggregated \$452.23. When

confronted with these facts by the investigator, Spencer stated that respondent had realized a profit of \$452.23 on the merchandise value billed to Industrial Browns.

In the first Caja National de Seguro Social, Lima, Peru transaction, respondent shipped 13 ambulances to South America at a cost to the client of \$44,854.03, while paying \$43,256 to the supplier. The difference of \$1,598.03 was retained by respondent as a profit on the sale of the merchandise. Also, the insurance rate on the cargo was inflated. First Spencer told the FMC investigator that the increase was a "penalty coverage provision", but later when confronted stated that the purchasing agent had requested him to inflate the ocean freight and insurance rates and charge them to the client.

Respondent argued in its brief that since it was dealing with the purchasing agent, it had no requirement or responsibility of disclosure to the client.

The second Caja National transaction involved respondent's purchase and sale of 13 "rural dispensaries" (rural medical vehicular dispensaries) and shows that the same procedures as in the prior transaction were followed; that is, a mark-up of the merchandise, a charge of 2½ percent of the marked up purchase price as a purchasing service charged, a false statement of the ocean freight, a false computation of the insurance, and the remittance to the agent of the inflated ocean freight and insurance charges to its account with respondent in New York.

Respondent's argument that it is a "consignee forwarder" and that it was necessary and in the best interests of its clients for BMI to operate in the manner described above in no way alters the clandestine character of the operations. Nor do we find respondent's arguments that it did not violate pertinent regulations persuasive. The testimony of respondent does not comport with the established facts of the record, which clearly demonstrate subterfuge and deceit. In several cases, the DeLaney file in particular, no actual "start-up" work was performed. In most of the transactions relatively little "purchasing work" was likewise performed. The record as established in the initial finding of fact conclusively shows that the FMC investigator was persuaded to believe that respondent's operations were only that of a licensed ocean freight forwarder, but later upon confrontation, Spencer admitted to the contrary that respondent was engaged in the purchasing of commodities involving the mark-up of the merchandise price, the retaining of a profit thereon, the financing of the merchandise, and the disposition of funds as found. Further, when confronted with the investigator's résumé statement of the transactions, although not signing the document, Spencer did affirm its correctness.

In the transactions discussed, in each instance respondent through its own purchase order and holding itself out as a principal (not as an agent for others), purchased merchandise, marked up the merchandise value, made a profit thereon or received income therefrom, and subsequently transferred its proprietary interest therein to consignees in South America. In so doing, respondent became a self-denominated seller and shipper of merchandise.

Respondent's activities as spread on the record before us clearly establish respondent has violated the following provisions of the Commission's General Order 4:

None of respondent's documents used in these transactions contained BMI's freight forwarder license number in violation of General Order 4, Rule 510.5 (e). Respondent has also violated Rule 510.23 (d) by reporting false information to its principals; Rule 510.23 (e) by knowingly withholding information from its consignee concerning the actual price of merchandise; Rule 510.23 (f) in failing to "promptly account" to its consignees for any overpayment of the merchandise price; Rule 510.23 (h) by filing false documents; and Rule 510.23 (j) by failing to use invoices which listed separately the actual cost of ocean freight assessed by the common carrier, the insurance rate, and the price of merchandise it had purchased for its consignees.

There remains what is perhaps the paramount issue in this proceeding, whether or not Bolton & Mitchell's conduct renders it free from shipper connections as required by statute and thereby should respondent continue to be licensed as an independent freight forwarder. Section 1, Shipping Act, 1916, specifies the criteria for independent ocean freight forwarders as follows:

An "independent ocean freight forwarder" is a person carrying on the business of forwarding for a consideration who is not a shipper or consignee or a seller or purchaser of shipments to foreign countries, nor has any beneficial interest therein, nor directly or indirectly controls or is controlled by such shipper or consignee or by any person having such a beneficial interest.

"Beneficial interest" is defined in General Order 4, 46 CFR 521 (1) as follows:

(1) The term "beneficial interest" for the purpose of these rules includes, but is not limited to, any lien interest in; right to use, enjoy, profit, benefit, or receive any advantage, either proprietary or financial, from; the whole or any part of a shipment or cargo, arising by financing of the shipment or by operation of law or by agreement, express or implied, provided, however, that any obligation arising in favor of a licensee by reason of advances of out-of-pocket expenses incurred in dispatching of shipments shall not be deemed a beneficial interest.

In his decision, the Examiner concluded that respondent had acted as a principal, purchasing the merchandise, marking up its value and

retaining a profit on received income from such mark-up, and subsequently transferring its proprietary interest in the commodities to the consignee in South America. In so doing, respondent became a seller and shipper of merchandise, and thereby does not continue to qualify as an independent ocean freight forwarder as defined by the Act.

We think the evidence of record is conclusive that Bolton & Mitchell does not possess the required independence from shipper connections in compliance with the statute. It is not independent because it acted either as a purchaser of shipments to foreign countries (as purchasing agent of the consignee), or as a person having a beneficial interest in shipments to foreign countries (as a financier of the merchandise), or a seller and shipper of shipments to foreign countries (as one who has exercised proprietary rights over the merchandise). By retaining a proprietary interest in merchandise and collecting compensation from the carrier for shipment thereof, BMI did willfully obtain transportation by water at less than the rates or charges as would otherwise be applicable, violating section 16 First of the Act. Under most circumstances, willful violations of law of the nature set forth above would be sufficient standing alone to revoke respondent's freight forwarder license. However, we note that the record establishes that Bolton & Mitchell embarked upon this illegal activity only after consultation with counsel.⁴ While the actions of respondent are violations of the law, nevertheless we are disinclined at this time to revoke respondent's license and deprive him of his livelihood when respondent appears to have acted in good faith upon the advice of counsel. Furthermore, Bolton & Mitchell has been operating as a licensed freight forwarder for the past ten years, and formerly provided good and valuable service for approximately forty years without serious complaints.

Accordingly, we find that respondent has violated section 16 First of the Act by willfully⁵ obtaining transportation by water at less than the applicable rates as a result of its receiving compensation on its own shipments, and has violated Commission General Order 4, to wit:

§ 510.5(e)—failing to show license number on invoices and shipping documents;

§ 510.23(d)—imparting false information to its principals;

§ 510.23(e)—withholding information as to actual price of merchandise;

§ 510.23(f)—failing to promptly account to its principals;

⁴ In response to Commissioner Morse, questioning how long counsel had served respondent, counsel answered:

"Since this proceeding began. Well, no. He came to me and asked me about the legality of his financial matters, and I advised him when this got into the general order four, that he could finance the shipments so long as he did not retain a lien upon the goods, and I think I am right, that the rule says you have a beneficial interest on the goods if you have a lien arising from the financing, and since his financing did not have a lien, I said he could do it, and that is the first time I advised him on a legal basis."

⁵ See Administrative Procedure Act, 5 U.S.C. § 561, 558.

§ 510.23(h)—filing false documents;

§ 510.23(j)—failing to use invoices which stated separately the actual amount of ocean freight, price of merchandise and insurance; and

§ 510.9(c)—willfully making false statements in connection with an application for a license or its continuance in effect.

We further find that Bolton & Mitchell is not independent of shipper connections as required by section 1 of the Act, and has operated in violation thereof. We will not, however, revoke respondent's independent ocean freight forwarder license No. 516, but we hereby order respondent Bolton & Mitchell to cease and desist from the activities herein found to violate the Shipping Act, 1916, and other pertinent Commission regulations or orders, if it desires to maintain its license. Furthermore, respondent shall submit within 90 days from the date of service of this Report and Order a full report to the Commission on the manner in which it has complied with the requirements to cease and desist, as heretofore set out. Additionally, within one year from the date of service of this Report and Order, a complete examination of respondent's activities will be performed to assure that respondent is acting in compliance with the decision herein.

[SEAL]

(Signed) FRANCIS C. HURNEY,
Secretary.

FEDERAL MARITIME COMMISSION

DOCKET No. 70-9

BOLTON & MITCHELL, INC.—INDEPENDENT OCEAN FREIGHT
FORWARDER LICENSE No. 516

ORDER

This proceeding was initiated by the Federal Maritime Commission to determine *inter alia* whether Bolton & Mitchell, Inc., continues to qualify as an independent ocean freight forwarder and whether its license, No. 516, should be continued in effect or revoked, and the Commission has fully considered the matter and has this date made and entered of record a Report containing its findings and conclusions thereon; which Report is hereby referred to and made a part hereof. The Commission found that Bolton and Mitchell, Inc., did not possess the required independence from shipper connections necessary to be an ocean freight forwarder but declined to revoke Bolton and Mitchell, Inc.'s license as an independent ocean freight forwarder due to mitigating circumstances, but subjected the retention of said license to certain specific conditions.

Now therefore, it is ordered, That Bolton and Mitchell, Inc., be allowed to retain its license as an independent ocean freight forwarder subject to the following conditions:

1. Bolton and Mitchell, Inc., shall immediately cease and desist from all activities found in the Report to violate the Shipping Act, 1916, and certain Commission regulations or orders; and

2. Bolton and Mitchell, Inc., shall submit in the form of an affidavit a full report to the Commission on the manner in which it has complied with the requirements to cease and desist, as heretofore set out, within 90 days of service of the Report and Order. If Bolton and Mitchell, Inc., fails to submit the required report, its license as an independent ocean freight forwarder will be revoked without further proceedings.

It is further ordered, That to insure compliance with this Order a complete examination of Bolton and Mitchell, Inc.'s activities will be made within 1 year from the date of service of the Report and Order in this proceeding to determine whether respondent is acting in keeping with the decision herein.

By the Commission.

[SEAL]

(Signed) FRANCIS C. HURNEY,
Secretary.

FEDERAL MARITIME COMMISSION

DOCKET No. 69-57

AGREEMENT No. T-2336—NEW YORK SHIPPING ASSOCIATION
COOPERATIVE WORKING ARRANGEMENT

NOS. 71-2, 71-8, 71-26, AND 71-34. TRANSAMERICAN TRAILER TRANSPORT, INC., SEATRAN LINES, INC., DANIELS & KENNEDY, INC., CHANDRIS AMERICA LINES, INC., GREEK LINE, INC., HOME LINE AGENCY, INC., INCRES LINE

v.

THE NEW YORK SHIPPING ASSOCIATION, INC.

June 9, 1972

Agreement No. T-2390 of the New York Shipping Association, providing an assessment formula to meet certain fringe benefit obligations in collective bargaining agreements with the International Longshoremen's Association, AFL-CIO, when subjected to certain modifications, found not to be unjustly discriminatory nor unfair as between carriers, shippers, exporters or importers, nor to be otherwise unlawful in violation of the Shipping Act, 1916. Agreement No. T-2390, as modified herein, approved.

Alfred Giardino, C. P. Lambos and Donato Caruso for respondents, the New York Shipping Association and its members.

Edward D. Ransom for intervener, the Pacific Maritime Association.

Stanley O. Sher, Alan S. Davis and Joseph Adams for interveners, States Marine International, Inc., Isthmian Lines, Prudential-Grace Steamship Co., Atlantrafik, Barber Lines, Blue Sea Line, Concordia Line, Hellenic Lines, Hoegh Lines, Meyer Line, Nedlloyd Lines, and Norwegian America Line.

Ronald A. Capone, John Williams and Russel T. Weil for intervener and complainant, Transamerican Trailer Transport, Inc.

Neal M. Mayer and Marvin J. Coles for intervener and complainant. Seatrain Lines, Inc., and for complainants, Chandris America Lines, Inc., Greek Line, Inc., Home Line Agency, Inc., and Ingres Line.

Gerald A. Malia and *Paul J. McElligott* for intervener, Sea-Land Service, Inc.

Alan F. Wohlstetter for interveners, the United Fruit Co. and Wal-lenius Line.

Herbert Rubin, *Philip Elman* and *Cecelia H. Goetz* for intervener, Wolfsburger Transport-Gesellschaft m.b.H.

Joseph F. Kelly, Jr., for complainant, Daniels & Kennedy, Inc., and for intervener, the Madden Corp.

Walter E. Maloney and *Bradley R. Coury* for interveners, American Export Isbrandtsen Lines, Inc., Atlantic Container Line, Dart Steamship Co., Moore-McCormack Lines, Inc., Hamburg America Line and North German Lloyd.

Robert M. Vorsanger and *Frederick M. Porter* for interveners, American Sugar Company and the American Sugar Refining Company of New York.

William Warner for intervener, Wilford & McKay, Inc.

William F. Giesen for interveners, Universal Terminal & Stevedoring Corp., International Terminal Operating Co., Inc., Pittston Stevedoring Co., Inc., John W. McGrath Corp., Bay Ridge Operating Co., Inc., Nacirema Operating Co., Inc., and Northeast Stevedoring Co., Inc.

Samuel H. Moerman, *Arthur L. Winn, Jr.*, and *F. A. Mulhern* for intervener, the Port of New York Authority.

Mario F. Escudero, *Dennis N. Barnes*, *Edward Aptaker* and *Robert A. Peavy* for intervener, the Commonwealth of Puerto Rico.

Donald J. Brunner and *Norman D. Kline* as Hearing Counsel for the Federal Maritime Commission.

SUPPLEMENTAL REPORT ON REOPENED PROCEEDING AND ON CONSOLIDATED PROCEEDINGS

BY THE COMMISSION: (*Helen Delich Bentley*, *Chairman*; *Ashton C. Barrett*, *Vice Chairman*; *James V. Day*, *Commissioner*)

On November 20, 1970, we issued a Report and Order in Docket No. 69-57 (14 FMC 94) which basically adopted the Presiding Examiner's findings but was in disagreement with his treatment of two major issues, i.e., the trade from Puerto Rico to the Port of New York, and automobiles, trucks and buses. Our decision, which appended the Examiner's initial decision served on August 13, 1970, provides a background to the current proceedings and must be read in conjunction with this Report. The ideas formulated in the prior Report provide the routine ingredients of our inquiry into the impact upon these issues, including the several new ones presented in the reopened and consolidated proceeding now before us.

The agreement (T-2390) under consideration is a cooperative working arrangement by the members of the New York Shipping Association (NYSA) comprised of ocean carriers, stevedores and other employees of maritime labor, designed to assess members and non-members for monies needed to finance certain fringe benefit obligations arising out of a collective bargaining agreement between NYSA and the International Longshoremen's Association. In our prior decision we determined that all cargoes to and from Puerto Rico and the Port of New York should be treated under the "excepted cargo" status provided under the excepted cargo provision of the agreement. Additionally, we determined that automobiles, trucks and buses as treated under the agreement should be approved as submitted. In all other areas of dispute we agreed with the Presiding Examiner.

Subsequent to our decision, NYSA petitioned for reconsideration of our treatment of the Puerto Rican trade and, on the basis of numerous pleadings and the new issues arising from the filing of complaints, we reopened Docket No. 69-57, and consolidated two cases which had commenced with the filing of complaints.¹ In view of the dispute over data and the increased assessments since the time of our earlier Report, we indicated that we would reevaluate our treatment of the many and varied interests including automobiles, trucks and buses. Ever mindful of the data and statistical problems presented in the prior hearings we noted in our Order that it was "expected that the parties will at the very least stipulate or agree upon a set of basic financial data and figures * * * and the parties should present alternative proposals, backed by arguments that could provide more equitable solutions to the wide differences still apparent."²

In his decision on the reopened proceeding served September 22, 1971, the Examiner departed from his previous decision where he had provided relief to a portion of the Puerto Rican trade assessment and had reduced the automobile assessment from a 20 percent measurement-ton to 18 percent. Instead, he approved the rate of assessment adopted by the NYSA for both.

Additionally, he concluded that newsprint should also bear the assessment as provided in the agreement and that the complaints consolidated with the reopened proceeding, insofar as they protested the increase in GAI were without merit.

Exceptions to the Examiner's decision were filed by the Puerto Rican carriers, Transamerican Trailer Transport, Inc. (TTT), Seatrain Lines, Inc. (Seatrain), and Sea-Land Service, Inc. (Sea-Land); the automobile interests, Wolfsburger Transport-Gesellschaft m.b.H.

¹ Two additional complaints were filed and also consolidated in the reopened proceeding.

² Order Reopening Proceeding and Consolidation, served March 11, 1970.

(Wobtrans) and Wallenius Line (Wallenius); the newsprint interests, Daniels & Kennedy, Inc. (D & K), and the Madden Corp. (Madden); the four complainant passenger lines, Chandris American Lines, Inc., Greek Line, Inc., Home Line Agency, Inc., and Ingres Lines (passenger lines); the Commonwealth of Puerto Rico and Hearing Counsel. NYSA and the breakbulk carriers³ (with one minor exception) support the Examiner's decision. We heard oral argument.

The major issue to be decided in this lengthy, complicated and hotly contested proceeding has been the determination of the rate of assessment to be imposed for those carriers serving the Puerto Rican trade, and the automobile and newsprint interests. The salient facts often in dispute, notably in the statistical arena, have been adequately resolved by the Examiner. Many of the legal problems, particularly those posed by the passenger lines, have also been correctly answered by him. In fact, since we are attaching his decision to this Report, no useful purpose would be served by setting out at length the evidence before him relating to these problems. It is sufficient to say that he had a great mass of material before him in which he weighed contending considerations and conflicting evidence in framing his decision. There was before him, as there is before us now, a clash of adversary argument exploring every aspect of a multifaceted situation embracing conflicting and demanding interests. We will not attempt here to repeat the basic background, facts and views contained in our prior decision, and we find it unnecessary to repeat much of what appears in the Examiner's decision attached hereto. Since, as before, we disagree not with the factual presentation expressed in his decision, we need only point to our areas of disagreement where we have placed, in the main, a differing degree of weight on the evidence which leads us to certain conclusions not reached or treated by him.⁴

In our earlier decision we found that the Examiner failed to give sufficient consideration to certain factors which led us to conclude that the Puerto Rican trade deserved some degree of special consideration in computing its assessment. We were primarily impressed with the steady growth in hours and tons carried in this trade which trans-

³ States Marine International, Inc., Isthmian Lines, Prudential-Grace Steamship Co., Atlantrafik, Barber Lines, Blue Sea Line, Concordia Line, Hellenic Lines, Hoegh Lines, Meyer Line, Nedlloyd Lines, and Norwegian America Line.

⁴ The particular portions of the Presiding Examiner's decision discussed here will be pointed out by reference to the initial decision attached. We will not attempt or find it necessary to strike or comment upon each and every sentence, phrase, or otherwise, that might be contrary to our conclusions expressed herein. Once again, we agree with his presentation of the facts and his disposition of all the other issues not treated in our report—our disagreement lies mainly in his *conclusions* with respect to those issues treated here.

lates to increased work opportunities for the longshoremen. That factor, however, was not our only consideration, for we also recognized the peculiar status of the Puerto Rican economy and its dependence upon low-cost ocean transportation. In his most recent decision, the Examiner, however, has adopted and agreed with the position of the NYSA and its breakbulk carrier interveners, namely, that this trade should be assessed on the same combination man-hours and tonnage basis as is regularly provided in the Agreement for other containership, ro-ro and other carriers in other trades.

Briefly, the nub of his conclusion in treating this trade as originally proposed and submitted by the NYSA probably can be found in his observation that "on a dollars and cents basis, which is what these proceedings are all about, the most logical basis of assessment must be related to dollars of revenue and therefore to revenue tons of cargo handled, rather than to longshore hours."⁵ Additionally, while noting that tons carried must be entitled to a greater weight in reaching a just conclusion to the assessment problem, he concluded that "hours" was the key in the past and "tons" will be in the future.⁶ In denying this trade favored treatment he observed that other trades serving the Port of New York would be disfavored by the imposition on them of higher assessments to make up for assessments not collected from the Puerto Rican trade.⁷ He concluded that, to the extent that the foreign trades would be disadvantaged by cargo diversion and to avoid undue discrimination between the various trades of NYSA, "the fairest action under all the circumstances would be to spread the assessment herein on the same basis for all trades. * * *"⁸ Finally, he reasoned that all carriers recognize in a general way that the assessments of the ILA labor fringe benefits are:

an industry problem, and that all carriers must share not only in the benefits of the ILA contract, but also in the costs of the contract. Some carriers and parties seek exceptions to the uniform assessment basis of T-2390. But, granting an exception here and another exception there has a snowballing effect, and the result of granting too many exceptions can only be chaos. Exceptions must be limited to recognized hardships and no others.⁹

However, the unfairness of the Examiner's result is particularly emphasized when we consider the plight in which it leaves the carriers serving the Puerto Rican trade. Obviously, we are not here dealing with the fine writing in an insurance policy. In this proceeding the arguments have extended far beyond the comparatively narrow issue

⁵ Presiding Examiner's Decision, September 22, 1971, 15 FMC 291.

⁶ Id. 15 FMC 295.

⁷ Id. 15 FMC 310.

⁸ Id. 15 FMC 310.

⁹ Id. 15 FMC 311.

involved; i.e., how the costs for the labor fringe benefits should be distributed. At one extreme the carriers in this trade seek the excepted cargo status (\$1.84 per man-hour) compared to the opposite extreme of NYSA, which urges assessment comparability with the containerized operators in the foreign trades (\$5.97 per ton).¹⁰ Between these two extremes are the proposals submitted by Hearing Counsel.

In a proceeding of this nature we are duty bound to exercise discretion which means to weigh contending considerations and conflicting evidence as a matter of judgment in framing a decision to meet the needs of this case. In assessing the benefits received and cost burdens incurred by the parties from a stable labor force during the period of the NYSA and ILA contract, there is no calculus by which they can be equally distributed. We have been forced to deal with elusive and sometimes contradictory financing of the labor fringe benefit costs, which in their nature are not within the usual province of our considerations. In balancing the path of the extreme positions presented to us, we have found considerable merit to the proposals submitted by Hearing Counsel. First, these proposals were not fully treated by the Examiner, since the parties had not had the opportunity to comment fully on them prior to the rendering of his decision.¹¹ And even though the Examiner observed that the only compromise solution "with the most substantial merit is the T-2890 compromise",¹² we think he was without benefit of argument and considerations that developed in the pleadings and oral argument presented to us. Secondly, while we recognize that the Shipping Act under which we function does not set up machinery for conciliation, mediation, arbitration, and adjustments of disputes to be invoked if negotiations fail, it does however, impose upon us a duty to devise solutions within the framework of our statutory mandates. It was in this framework that the Chairman of the Commission at the completion of oral argument provided an occasion for the parties to attempt to resolve the differences among themselves and report back to the Commission. In affording the parties the opportunity to bargain anew in an effort to devise solutions for the troubles which beset the Agreement, it was made clear that such bargaining would not trample on our statutory duty to decide the case. Out of this opportunity provided by the Commission, counsel representing the automobile interests (Wobtrans and Wallenius) and the newsprint interests (D & K and Madden) notified us that they would accept the offer of settlement as outlined by Hearing Counsel

¹⁰ Seatrain, TTT and the passenger lines also insist even that the increase of the hourly payment for GAI was not authorized. However, we agree with the Examiner's treatment of this issue and his conclusions. See *Id.* 15 FMC 802, 804.

¹¹ *Id.* 15 FMC 808.

¹² *Id.* 15 FMC 808.

with respect to their interests. Finally, we look upon the proposals of Hearing Counsel not simply as a compromise for its own sake but as proposals which are substantially supported by the record. In each area that they have offered proposals, i.e., the Puerto Rican trade, automobiles and newsprint, we find their reasons persuasive and supportable and, accordingly, we set them forth below in substantially the manner presented to us in their briefs.¹³ Additionally, we are not adopting the Examiner's conclusions on the Puerto Rican trade issue because we agree with Hearing Counsel that his determination imposes on the Puerto Rican trade at this time an unnecessarily severe increase in costs, including the so-called "shortfall" which is mainly attributable to conditions occurring in the foreign trade and gives little or no consideration to the peculiar economic problems which affect the Commonwealth of Puerto Rico. As will be shown below, in our opinion, Hearing Counsel's compromise solution would require the trade to bear its fair share of clear industrywide costs while giving the trade special consideration by leaving it in the "excepted" category for other purposes. Similarly, for automobiles and newsprint, the compromise solutions offered by Hearing Counsel would, in our opinion, lessen the severity of the drastic increases in costs which those commodities would have to bear under the Examiner's decision at this time, while not exempting them from an increase which gives due consideration to the benefits which these commodities derive under the labor contract.

The major issue in the reopened proceeding is that relating to the rate of assessment for carriers serving the Puerto Rican trade. Our decision of November 20, 1970, placed this trade in the "excepted" category, i.e., to be assessed on a man-hour basis, at the time of the decision, \$2.559 per man-hour. Since that time, on December 7, 1970, that rate was increased to \$3.394 by the Board of Directors of the NYSA.

The NYSA contends that the Puerto Rican trade ought to be placed in the regular man-hour/tonnage level of assessment. The NYSA submits data that indicate that the trade is substantial and can bear the burden of the higher assessment and that it benefited greatly when the NYSA persuaded the ILA to abandon its early demands for restrictive conditions on containerized operations, especially those relating to stuffing and stripping. Furthermore, the NYSA contends that all fringe benefits are interrelated and are industry costs which all trades should assume. In early June 1971, using data current at that

¹³ We have, of course, reviewed carefully the arguments presented in the exceptions, as well as those presented in opposition to the proposals of Hearing Counsel. Accordingly, we think it is necessary to provide the full position and arguments of Hearing Counsel.

time, the NYSA estimated that the labor contract would end with a deficit of \$3,376,522, which could have been avoided had the Puerto Rican trade paid a greater share of costs as per the regular man-hour/tonnage level. Again, using data available at the time, the NYSA estimated that the Puerto Rican trade had realized a savings of approximately \$6,500,000 over the life of Agreement No. T-2390 by being placed in the "excepted" status. It was also estimated by the NYSA that on a per ton basis the Puerto Rican trade paid only \$0.90 compared to \$4.02, \$2.60, and \$2.54 for breakbulk, containerized, and ro-ro generally.

Whether these estimates of deficit and costs are reliable, and as with most other data in the record, they are vulnerable to attack because they rely on data current at the time and since revised, they persuaded the Board of Directors of the NYSA that an increase in the assessment rates was necessary. There have been four different changes in assessment, three affecting the tonnage assessment, and one, the "excepted" man-hour. The tonnage rate has increased from \$1.23 to \$1.73 to \$2.23 to the present level of \$3.23 whereas the "excepted" level has increased from \$2.559 to the present level of \$3.394 per man-hour, all of which are assessed against the carriers under the terms of the agreement.

Other significant facts about the Puerto Rican trade, which are consistent with evidence developed on the earlier record in this proceeding, further explain the basis for the NYSA's contentions. As Mr. Carter, President of TTT stated, "the Commission was totally correct when it found that the New York-Puerto Rico trade * * * has provided a steady growth for years resulting in increased work opportunities. That steady growth is still continuing, and at even a more accelerated rate." Mr. Carter offered this evidence to refute the NYSA's allegation that Puerto Rican hours had dropped to 768,310, an estimate which is clearly understated by a substantial amount and to demonstrate that even at the "excepted" man-hour level, the Puerto Rican carriers are contributing their fair share toward costs of fringe benefits.

By Mr. Carter's calculations, in the year 1970-71, the Puerto Rican trade would contribute \$2,837,703 toward fringe benefits at the rate of \$2.559 per man-hour, which includes \$0.72 per hour for vacations and holidays, a fund not subject to Agreement No. T-2390. Even with this extra contribution toward vacations and holidays, this trade contributes only 3.68 percent of the total T-2390 expenses of \$77,081,399 for that year. Over the life of the agreement, however, according to Mr. Carter's calculations, the trade contributes \$3,809,530 at the \$1.71

and \$1.84 per man-hour levels (i.e., without vacations and holidays), compared to total expenses of \$148,005,142, or approximately 2.6 percent. Mr. Carter's own exhibit, however, shows that the Puerto Rican trade comprises approximately 10.15 percent of total tons moving through New York. In the earlier record, Mr. Carter had calculated that Puerto Rican tons represented some 9.5 percent of the total for the year 1969/70 (2,630,000 out of 27,480,000). Other evidence of record shows the Puerto Rican proportions of assessable tons to be 10.4 percent for both 1969/70 and 1970/71.

The Puerto Rican carriers dispute the NYSA's contentions regarding deficits. They have attempted to break out each account to determine where a deficit, if any, actually occurs, and contend that such deficit appears if at all in the shortfall account for which the Puerto Rican trade cannot be held responsible. Since our decision of November 20 held it proper to relieve the Puerto Rican trade of costs of shortfall since the trade has continuously increased in man-hours of employment, both TTT and Seatrain have explored the possibility that the NYSA is attempting to shift shortfall costs onto the trade improperly.

TTT's and Seatrain's exercise, while perhaps sound in principle, is itself of questionable reliability. The NYSA does not break out income for each account in the ordinary course of business. It did so for purposes of isolating shortfall and to show the Puerto Rican contribution minus shortfall. However, both Seatrain and TTT have utilized the data in exhibit 102, especially the cost per ton for GAI (for 1969/70 and 1970/71, \$0.647 and \$0.959) in an attempt to match income with expense and to show that the GAI account has either a surplus or very small deficit. From this, TTT and Seatrain conclude that the NYSA is attempting to shift the costs of the shortfall deficit onto the Puerto Rican trade contrary to the Commission's decision.

In using the NYSA data in Exhibit 102, of course, TTT and Seatrain are relying on data derived from an exhibit prepared for limited purposes based on data current at the time. Moreover, their exercise would not properly match income and expense for the GAI account since \$0.647 and \$0.959 per ton are NYSA figures which include contributions toward GAI equivalent hours for pension, welfare and clinic, whereas equivalent hours expenses have been removed by TTT and Seatrain in accordance with their contentions that it does not belong in the GAI account. The result would have to be an overstatement of income in the GAI account.

Even if these various imperfections were to be corrected, in our opinion the need for such exercise can be avoided provided that an equitable revision to the formula can be made.

Regardless of the contentions of TTT and Seatrain regarding a surplus or minimal deficit in the GAI account, the record shows that the costs of GAI have mushroomed drastically and that such increases could not have been anticipated. No one disputes the fact that the NYSA Assessment Committee had estimated GAI costs to be \$15,600,000 for 1969/70 and \$15 million for 1970/71. These were estimates employed by the Committee which was advised that the final figures might vary substantially because of a number of factors. GAI, unlike the fixed obligation for pension, welfare and clinic (\$30 million and \$19,800,000 for 1970/71, respectively), varies depending upon the number of recipients of payments, equivalent hour payments to pension, welfare and clinic, and vacation funds, etc.¹⁴ The Assessment Committee did not anticipate the "fantastic escalation", as Captain Evans described it, that took place in the number of men who found themselves beneficiaries of the GAI, nor the breakdown in the prior day ordering system which also increased costs. Since the inception of GAI in 1964, the costs of this particular guarantee had necessitated periodic increases from an original \$0.02 per man-hour, to the present, including such rates as \$0.12, \$0.22, and \$0.55.

According to a statement issued by Coopers & Lybrand, a firm of certified public accountants, the cost of GAI for 1969/70 was actually \$24,340,472. This is almost \$9 million over the earlier estimate. For 1970/71, the NYSA estimates GAI costs to be \$31,756,842. This is almost \$17 million over the earlier estimate. Perhaps the estimate for 1970/71 is too high. Nevertheless, it is clear that the earlier estimates of the Assessment Committee were far off the mark and that costs of GAI have escalated substantially. Some explanation for this development may be found in the breakdown of the PDO system which, had it worked, would have reduced costs, by overall decline in hours of employment at the port, or by possible undue advantage taken by some members of the labor force. Whatever the reason, it is evident that this particular contractual guarantee made by the industry in 1968 has been costly. Under the previous ILA contract, GAI costs had required no more than \$0.12 per man-hour for funding, whereas at the time of the last assessment on the man-hour basis in early

¹⁴ TTT and Seatrain also dispute the inclusion of certain expense items in the GAI account and would reduce that account by eliminating certain items above the payments to recipients, such as equivalent hour expense for vacations, pension, welfare, and medical funds. Seatrain also disputes certain administrative allocations attributable to prior day ordering (PDO). Nevertheless, these items of expense except for PDO have apparently been included in the GAI account from its inception in 1966, according to the administrator of the fund, Capt. Haynes. In the case of equivalent hour payments, this was required by a decision of Arbitrator Theodore W. Kheel which went against the NYSA. Significantly, both TTT and Seatrain have paid \$0.55 per man-hour toward GAI even though this figure was designed to cover the disputed items of expense.

1970 the rate of assesment of GAI had risen to \$0.55. Unlike shortfall, GAI was not one of the items for which the Commission found the Puerto Rican trade free of any responsibility. The Puerto Rican carriers, under the "excepted" category, were and still are willing to pay at the rate of \$0.55 per man-hour even though at that rate they assert that the trade would be bearing some costs attributable to other trades.

Although it can be shown that the decline in overall hours of employment from 40 million to under 30 million is not a phenomenon of the Puerto Rican trade which continues to increase man-hours of employment annually and that the costs of "shortfall" could arguably be allocated to non-Puerto Rican trades, the same cannot be said for GAI. This is an industry expense which cannot be traced to any specific cause nor to any trade. Overall increase or decrease in total hours of employment does not determine directly the GAI exposure. Even with an overall increase in hours of employment, cost of GAI could conceivably increase as well. The breakdown in operation of the prior day ordering system must be accounted for as an industry misfortune. Had the system worked, it promised to promote labor efficiency and reduce costs of GAI accordingly. Puerto Rican carriers would also have benefited.

The increase in GAI benefits, e.g., from 1,600 to 2,080 hours was an industry-promised benefit not separable by trades. Containerization, as the major concern of the ILA during the 1968 negotiations, played a major role in the increase in GAI benefits. Furthermore, the increase in GAI benefits served to divert the ILA from its demands for stuffing and stripping all containers, a concession that would particularly benefit a fully containerized trade such as the Puerto Rican.

GAI, unlike pension, welfare and clinic, or shortfall, cannot be calculated by reference to the 40-million-hour guarantee contained in the ILA Contract. Pension, welfare, and clinic are fixed sums based upon the 40-million-hour guarantee (\$0.75 times 40 million hours and \$0.495 times 40 million hours, or \$30 million and \$19,800,000 for pensions and welfare, respectively, for 1970/71). GAI, as we have seen, is a variable, depending on many factors, chief among them being the number of men receiving payments. GAI must be funded by relying on advance estimates which are subject to revision as actual experience dictates. If there is an underestimate, as there appears to have been for GAI, any previous rate of assesment designed to cover GAI must likewise rise. The \$0.55 per man-hour rate which had been effective for all parties under the previous man-hour basis for assesments, would necessarily have been increased. The same rate applied under the "excepted" category, and indeed, was increased by \$0.835

in December 1970. As Captain Haynes explained, the \$0.55 per hour rate was geared to the estimate of \$15.6 million for GAI in 1969/70, which escalated to over \$24 million.

In summary, GAI should be considered to be an industry obligation guaranteed to the ILA in return for a number of benefits, chief among them being the freedom to move containers generally without stuffing and stripping. GAI, unlike shortfall, cannot be traced exclusively to any one trade. Therefore, all parties, including carriers serving the Puerto Rican trade, have not asserted any objection to bearing their share of GAI costs. This leaves us with the question of determining a fair share of such costs.

In our opinion, a revision to the Puerto Rican contribution under Agreement No. T-2890 is warranted. Although the trade may have been relieved of shortfall expense on the grounds of lack of responsibility, this argument fails to withstand analysis in the case of the GAI. The most significant fact which was developed since the closing of the earlier record is the substantial escalation in the cost of GAI, far beyond anyone's predictions. The Puerto Rican trade, enjoying the benefit of a man-hour assessment designed to apply to marginal and special-type highly productive cargoes, would naturally contribute an amount significantly less than under the regular level of assessment on the man-hour/tonnage basis, which has since escalated in the tonnage portion from \$1.23 to \$3.23. The NYSA has estimated a savings to the trade of over \$6 million, or an "avoidance" of assessments, as it is described. Counsel for a group of breakbulk carriers has calculated the savings to the Puerto Rican trade on an annual basis to be \$4,952,537.¹⁵ His calculations also show that the Puerto Rican contribution is so low on the "excepted" basis that it is even less than half what the contribution would have been under the earlier tonnage rate, \$1.23, which has since almost tripled.

Hearing Counsel do not advocate an increase in the Puerto Rican contribution merely on the basis of a comparison of total aggregate payments. This lends itself to finger pointing by one segment of the industry toward another and to allegations that another segment is not contributing enough in the aggregate as well. Rather, the basis for the proposal is the fact that at the \$0.55 per hour level, the trade could not be paying its fair share of total costs of GAI for the simple reason that this figure was geared to early estimates of \$15.6 and \$15 million which have been proven to be substantial understatements. What had been estimated as total cost of GAI for the 2-year life of Agreement

¹⁵ The record shows a total annual P.R. contribution of \$1,846,808 under the \$1.84 per man-hour "excepted" rate as opposed to \$6,799,845 under the regular level of assessment on a man-hour/tonnage basis. The difference is \$4,952,537.

No. 2390 in the amount of \$30.6 million appears to be in reality closer to \$56 million. Under a \$0.55 per hour rate of assessment, there would necessarily be no contribution to the additional amount. Even increasing the \$0.55 per hour rate by \$0.835 as was done by the Board of Directors of the NYSA in December, 1970, and applying it for the full year 1970/71 rather than for the 42.3 week period as did the Board of Directors, the additional contribution would have amounted to only \$843,000 or merely 3.3 percent of the increase.¹⁶ This illustrates to us that the man-hour basis for funding GAI is inadequate even at the increased level of assessment.

Under the circumstances, Hearing Counsel proposed that the present decision of the Commission to place the Puerto Rican trade under the "excepted" man-hour level of assessment should be modified so that the trade will contribute a fair share of GAI costs. Such a share, they submitted, would be 10 percent of the total costs, i.e. \$5,609,731 [0.10 times (\$24,340,472 plus \$31,756,842)]. The 10 percent is derived from the approximate percentage of tonnage which the record indicates to be the share of total volume enjoyed by that trade.

Under this proposal, the carriers serving this trade would continue to be assessed for pension, welfare/clinic, and NYSA administration at the man-hour "excepted" level and would still be relieved of shortfall. The only change would be an increased contribution toward GAI, thus insuring that this growing and substantial trade would contribute adequately to an industry problem. This proposal is consistent with our earlier decision since it is based upon the principle of responsibility. By leaving the pension, welfare and clinic assessments on the man-hour basis, i.e. at \$0.75 and \$0.495 per hour as provided in the ILA contract, no hidden contribution toward shortfall will be made. This is so because those hourly rates of assessment were premised on the assumption that the port would work 40 million hours annually overall. Had this happened, the pension and welfare/clinic obligation would have been fully funded. An increase over the \$0.75 and \$0.495 levels is necessary because the actual total is substantially less than 40 million and therefore would be related to the shortfall problem from which we have relieved the Puerto Rican trade.

Therefore, if applied on a retroactive basis to October 1, 1969, in order to prevent the unfairness inherent in a prospective-only increase in the rate of assessment cited by Seatrain and TTT, the Puerto Rican trade would pay on a man-hour basis for pension, welfare and clinic, and NYSA administration, on a tonnage basis for GAI, and be re-

¹⁶ According to the record, with the \$0.835 increase, P.R. would contribute \$2,689,916 but only \$1,846,808 at the original man-hour level. The difference is roughly \$843,000, which is 3.3% of the \$25.4 million increase in GAI costs over the earlier estimates.

lieved of shortfall. We believe that this is a reasonable compromise between the Puerto Rican position, namely, everything on a man-hour basis at \$2.559 per hour, and the NYSA position, everything on the regular man-hour/tonnage basis, at \$0.93 per hour and \$3.23 per ton presently. It not only requires the Puerto Rican trade, like all others, to contribute toward the industry problem of escalating GAI costs in an adequate fashion but also cushions the trade against the severe increase in costs for containerized operations which results from a shift from a strictly man-hours basis of assessment to tonnage.¹⁷

Since the total share of GAI costs for the Puerto Rican trade is simply 10 percent of the total GAI, or roughly \$5.6 million and the approximate assessable tons are roughly 2.6 million annually or 5.2 million for the life of Agreement No. T-2390, the GAI cost per ton is \$1.08. However, since payments already made by the three carriers involved at the \$0.55 and \$1.385 per hour levels and the \$0.647 per ton rate will be credited, all that remain is for these carriers to make up the difference between \$5.6 million and these actual payments made toward GAI, an amount which the record shows would be considerably less than \$4.5 million.¹⁸

Since the overriding concern of every party naturally is how much will it cost, any proposed increase met with opposition and contentions that the Puerto Rican economy is still severely affected by poverty, inflation, and unemployment and that any increase in transportation costs would have an adverse effect. It was also argued that if the Puerto Rican trade is underassessed, so are breakbulk operators or intercoastal and bulk carriers. In our opinion none of these contentions demonstrates that the proposal is not fair and reasonable.

Poverty, inflation, and unemployment are serious problems affecting the Commonwealth. Nevertheless, the Puerto Rican economy has made significant gains in gross national product and per capita and family income despite inflation and important increases in particular costs, especially wages. The Commonwealth, of course, strenuously opposes any increase in costs of transportation because it feels that any increase may adversely affect its programs and the Commission was equally concerned in its earlier decision. However, even the Commonwealth realizes that it must bear a fair share of cost increases. As its

¹⁷ As Seatrain shows, placing the Puerto Rican trade in the regular assessment level would mean an increase for containerized Puerto Rican carriers from \$1.84 or \$2.675 per hour to over \$9 per hour excluding container royalty.

¹⁸ As Seatrain points out, there was a surplus in the GAI account for 1968/69 of \$1,480,612 which should be deducted from the total GAI obligations for 1969/70 and 1970/71. This leaves total GAI obligations of \$54,616,702. This also requires a minor adjustment to the proposal, reducing the Puerto Rican share of GAI by \$148,061.

economic witness stated in connection with the proposed rate increases filed by the three carriers serving the trade :

If the Commission finds that the service connected cost increases justify a part of the rate increases, our economy will have to adjust to the economic consequences of this finding.

The witness further explained that the Commonwealth had to consider the possibility that an increase in rates in some amount might become effective with a total increase in ocean transportation costs of \$25 million or less. The witness assumed that the total transportation cost increases to Puerto Rico if the trade were taken out of the "excepted" category would be some \$6 million. Based on total transportation costs of \$125 million, such an increase would mean a 3 or 4 percent rise. (Actually 4.8 percent) If the Commonwealth can adjust to a possible \$25 million increase in overall transportation costs, it can certainly adjust to one of only \$6 million. Moreover, under Hearing Counsel's proposal, the increase in cost to the Commonwealth would be less than \$4.5 million, which amounts to only 3.6 percent of the total figure of \$125 million. Since February, 1971, the trade has been subject to a 3 percent bunker surcharge which it is apparently bearing. Of course, the Puerto Rican carriers, who contend that there should be no increase over the "excepted" level of assessments because any increase would have adverse effects on the Puerto Rican economy, are themselves seeking far more substantial increases in the amount of 18 percent and 28 percent for containerload and less than containerload shipments, respectively. (See F.M.C. Docket Nos. 71-30, 71-42, 71-43.) In Docket No. 71-30, furthermore, TTT produced evidence that such increases would have minimal effect on price levels in San Juan, that they would not interfere with traffic in the trade, and that the Commonwealth was enjoying growth in per capita and family income.¹⁹

Another argument raised by the Puerto Rican interests, is that one should look to other "excepted" cargoes and/or trades to cover any deficits rather than to the Puerto Rican trade, i.e. intercoastal, coastwise, bulk sugar, lumber at lumber terminals, bananas, automobiles, Alaska and Hawaii, which are placed in the "excepted" category. None of these other interests, however, is truly comparable to the Puerto Rican trade. These other interests cannot compare with the Puerto Rican trade in terms of special benefits received from the collective-

¹⁹ To counteract this obvious inconsistency in positions, TTT attempts to distinguish the proposed rate increases and the present assessment on the grounds that the former is a "service-connected" cost and the latter "nonservice" connected. Of course, to a consumer in San Juan, this distinction is meaningless since the impact would be the same. It is unnecessary to linger over the merit or lack of same for such terminology since if the Puerto Rican trade contributes its fair share of the costs of labor under any formula, such costs must be considered to be a proper cost of service.

bargaining agreement which permitted the fully containerized trade to operate without a variety of restrictive conditions applicable to containers. Neither bulk scrap and sugar, bananas, nor automobiles, were the cause of the ILA's concern when it made its initial demands regarding stuffing and stripping. Any extremely productive cargoes such as bulk would suffer a drastic increase in costs in a shift from hours to tons. It would not therefore be fair to shift such a disproportionate burden onto such cargoes which had little to do with the central issue in the labor negotiations and consequently derived relatively few benefits compared to containerized operators.

No new evidence was offered regarding the Alaskan and Hawaiian trades indicating that the NYSA isn't much concerned if these trades remain in the "excepted" status. No tonnage moves between New York and Alaska. The Hawaiian trade is negligible, and is also subject to diversion via west coast ports. Clearly, these two trades are not comparable to the Puerto Rican.

Intercoastal and coastwise trades are not negligible according to New York Port Authority data. These trades are treated differently under the ILA contracts than is the Puerto Rican which is treated like the deep-sea trades. They are of course subject to rail and truck competition which is not true of Puerto Rico. How much of the trade is containerized is not shown by the record, although the port authority attributes a rise in overall coastwise trade (including Puerto Rico by its definition) to the adoption of containerization.

Although the port authority's data regarding "coastwise" tonnage show no gradual decline, after deducting Puerto Rican cargo, neither do they show a prospering trade enjoying steady growth. Total volume for 1969 was estimated to be 4,648,400 which is substantially below the volume for 1966, i.e., 5,171,700 and not significantly over that for 1960, i.e., 4,549,600. Furthermore, the "coastwise" trade, even including the steadily growing Puerto Rican trade, has never reached the levels it enjoyed prior to the Second World War when total tonnages consistently exceeded 5 and 6 million, reaching a peak of 6.7 million in 1937. This situation is to be compared with the Puerto Rican trade which has quadrupled between 1958 and 1969 (from 650,000 to 2,630,000 assessable tons). According to the NYSA's records, the intercoastal trade seems to be declining, judging by the amount of container royalty payments made between 1966 and 1969. According to these records, intercoastal tonnage subject to royalty declined from 1,175,286 in 1966 to 496,281 in 1969. Captain Evans of the NYSA Assessment Committee also indicated that the intercoastal trades were

considered marginal in the belief that volume and profits were declining and because of inland competition.

The ever-present factor of inland competition to which the intercoastal trades are subject, of course, further distinguishes these trades from the Puerto Rican. The basic principle underlying the establishment of the "excepted" cargo category is that such cargo, if forced to bear an assessment on tonnage, might be diverted from the port of New York and thereby cease even limited or marginal support of fringe-benefit costs. If one argues that the intercoastal assessment should also be revised if such happens to the Puerto Rican trade, he is gambling that such an increase would not ultimately deprive the NYSA of revenues because of diversion to rail, truck, or other ports. He is also comparing unlike situations. As the Examiner had found in his earlier decision :

The steady growth every year since fiscal 1957/1958 in the New York-Puerto Rican trade shows that it is not likely to dry up, or wither away, because of any reasonable increase in assessment. Therefore, there appears to be no substantial reason to blanket this entire Puerto Rican trade under the "excepted cargo" status. There is little likelihood that this cargo as a whole will be diverted to other modes of carriage, as in the case of domestic intercoastal or intercoastal cargoes which are subject to rail and motor truck competition.

The Puerto Rican interests also contend that the breakbulk operators are underassessed and are enjoying a "windfall". It would perhaps be desirable if the entire formula could be reworked so that every interest could be carefully examined and assessments revised in an attempt to achieve a more equitable allocation. At this stage in time, such an exercise would lead to administrative complexities which would offset any slight improvement that could be achieved. The most glaring inequity, as we have stated, is the underassessment of the Puerto Rican trade, which has caused a shift of some \$6 million in costs to the remaining carriers subject to assessment. The breakbulk operators do realize a reduction in costs per ton or per hour compared to the previous man-hour basis of assessment. This is so because any carrier with low productivity will have comparatively fewer tons per hour on which to be assessed. But all the members of the NYSA realized this fundamental effect when they voted unanimously to depart from an exclusively man-hour basis. If the Puerto Rican carriers oppose such reduction in cost for breakbulk operators, then they would be opposed to any uniform tonnage basis for assessment since under such a basis the breakbulk operators stand to benefit. However, the Examiner and the Commission have already found that the partial

tonnage basis is fair for a number of reasons. We might further add that if the breakbulk operators do enjoy a reduction in allocation of costs, they have been overassessed not only in the past but for the first year of the present contract as well, since agreement No. T-2390 applies only to the last two years of the current labor contract, i.e., 1969/70 and 1970/71. Therefore, if the breakbulk operators enjoy a cost savings presently, so did the containerized and ro-ro group for many years previously.

In order to test the contention that breakbulk operators are indeed contributing less than their full share toward total obligations, for the year 1969-70 hearing counsel have calculated the total breakbulk contribution and compared it with the volume of breakbulk tons, using a similar methodology as that employed by TTT. The results are surprising. Apparently, owing to the man-hour portion of the agreement No. T-2390 formula which, as we have said, would overassess breakbulk, these operators contribute \$37 million or 52 percent toward the total obligations of \$70,923,743, although breakbulk tons comprise only 12.3 million or 44.7 percent of total volume of 27.5 million tons.²⁰ This calculation employs NYSA Assessment Committee estimates for the 1969/70 contract year and was calculated at the then \$0.93 per hour and \$1.23 per ton rate of assessment. It demonstrates that for the first year of Agreement No. T-2390 the breakbulk operators were not underassessed on an overall basis. This is to be compared with the Puerto Rican aggregate contribution of 3 percent compared to around 10 percent of total volume.

Finally, both Seatrain and TTT have contended that they should contribute at the "excepted" rate for reasons relating to their financial statements. TTT contends that increasing its payments to the level of the regular assessment would be "financially disastrous" and Seatrain contends that financial information is relevant to the issues in these proceedings under the public interest standard of section 15.

²⁰ For the year 1969/70 :

<i>Breakbulk Contribution</i>
28, 628, 921 hours
× \$0. 93
<hr/>
\$21, 970, 246. 53
plus
12, 284, 439 tons
× \$1. 23
<hr/>
\$15, 109, 859
<hr/>
\$21, 970, 247
15, 109, 859
<hr/>
\$37, 080, 106

Comparison With Totals

\$37, 080, 106	= 52 %
<hr/>	
\$70, 923, 743	
BB tons = 12, 284, 439	= 44.7 %
total tons = 27, 480, 000	

Relevancy of "ability to pay" as a standard has been disputed by Wallenius and the breakbulk group. If such a standard is relevant, in effect it means that the financial burden of certain carriers should be relieved at the expense of other carriers. In his prior initial decision, the Examiner indicated that a proper assessment for the Puerto Rican trade could be determined without reliance on the financial situation of the two Puerto Rican carriers who raised the issue.²¹

In their treatment of the automobile issue hearing counsel argued as follows:

A highly productive cargo such as automobiles suffers an extremely severe increase in costs in any shift to a tonnage basis for assessment although automobiles were not the major cause of ILA concern nor the chief beneficiary of the collective bargaining agreement. Under the principles enunciated by the Supreme Court in the *Volkswagen* case,²² it is necessary to determine whether the severe increases in costs which automobiles suffer are reasonably related to the benefits received.

The assessment on automobiles, presently at \$3.23 per ton, casts an unreasonably disproportionate burden on this cargo, even when the ton is measured at 20 percent. The productivity of automobiles is so high that the 20 percent tonnage basis for assessment increases costs over seven times for conventional automobile carriers (from \$0.93 to \$6.66 per hour) and over 13 times for ro-ro carriers (from \$0.93 to \$12.51). There is scant justification for such an assessment. The 20 percent measurement rate of assessment appears simply to have been copied from the PMA agreement on the west coast where the normal rate of assessment was a mere 27½ cents. No consideration seems to have been given to the fact that cargo which played little role in the substantial increases in fringe benefits suffers the greatest increase in costs compared to the previous level of assessment. The NYSA, furthermore, seems to have ignored the recommendation of Captain Evans concurred in by Mr. Lambos, who constitute two-thirds of the Assessment Committee which formulated Agreement No. T-2390, that automobiles be assessed simply on a weight-ton basis. Clearly then, some-

²¹ The third and largest Puerto Rican carrier, Sea-Land Service, Inc., did not oppose Agreement No. T-2390 nor urge that the Puerto Rican trade be "excepted" in the earlier proceedings. After the Commission's decision of November 20, 1970, however, this carrier has actively participated in the proceedings in support of the decision to "except" the Puerto Rican trade. The record shows that the then president and now chairman of Sea-Land, Mr. McEvoy, was one of the members of the NYSA Assessment Committee which unanimously recommended the adoption of Agreement No. T-2390 without exception for Puerto Rico. Sea-Land, alone of the three Puerto Rican carriers, paid on the regular man-hour/tonnage basis for Puerto Rico from the inception of T-2390 to November, 1970.

²² *Volkswagenwerk Aktiengesellschaft v. Marine Terminals Corp.*, Docket No. 1089, 9 F.M.C. 77 (1965), aff'd sub nom. *Volkswagenwerk Aktiengesellschaft v. Federal Maritime Comm.*, 125 U.S. App. D.C. 282, 371 F.2d 747 (D.C. Cir. 1966) rev'd. and remanded, 390 U.S. 261 (1968).

thing other than the present rate of assessment is required in all fairness.

At various stages of these proceedings the automobile carriers have suggested the following rates of assessment: 5.85 percent measurement, 10 percent measurement or weight tons, and "excepted" cargo status. Each of these suggestions has merit, and it is of course impossible to be precise in a case of this kind. In the interests of compromise and for the following reasons, we suggest that the weight-ton basis would be fair and reasonable.

The 5.85 percent measurement rate proposed by Wobtrans is based upon an equalization of costs with breakbulk operators. The rationale is that automobiles had as little to do with the increase in fringe benefits as breakbulk and derive no more benefit from the 1968 General Cargo Agreement than does breakbulk. This at least is a principle on which to formulate a rate of assessment in contrast to merely copying a rate existing on the west coast or comparing present costs per ton without regard to the quantum of increase over previous levels. However, in relying on a comparison with breakbulk operations, the proposal ignores the fact that breakbulk and automobiles are not completely comparable. The record shows that breakbulk operators, having the lowest productivity, suffered the greatest cost burdens under the previous man-hour rates of assessment and were therefore probably overassessed in the past compared to more productive operators. This imbalance furthermore continued through the first year of the current ILA contract, i.e., 1968-69. Thus, on a per ton basis, at the \$0.93 per hour rate current at the end of the previous labor contract, automobiles would have contributed a mere \$0.10 per ton as compared to a breakbulk rate of \$1.79.²³ As the Examiner found in his prior decision:

It likewise follows that maybe automobiles were underassessed in past years to the extent that their high productivity rates and the man-hours formula produced low assessments per automobile.

We do not contend that because of this past history automobiles should now be heavily penalized with sevenfold increases in costs. Our purpose is merely to show that breakbulk and automobile operations are not completely comparable.

If automobiles were placed under the "excepted" rate of assessment, they would contribute at the rate of \$2.67 per hour presently (\$1.84 plus \$0.835 per hour). This is practically the same as what automobiles would pay at the 5.85 percent measurement basis (\$2.67 compared to

²³ These figures are derived by dividing the productivity factors of 8.9 and 0.52 tons per hour into \$0.93 for automobiles and breakbulk respectively.

\$2.61 per hour converted on the 5.85 percent measurement basis). Because of high productivity (8.9 tons per hour for Wobtrans vehicles), automobiles would be paying at the level of merely \$0.30 per ton (\$2.67 divided by 8.9). Although under the "excepted" rate, automobiles would surely not be paying toward shortfall with which they are not directly involved, they would be enjoying rates which were designed to protect marginal traffic. Moreover, on a man-hour basis, if any increases in productivity have occurred by a change in the proportion of ro-ro to conventionally loaded automobiles, automobiles would escape further contribution.

A weight-ton basis is a compromise position. It represents about 10 percent to 12 percent measurement and thus falls between the 5.85 percent suggested by Wobtrans and the 20 percent presently assessed by the NYSA.²⁴ It is simple and was recommended by Captain Evans of the Assessment Committee (and later concurred in by Mr. Lambos). It would reduce the cost per hour substantially from \$6.68 to \$3.81,²⁵ much closer to the breakbulk contribution of \$2.61 than to the container at \$9.13.

As we noted before, it is acceptable to Wobtrans and Wallenius as an alternative solution to end litigation. Although the NYSA has estimated that such a solution would result in a considerable reduction this would be more than offset by revising the assessment on the Puerto Rican trade as we have determined. Therefore, in our opinion, this proposal constitutes a reasonable compromise.²⁶

Likewise, we look upon hearing counsel's treatment and proposal of the newsprint issue as supportable and with considerable merit. Accordingly, we will set forth their presentation of this issue substantially in the manner presented to us:

In our opinion, the newsprint interests have shown that neither the NYSA's Assessment Committee nor its Tonnage Review Committee has sufficiently considered the severe impact on newsprint resulting from the regular man-hour/tonnage assessment under Agreement T-2390. Nor have they applied the tests of the *Volkswagen* case, namely, relating benefits to burdens and determining whether any cargo bears

²⁴ A Wobtrans vehicle has an average measurement tonnage of 8.7 and a weight tonnage of 0.87. For Wallenius, the average imported car is 9 tons measurement and 1.008 weight, i.e., 9 to 1; average export is 13 measurement to 1.6 weight, or 8.1 to 1.

²⁵ $0.93 + \$3.23 \text{ times } 20\% \text{ times } 8.9 = \6.68 per hour.

$0.93 + \$3.23 \text{ times } 10\% \text{ times } 8.9 = \3.81 per hour.

²⁶ We realize that for Wallenius, a weight basis would result in slightly higher costs (on the average, 12% measurement) than for Wobtrans because of the heavier Wallenius automobiles. Wallenius is presently passing on the 20% assessment by a special surcharge in its tariffs, but has specified that it will refund to shippers any amount found by the Commission to be excessive. In this case, such would be the difference between the higher contribution at 20% measurement and the lower at the 12% level.

a disproportionate increase in assessment. Thus, the Tonnage Review Committee relies heavily on a mere comparison of present costs per ton without regard to differences in productivity or the quantum of increase over the previous level of assessment. Nor did the committee agree with Captain Evans of the Assessment Committee who testified that a highly productive commodity like newsprint "in all probability * * * would * * * possibly be hurt." Aside from the many questionable practices followed by the committee in its procedures which have been mentioned by Wobtrans as well as the newsprint interests, the failure of the committee to apply the *Volkswagen* standards is a fatal error. As a non-innovative commodity, newsprint was not involved in the containerization issue which led to the sizable increases in fringe benefits and consequently newsprint derived fewer benefits from the labor contract than did the innovators. The Tonnage Review Committee, however, seems to ignore this consideration completely. Later evidence has developed which indicates diversion to inland routing, as pointed out by the newsprint interest. This possibility, discounted by the committee, is supposed to be a factor in favor of "excepted" or similar status.

The newsprint interests show that their cargo suffers an increase of 1346 percent at the present \$3.23 per ton assessment level over the previous \$0.931 per-hour rate applicable under the previous labor contract. This is to be compared with an increase of only 180 percent for the breakbulk operators. Certainly this is a disproportionate increase in cost for a cargo which has not changed its handling methods for more than 30 years. The problem, therefore, is to determine what increase in costs would be a fair share for newsprint to assume.

The newsprint interests suggest either "excepted" status or a rate of assessment which would equalize the percentage of cost increase with that borne by breakbulk. In terms of cost per ton, both suggestions work out to be the same, i.e., \$0.686 per ton at the present "excepted" rate and \$0.67 at the rate equalized with the breakbulk increase.²⁷ There is some merit to either suggestion. "Excepted" status would relieve the possibility of diversion and of contribution toward shortfall with which this noninnovative cargo is not directly involved. It would also place newsprint together with bulk and lumber which are also highly productive specially handled cargoes. The alternative suggestion is based on the principle that every noninnovator should bear the same proportionate increase in costs. The newsprint interests do not suggest that newsprint enjoy special relief forever but only

²⁷ The present \$2.675 per hour "excepted" rate divided by productivity of 3.90 tons per hour equals \$0.686 per ton. The alternative suggestion is \$0.67 per ton.

while the NYSA is "saddled with a modernization tax (as it clearly is presently as a result of the 1968 negotiations) * * *."

The suggestion for "excepted" status suffers from the fact that this is a rock-bottom rate of assessment designed for marginal commodities which would cease to move via New York on a tonnage assessment. Although the record does not indicate the productivity for bulk, obviously it would be on the high side and in the case of sugar, this commodity is already paying a royalty. Uncontroverted evidence also indicates that lumber faces inland rail competition.

The alternative suggestion based upon a comparison with breakbulk assumes that newsprint and breakbulk are entirely comparable, but as we have seen in the case of automobiles, this is not the case. Because of vast differences in productivity (3.90 for newsprint compared to 0.52 for breakbulk) breakbulk suffered from overassessment in the past on the man-hour basis even during the first year of the current labor contract, which is not the case for highly productive newsprint. The relatively smaller increase in cost for breakbulk therefore has an equitable basis.

Reducing the newsprint assessment to the "excepted" or \$0.67 per ton level in the alternative would lower the newsprint contribution annually by about \$846,000, as estimated by the NYSA. Newsprint moves over 300,000 long tons (which would be over 400,000 measurement tons) per year through the port and is the sixth largest inbound commodity in the port.²⁸

By either suggestion, newsprint would be relieved not only of costs of shortfall but of a fair share of GAI as well. The "excepted" rate of assessment, as we have seen in the Puerto Rican situation, is not an adequate rate to fund the costs of GAI, especially with its substantial increases. As the NYSA has pointed out, newsprint is not free of responsibility for the GAI problem, maintaining a small work force on a nonfull-time basis and creating a possible exposure to GAI payments estimated at \$400,000.

As in the case of the Puerto Rican trade, we therefore find that newsprint should be placed in the "excepted" category for all costs except GAI as to which it should remain on the tonnage basis, and that newsprint should be credited with or refunded the excess payments already made under the regular rate of assessment.

One final observation should be made, the agreement under consideration in this proceeding by its very nature has invited the controversies and extended litigation that we have seen here. There is simply

²⁸ Daniels & Kennedy, Inc. discharged 336,270 measurement tons in fiscal 1969-70 which is 80 percent of the total.

no way to obtain a perfect formula of assessment for all the divergent interests that are affected thereby. This proposition was recognized by Mr. Justice Harlan in his concurring opinion in *Volkswagen* where in commenting on an analogous problem faced by the Pacific Maritime Association, he stated:

The real difficulty in this case is to formulate a workable definition of whether the burdens have been "unfairly" allocated. Obviously, as the debates in the PMA indicate, there was no "perfect" way to apportion the costs * * *. Of course charges need only be "reasonably" related to benefits and not perfectly or exactly related * * * 390 U.S. 261, 293 (1968).

While we fully recognize the frustration attendant to equating the levels of responsibilities for fringe benefits costs with precision rates of assessment, we are convinced that the proposals, as detailed above, not only have substantial record support but also obtain a reasonable degree of relating benefits derived to the costs imposed, including a reduction of the severity of costs to these parties had we adopted the examiner's decision.

We should also point out that our decision, of course, applies only to the obligations arising under agreement T-2890 and the particular collective bargaining agreement which created the benefits to be funded. We also recognize that our decision here will necessitate many assessment adjustments—that simply cannot be helped—for these adjustments are ordered on the record established in this proceeding only, and will not have application to additional assessment proceedings, if any, initiated in the future.

For the foregoing reasons, and with the exceptions noted herein, we will adopt the Presiding Examiner's decision as our own. An order will be issued approving agreement No. T-2890, appropriately modified as required herein.

Commissioner George H. Hearn, dissenting:

With respect to the Puerto Rican trade, I am not completely persuaded that we should depart from our original decision. In the original report in this case the Commission unanimously held "that all cargoes to and from Puerto Rico and the port of New York should be treated under the 'excepted cargo' status provided under the excepted cargo provision of the agreement." *Agreement No. T-2336—NYSA Cooperative Working Arrangement*, 14, F.M.C. 94, 99 (1970).

Although the decision of the majority represents a fair resolution of the issues herein, and has support in the record, I nevertheless believe that the present record will better support the Commission's original decision as to the entire domestic offshore trade and particularly the Puerto Rican trade. Thus the factors which led me to join in that decision remain uncontroverted.

The domestic offshore and foreign trades of the United States, while similar in many respects as concerns the issues herein, are substantially and persuasively different in certain controlling aspects.

The domestic offshore trades, including the Puerto Rican trade, are subject to utility-type regulation by the Federal Maritime Commission. Therefore, the rates and practices of carriers in the Puerto Rican trades may not only be found unlawful by the Commission, but we can suspend their implementation and also order enforced a maximum minimum rate. 46 U.S.C. 845, 845a. In the foreign trades, however, the carriers can implement a rate increase merely by filing and giving 30 days notice. 46 U.S.C. 817 (b) (2). We have no suspension power over such rates, and can halt rate increases only after notice and hearing.

Consequently, the carriers in our foreign trades can and have increased their rates almost at will. According to the tariffs on file at the Federal Maritime Commission and of which we may take official notice, from 1965 to the present, conference rates have, for example, increased 50 percent to 70 percent in many trades serving New York and 77 percent in one instance.

In the Puerto Rican trade, during the same period, rates have remained relatively stable; and prior to the rate increases noted in this record, the last general rate increase in that trade was in 1959. As the record herein establishes, the Puerto Rican trade is *sui generis* and the Commission has developed a policy of balancing the need for efficient ocean service for Puerto Rico and for not overburdening the Puerto Rican economy with inhibiting freight rates. Furthermore, the Commission has discouraged the establishment of rate fixing conferences in the offshore Puerto Rican trade.

None of these considerations applies to our foreign commerce, and I must conclude that the standards applied in implementing agreement T-2390 in the foreign trades must differ from those applied in the Puerto Rican trade.

The result reached by the majority goes part way toward recognizing that distinction, but I believe it would be preferable and more in tune with the relevant factors if the Puerto Rican and all the domestic trades were totally exempted.

Commissioner Clarence Morse, concurring and dissenting:

GAI, pensions and welfare, shortfall, and other fringe benefits are industry problems and not merely innovator's problems. This is so even though the newsprint and Wobtrans operations predate agreement T-2390. Those operations do have some impact and are reflected to some imprecise degree in the contract negotiated with the union; hence, these matters must be considered in arriving at an overall industry settlement and funding of their costs.

Puerto Rico. The record conclusively shows that for the last 10 years, without excepted status, Puerto Rico has experienced a continuing and steady growth in hourly wage rates, in income per family, in excess of income over basic living costs, in total exports to the United States, in exports to the U.S. North Atlantic, in longshore man-hours utilized in New York, and in most other economic indicia. It is a record of steady economic growth and of steady improvement in standards of living in Puerto Rico.

According to exhibit 94, for the 5 fiscal years from fiscal year 1966 including fiscal year 1970, total tonnage in the U.S./Puerto Rican trade has increased from 2,337,000 short tons to 3,401,000 short tons. Through the port of New York, tonnage has increased during that period from 1,356,000 short tons to 2,177,000 short tons, or an increase from 58 percent to 64 percent of the total Puerto Rican movement. Of this movement between New York and Puerto Rico, some 1,565,000 tons moved to Puerto Rico and 612,000 tons moved to New York. In the same 5-year span, longshore man-hours attributable to the Puerto Rican trade have increased from 655,800 to 1,003,700 (ex. 15). The Puerto Rican trade approximates 10.15 percent of the port of New York's aggregate waterborne commerce by tonnage. Exhibit 94 discloses further that during said 5-year fiscal period Puerto Rico's GNP increased from \$3.04 billions to \$4.61 billions; family income increased from \$4,662 to \$6,132; per capita income increased from \$993 to \$1,427 (this \$1,427 figure is but 86.6 percent of the average U.S. per capita income, and admittedly the standards of living and income are below those existing in the United States); unemployment rate decreased from 12.1 percent to 10.8 percent; and the labor force increased from 769,000 to 827,000.

Hence, I conclude there is nothing in this record which establishes that the Puerto Rican economy requires special and favored treatment. Accordingly, I see no justification in this record to grant excepted status to Puerto Rican cargo and therefore concur in the examiner's conclusion that this trade should be assessed on the same combination man-hours and tonnage basis as is regularly provided in the agreement for containership, ro-ro and other carriers in other trades. Puerto Rico already receives special tax, tariff, and other advantages from the Federal Government. To the extent its economy requires additional subsidy or special treatment, if any, such special treatment should be provided directly and openly by the Congress rather than being provided indirectly by this agency in an uncontrolled form of hidden subsidy (reduced freight expenses). Granting excepted status constitutes a laxity in fiscal integrity to which I do not subscribe. It is to be

remembered also that products of Puerto Rican labor are in competition in the United States with products of our domestic labor market. To the extent that Puerto Rico is favored here, then to that extent our domestic labor is prejudiced.

It is also to be borne in mind that to the extent we allow excepted status to cargo moving in our purely domestic trades we are thereby shifting such excepted costs to our already overburdened foreign trade.

In my opinion, the record in this case discloses no basis for granting excepted status to any domestic cargo save for cargo in the coastwise and intercoastal trades where the ability to meet competition from rail and trucking carriers is critical to survival of any waterborne trade. Hence, I would reject excepted status except in respect to the coastwise and intercoastal trades. Other than cargo moving to Puerto Rico, the volume of cargo moving between New York and our non-contiguous trades and territories is nominal.

Automobiles. I would assess all automobiles, including those in the Puerto Rican trade, on a weight-ton basis.

Newsprint. I would establish a formula on a weight and/or measurement basis which will achieve the same relative assessment as the assessment on automobiles. I would accept the basis proposed at page 281 of this report, but only if it achieves my objective. Neither newsprint nor Wobtrans are innovative operations. Both are highly productive operations and for this reason should be assessed on a comparable basis.

In all other respects I concur with the majority. I do so, however, on the assumption and belief that *all* members of the New York Shipping Association are in fact either "common carriers by water" (or shipping agents acting as the alter ego for common carriers) or "other persons subject to this Act"—that is to say that the stevedoring companies and other noncommon carriers which are members of NYSA are "other persons subject to this Act" in that they are companies in fact carrying on the business of forwarding or furnishing wharfage, dock, warehouse, or other terminal facilities in connection with a common carrier by water. If my assumptions and beliefs were proven ill founded, I would have serious and fundamental problems concerning our jurisdiction over this agreement under section 15, for the simple reason that section 15 by its express terms refers to filing and approval only of agreements between common carriers by water and other persons subject to this act—not to filing and approval of agreements between common carriers by water, other persons subject to this act, and strangers to this act (i.e., "mixed membership" agreements which include persons who are neither common carriers nor "other persons").

I have given serious consideration to Wobtrans' suggestion that I recuse myself on the basis of my prior association and actions while on the board of directors of PMA at the time when the Pacific Coast Mech cost allocation formula was adopted in 1961. At oral argument herein I indicated my then view that my prior PMA association and actions should not and did not preclude me from deciding the instant case with impartiality and objectivity. Further reflections have not caused me to alter my conclusion. The easy way out, both in respect to my workload and in respect to eliminating this possible ground for appealing from this report, is to recuse myself, but I conclude that such action is neither necessary, desirable, nor advisable.

[SEAL]

(S) FRANCIS C. HURNEY,
Secretary.

15 F.M.C.

FEDERAL MARITIME COMMISSION

DOCKET No. 69-57

AGREEMENT No. T-2336—NEW YORK SHIPPING ASSOCIATION
COOPERATIVE WORKING ARRANGEMENT

Nos. 71-2, 71-8, 71-26, AND 71-34

TRANSAMERICAN TRAILER TRANSPORT, INC., SEATRAN LINES, INC.,
DANIELS & KENNEDY, INC., CHANDRIS AMERICA LINES, INC., GREEK
LINE, INC., HOME LINE, INC., INGRES LINE

v.

THE NEW YORK SHIPPING ASSOCIATION, INC.

ORDER

The Federal Maritime Commission instituted this proceeding to determine whether we should approve, disapprove or modify a certain assessment agreement adopted, in accordance with the bylaws of, and by the membership of, the New York Shipping Association, Inc. (NYSA), and the Commission having this date made and entered its supplemental report on reopened proceeding and on consolidated proceedings adopting the examiner's initial decision therein (except as to certain modifications of the subject agreement), which report and initial decision are made a part hereof by reference;

Therefore, it is ordered, That pursuant to section 15, Shipping Act, 1916, agreement No. T-2390, as modified herein, is approved effective October 1, 1969.

It is further ordered, That NYSA within thirty (30) days from the date of service of this order, submit to the Commission a report containing the manner and method adopted by NYSA to accomplish the adjustments in the assessments as are made necessary by the terms and conditions of the approval of T-2390 granted herein.

By the Commission.

[SEAL]

FRANCIS C. HURNEY,
Secretary.

FEDERAL MARITIME COMMISSION

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DANIELS & KENNEDY, INC., CHANDRIS AMERICA LINES, INC., GREEK
LINE, INC., HOME LINE AGENCY, INC., INCRES LINE

v.

THE NEW YORK SHIPPING ASSOCIATION, INC.

Agreement No. T-2390 of the New York Shipping Association, providing an assessment formula to meet certain obligations in collective bargaining agreements with the International Longshoremen's Association, AFL-CIO, when subjected to certain modifications, found not to be unjustly discriminatory nor unfair as between carriers, shippers, exporters, or importers, nor to be otherwise unlawful in violation of the Shipping Act, 1916. Agreement No. T-2390, as modified herein, approved.

Alfred Giardino, C. P. Lambos and Donato Caruso for respondents, the New York Shipping Association and its members.

Edward D. Ransom for intervener, the Pacific Maritime Association.

Stanley O. Sher, Alan S. Davis, and Joseph Adams for interveners, States Marine International, Inc., Isthmian Lines, Prudential-Grace Steamship Co., Atlantrafik, Barber Lines, Blue Sea Line, Concordia Line, Hellenic Lines, Hoegh Lines, Meyer Line, Nedlloyd Lines, and Norwegian America Line.

Ronald A. Capone, John Williams and Russel T. Weil for intervener and complainant, Transamerican Trailer Transport, Inc.

Neal M. Mayer and Marvin J. Coles for intervener and complainant, Seatrain Lines, Inc., and for complainants, Chandris America Lines, Inc., Greek Line, Inc., Home Line Agency, Inc., and Incres Line.

Gerald A. Malia and Paul J. McElligott for intervener, Sea-Land Service, Inc.

Alan F. Wohlstetter for interveners, the United Fruit Co. and Wallenius Line.

Herbert Rubin, Philip Elman and Cecelia H. Goetz for intervener, Wolfsburger Transport-Gesellschaft m.b.H.

Joseph F. Kelly, Jr. for complainant, Daniels & Kennedy, Inc., and for intervener, the Madden Corp.

Walter E. Maloney and Bradley R. Coury for interveners, American Export Isbrandtsen Lines, Inc., Atlantic Container Line, Dart Steamship Co., Moore-McCormack Lines, Inc., Hamburg America Line, and North German Lloyd.

Robert M. Vorsanger and Frederick M. Porter for interveners, American Sugar Co. and the American Sugar Refining Co. of New York.

William Warner for intervener, Wilford & McKay, Inc.

William F. Giesen for interveners, Universal Terminal & Stevedoring Corp., International Terminal Operating Co., Inc., Pittston Stevedoring Co., Inc., John W. McGrath Corp., Bay Ridge Operating Co., Inc., Nacirema Operating Co., Inc., and Northeast Stevedoring Co., Inc.

Samuel H. Moerman, Arthur L. Winn, Jr., and F. A. Mulhern for intervener, the Port of New York Authority.

Mario F. Escudero, Dennis N. Barnes, Edward Aptaker and Robert A. Peavy for intervener, the Commonwealth of Puerto Rico.

Norman D. Kline and Donald J. Brunner as hearing counsel for the Federal Maritime Commission.

INITIAL DECISION OF CHARLES E. MORGAN, PRESIDING EXAMINER¹ ON REOPENED PROCEEDING AND ON CONSOLIDATED PROCEEDINGS

All of the subject proceedings, including the reopened investigation in No. 69-57, and the four complaints against the New York Shipping Association (NYSA), are concerned with the lawfulness of the assessment agreement (No. T-2390) of NYSA, and the proper manner of implementing this assessment agreement. The assessments under this agreement are for the purpose of raising the moneys for the so-called fringe benefit obligations of NYSA to the longshoremen of the port of New York, specifically the benefits of pensions, welfare and clinics, guaranteed annual income (GAI), shortfall of hours worked, and administrative expenses of NYSA. The agreement (No. T-2390) expires September 30, 1971.

The background situation largely has been detailed in the prior initial decision of the presiding examiner served on August 13, 1970,

¹ This decision became the decision of the Commission June 9, 1972.

and in the Federal Maritime Commission's decision served on November 20, 1970. These two decisions should be read as part of the following decision. In addition to the reopened issues, there are several new issues added to the old proceeding by the new complaint proceedings.

On December 4, 1970, NYSA petitioned for reconsideration of the Commission's report and order served November 20, 1970, and the Commission on December 11, 1970, granted reconsideration of its treatment of the Alaskan and Hawaiian trades was denied, and these two trades are no longer in issue. The Commission on March 11, 1971, reopened No. 69-57, and said it did so in order to reevaluate its treatment of the Puerto Rican trade. Reconsideration of the treatment of the Alaskan and Hawaiian trades was denied, and these two trades are no longer in issue. The Commission on March 11, 1971, reopened No. 69-57, and said it did so in order to reevaluate its treatment of the many and varied interests of the participants in this proceeding. Specifically, the Commission said it would consider reevaluating its treatment of the Puerto Rican trade, and its treatment of automobiles, trucks, and buses. The parties were directed to provide alternative proposals, backed by arguments, which could provide more equitable solutions to the issues herein. The proceeding was ordered to be expedited.

Hearing on the consolidated proceedings was held, and as in the prior proceeding, direct evidence was received mainly in the form of written statements and exhibits, with the oral testimony largely cross-examination. The record consists of 4,429 pages of transcript, 152 exhibits, and voluminous briefs and reply briefs.

When the original hearing herein started,² the assessment agreement in issue was No. T-2864 which provided a tonnage basis of assessment. The breakbulk carriers, which are the majority numerically of NYSA, favored then, and still favor, the tonnage only basis of assessment, because among other reasons they handle relatively few tons of cargo per man-hour of longshore labor. There is much logic to this tonnage basis of assessment, because revenues are earned on the basis of tons carried, and freight tariffs prescribe rates and charges on the basis of tons freighted. Contrariwise, the containership carriers generally favor a man-hours of labor basis of assessment because they use fewer man-hours of labor per ton of cargo freighted. There is also some logic in assessments on a man-hours basis inasmuch as labor is paid on hours worked. Tariff rates and charges are not related to longshore hours worked, nor are revenues of the ocean carriers related to longshore

² No. T-2890 was put into the record on the third day of hearing.

hours worked. Therefore, on a dollars and cents basis, which is what these proceedings are all about, the most logical basis of assessment must be related to dollars of revenue and therefore to revenue tons of cargoes handled, rather than to longshore hours.

In the future, if not in the present or in the next few years, NYSA assessments of necessity will have to be based on tons freighted, because unless a carrier receives revenues, it will not be able to pay assessments needed for labor benefits. In other words, no ocean carrier which goes out of business can pay fringe benefits to longshore labor. Likewise, if a certain ocean carrier has not gone out of business, but is losing cargoes, this carrier will be less able to pay fringe benefits. The final corollary in this reasoning is that the ocean carrier which is increasing its business, or handling more cargoes, will have to pay a greater share of the fringe benefits.

The last statement is true, because it matters not to a longshoreman laborer who is entitled to GAI benefits or who has earned his pension that an ocean carrier has gone out of business or that an ocean carrier has recently entered into an ocean trade, but what matters is that the laborer feels that he deserves his GAI or his pension *from the industry* as a whole, and if some ocean carriers have left the business the remaining ocean carriers including the new carriers must pay his GAI or pension, and other fringe benefits.

All of the members of NYSA unanimously recognized that the old man-hours type of assessment was outmoded and should be discontinued. By a resolution on October 1, 1968, they unanimously agreed that the man-hours basis should be discontinued and that a new system of assessment would take effect as of that date. Agreement on a new system was slow to be realized and in fact there has been no unanimous agreement on any new system of assessments. The agreement that has had the most support nearest to unanimous support has been No. T-2390.

The International Longshoremen Association, AFL-CIO (herein called the ILA or the union) has been continually looking over the shoulders of NYSA with a substantial interest in NYSA's assessment agreements. As long as the union is paid according to its labor contract for its fringe benefits, it supposedly would have no direct concern with the methods of assessment of the members of NYSA, but the union has the continuing interest of being assured that sufficient assessments are being collected by NYSA from its members to pay for the fringe benefits.

The union at the time of the ratification of its 1968-71 labor contract, and later, recognized that the man-hours burden on the break-

bulk carriers segment of the NYSA industry should be eased. When the first year of this contract ended on September 30, 1969, the union took a stronger and more insistent position and in effect said:

You told us during the negotiations that you were going to make your own allocations, that when we raised the issue of what we considered to be necessary protection for breakbulk carriers that you would take care of that reallocation among yourselves and we should let you do it.

However, for the entire first year of the 1968-71 contract, and for part of the second year of the contract, the old man-hours basis of assessment was continued. This was because of the difficulties in agreeing on the new basis. It was not until sometime after the Commission on March 11, 1970, gave its conditional approval of agreement No. T-2390 that a new method of assessment began to be implemented. The new basis in No. T-2390 was a combination of man-hours and tonnage assessments.

The T-2390 basis was in itself a compromise basis, worked out after many months of hard work, research and soul searching by the assessment committee appointed by NYSA for this purpose. One of the three committee members who agreed to this basis was the president and now the chairman of Sea-Land, which did not oppose T-2390 in the original proceeding, but now opposes it in the reopened proceeding and now supports "excepted cargo" treatment for the three Puerto Rican carriers, of which Sea-Land is the principal carrier tonnage-wise. Sea-Land's present opposition to No. T-2390 is natural since the Commission's report on November 20, 1970, gave the Puerto Rican carriers including Sea-Land very preferential treatment in relation to carriers in other trades.

No. T-2390 was intended by NYSA to treat all carriers alike, and all trades alike, with certain exceptions based upon hardship, such as the intercoastal and intracoastal trades of the continental United States, which are subject to overland competition, and because of such competition were given the so-called "excepted cargo" treatment. NYSA is vehemently opposed to the excepted cargo treatment for the Puerto Rican trade, a trade which in recent years has grown and prospered.

The old type of assessment agreement, with assessments on man-hours only, never has been approved by the Federal Maritime Commission. Such approval was not sought, nor was it believed necessary, under section 15 of the Shipping Act, 1916 (the act), until after the decision of the Supreme Court in *Volkswagenwerk Aktiengesellschaft v. Federal Maritime Commission*, 390 U.S. 261 (1968).

Thus, we have a situation, where assessments by NYSA have been made in the past on both a man-hours basis, and more recently on a combination of man-hours and tonnage, but never with any final administrative approval as agreements or cooperative working arrangements subject to section 15 of the act.

In the past when there were no containership carriers, and when cargoes generally were handled in the old-fashioned breakbulk method, it was fair to all the carriers to not only pay wages, but also fringe benefits on an hourly basis. But, times have changed.

There are two key words in this report. These words are "tons" and "hours." Almost literally reams of figures and statistics have been presented in these proceedings, but in looking at any of the statistical conclusions, we must determine whether they are based on "tons" or on "hours." Some credibility must be given to both types of statistics, but overall the "tons" must be considered to be entitled to the greater weight in reaching a just conclusion to the assessment problem herein.

"Hours" was the key in the past. "Tons" will be the key in the future. In the present a combination of tons and hours is the key. Agreement No. T-2390 is a combination of tons and hours. It places some of the assessment costs on a man-hours basis, and some on a tons basis. In other words it is a compromise solution.

Genuine and equitable compromises are hard to come by in these proceedings. The Commission as late as July 22, 1971, when it denied a motion to certify the record to it for decision, also reiterated its request, made previously when it reopened the proceeding, that the parties offer "alternative proposals" for solution of this multiparty dispute. The Puerto Rican carriers have failed to offer any compromise. They insist on the man-hours expected cargo basis. Sea-Land has backed off from its former acceptance of the T-2390 compromise basis.

The Puerto Rican carriers adhere to their use of "hours," and in effect fail to acknowledge that they have an industry obligation to the longshoremen in the port of New York. TTT, a relatively new carrier in the ocean trade in effect says, Don't blame me for any shortfall in hours worked by the longshoremen, and praise me because I have added a second ship and am adding more work hours. But TTT would like to forget that it, Sea-Land and Seatrain, the carriers in the Puerto Rican trade, do not have to pay \$4 a ton royalty on their containerized traffic instead of \$1 a ton. The \$4 a ton demand of the longshoremen at the time of the negotiations for the 1968-71 labor contract was dropped by the longshoremen in return for other labor

contract benefits, and now TTT, Seatrain, and Sea-Land say we are not responsible for shortfall and GAI, which are part of the labor contract package. But these three Puerto Rican carriers gladly took the benefit of the *industry labor contract* insofar as these three carriers escaped the \$4 a ton container royalty payment, so they cannot in all equity escape their fair share of the *industry labor contract* obligations as to shortfall and GAI if they are to accept the container benefits. The Puerto Rican carriers conveniently forget that dropping the \$4 a ton container royalty helped them greatly and was relatively of no benefit to breakbulk carriers.

The \$4 a ton royalty was not the only demand of the ILA which would have hurt the containerized Puerto Rican carriers. The ILA demanded that all containers be stuffed and stripped by ILA labor. The industry labor contract dropped this demand, but again it was offset by the NYSA industry's agreement to accept 40 million man-hours as a basis of calculating pensions and welfare and clinic payments. The Puerto Rican carriers again would conveniently forget that the breakbulk carriers gained little or nothing relatively by the dropping of the stuffing and stripping demand from the labor contract. Furthermore, the Puerto Rican trade is practically 100 percent containerized, that is, all the ships are full containerships or are ro-ro ships with high productivity in tons of cargo handled per longshore labor hours. Other trades are partially containerized and get some benefits from the dropping of the demands for a \$4 royalty per ton on containerized cargo and the dropping of the demands to stuff and strip all containers. The carriers who got the greatest benefit out of the labor contract in respect to the above demands are the Puerto Rican carriers, but they would on the excepted cargo basis escape the costs of the 1968-71 contract to a much greater degree than the foreign trades which must pay on the combination hours-tonnage basis, including the containership carriers in the foreign trade.

The NYSA industry blunted the demands of the ILA against the containership carriers by accepting the ILA's demands for increased pensions, earlier retirements, GAI, and the minimum dollar amounts for contribution to the pension, welfare, and clinic funds. Increased hourly wages, and increased vacations and holidays paid by the hour, were a big part of the price of the 1968-71 contract. Who pays this price on the hourly basis? Not the high productivity containership carriers, not the high productivity automobile carriers, but the labor intensive breakbulk carriers. In other words, the increase in wages, vacation and holiday payments passed on only a relatively light burden to the Puerto Rican carriers and others with high productivity labor.

The Puerto Rican carriers and others with high productivity would like to forget history in that in the past when all were paying NYSA assessments on the same hours-only basis, those with high productivity were being underassessed for their share of fringe benefits. In the future the Puerto Rican carriers would continue to be underassessed if they paid assessments only on a man-hours basis, and not on tonnage.

Of course the Puerto Rican carriers, as well as containership operators in other trades, have made relatively high investments in their ships, cranes, containers, and other shoreside equipment, and we must not penalize innovation. Nevertheless to the extent that there are hours in the No. T-2390 combination man-hours and tonnage formula, innovation is aided in that these high productive carriers pay less per ton of cargo than do the labor intensive carriers.

Furthermore, the investment in ships and shoreside equipment of the containership operators is reimbursed in savings in faster turnarounds of the ships with the fewer days in port, and the resulting higher tonnages of cargoes handled on yearly bases.

The principal plea of the Puerto Rican carriers has been that the Commonwealth of Puerto Rico and its economy must be helped. That may be true, but it does not follow necessarily therefrom that the Puerto Rican carriers must in effect be subsidized in these proceedings by unduly low assessments to NYSA for longshoremen's fringe benefits.

The Commonwealth of Puerto Rico may be subsidized by the Government of the United States by laws other than the Shipping Act, by means such as no Federal income taxes or other measures.

It does not follow that the Puerto Rican carriers should be placed in the "excepted cargo" category because it is not the duty of this Commission to equalize economic differences between the several States of the United States or between the States and a territory. In fact, to attempt to equalize such differences may result in unlawful discrimination, preference, and prejudice between carriers and between ports. There appears little equity in this proceeding which compels aiding the Puerto Rican carriers. On the one hand, they say, and the testimony shows, that assessing the Puerto Rican carriers on the basis of T-2390 without any excepted cargo status for the Puerto Rican trade will possibly result in increased rates of 4 or 5 percent. On the other hand, these same Puerto Rican carriers are now seeking rate increases in their Atlantic coast Puerto Rico trade of 18 percent and 28 percent depending on the type of cargo, trailerload or less-than-trailerload. The Puerto Rican carriers are contending that the latter increases of 18 percent and 28 percent are justified and won't hurt

the Puerto Rican economy, but that the 4 or 5 percent increase which may result from NYSA assessments is unjustified because it will hurt the Puerto Rican economy.

The presiding examiner, trying to achieve practical justice and in the interest of obtaining an equitable compromise, in his prior initial decision decided that the northbound segment of the Puerto Rican trade should be granted "excepted cargo" status. The northbound segment is about 30 percent or less tonnage-wise and probably less revenue-wise. It was in need of some stimulation, but not the southbound segment of the Puerto Rican trade, which has been and continues to enjoy substantial increases in recent years.

Now, on more mature reflection, and having the benefit of the evidence in the reopened hearing, including the relatively minor effect which a 4 or 5 percent increase in transportation costs might have on prices of consumer and other products in Puerto Rico, there appears on this entire record no good or sufficient reason for treating the Puerto Rican trade differently from any of the foreign trades of the port of New York, and in fact if any different treatment were justified on the basis of ILA demands against container carriers, it would appear that the Puerto Rican trade should pay higher assessments than those paid by other trades which are only partially containerized. All in the industry knew that there would be much less hours than 40 million worked and that there would have been a shortfall of hours, but this was a convenient way to calculate the dollars and cents to be paid for pensions and welfare and clinic benefits. The labor contract might have stated the pension obligation in dollars only without any reference to hours worked, and the contract also could have stated the obligation for welfare and clinics in dollars.

If these pension and welfare and clinic obligations had been stated only in dollars, then there could have been less emphasis on that mean word, "shortfall." The hours were specified in the contract so as to provide a minimum dollar amount of pensions, and of welfare and clinic obligations. The point of this discussion is that the ILA intended and got by contract its dollar amounts for pensions, and welfare and clinics, and these dollar amounts were industry obligations to be paid by the NYSA industry, including the containership segment of the industry which in the union's view had to take a reallocation of assessments so as not to unduly burden the breakbulk carriers segment of the industry.

And why would not the union have taken this view, when a new type of employer (the containership and ro-ro operator) was providing less man-hours of employment per ton of cargo than the older type of employer of longshore labor, the breakbulk ship operator?

It bears repeating and repeating that the matter of "shortfall" has been greatly overemphasized as an excuse or reason for the "excepted cargo" treatment of Puerto Rico. Shortfall is only one element of the labor contract and there were many other elements. Besides the demands for \$4 a ton container royalty, stuffing and stripping all containers on the piers by ILA labor, there was a demand that all containers be unloaded from vessels before a single container could be loaded. This was contrary to the existing practice of simultaneous loading and unloading of containers and would have cut productivity of the handling of containers in half. The containership carriers benefited by the dropping of this demand in the labor contract, not the breakbulk carriers. There was another demand which would have increased the gangs of longshoremen employed on containerships. In summary many of the union's demands were demands against the containership segment of the industry.

Parenthetically, as general background of NYSA-union relations, some mention is appropriate of the prior-day-ordering system (P.D.O.). The NYSA industry, in the same 1968-71 labor contract, not only took on certain obligations, but also obtained certain benefits, including P.D.O., which calls for certain men to work, after having been ordered to work on the prior day. This system was intended in part to alleviate unemployment of longshoremen and thereby to reduce NYSA's obligation for guaranteed annual income payments. Unfortunately, the P.D.O. system has not worked nearly as well as anticipated. Notwithstanding the use of the P.D.O. system, because of its faults or because of lack of union rank and file enthusiasm of checkers or of other personnel in administering the P.D.O. system, apparently, there have been many instances where senior-type longshoremen have not worked and have therefore subjected NYSA to GAI obligations, when at the same time casual-type longshoremen without seniority and without GAI rights have worked. Thus, GAI expenses for the 2 contract years, 1969-70, and 1970-71, have amounted to some considerable millions of dollars more than were anticipated by NYSA when the 1968-71 contract was negotiated. Estimates of GAI for the last contract year, 1970-71, have ranged as high as \$32 million, whereas without experience GAI had been estimated as low as \$15 million.

Man-hours of longshore labor are not a precise figure known trade by trade in the port of New York. The stevedores who directly employ the longshore labor do not necessarily have the information nor is it necessarily their duty or business to determine how many hours, for example, should be allocated to labor of a carrier in its Puerto Rican trade, versus how many hours should be allocated to the carrier's North Atlantic trade, or to other trades. As a result of this situation, no

accurate or complete record exists to this day of the number of man-hours in the Puerto Rican trade. The parties must make, and have made, their best estimates of the situation, and have stipulated certain man-hours, but with the stipulations binding only for this proceeding, and subject to audit, et cetera, for other purposes by NYSA.

TTT is an exception to the above discussion because it operates only in the Puerto Rican trade. Apparently, Sea-Land prior to NYSA's petition for reconsideration had reported to NYSA that Sea-Land's total Puerto Rican tonnage in this 1969-70 contract year was about 1,250,000 tons, and NYSA relied on this reported tonnage, and used the container productivity factor of record, agreed by the parties of 2.54 tons per man-hour, and computed man-hours for Sea-Land on this basis in making its petition to the Commission for reconsideration. But, just prior to the reopened proceeding Sea-Land informed NYSA that its total tonnage in 1969-70 actually was 1,690,835 tons. This difference between the earlier reported tonnage using the container productivity factor of 2.54 tons per man-hour accounts for about 173,000 man-hours inferentially under reported by Sea-Land to NYSA, and in turn under reported by NYSA to the Commission in NYSA's petition for reconsideration. Thus, we obtain a figure of about 941,310 Puerto Rican hours by adding the 173,000 hours to the 768,310 hours reported by NYSA in its petition for reconsideration.

The parties have stipulated 599,604 hours for Sea-Land and between 240,000 and 260,00 hours for Seatrain. Sea-Land maintains records which show direct ship labor, but does not maintain a breakdown of hours of labor by trades for terminal, garage, consolidating, and marine gate labor, and it is necessary to allocate a percentage of hours of labor to the Puerto Rican trade. Seatrain's stevedore, United Terminals, maintains man-hour records by trade for ships' labor, linesmen, and terminal labor, but for the less-than-trailerload and team track facilities, hours of labor are not broken down by trade, and may not be clearly separated between the LTL and team track operations; and allocations were therefore necessary to determine Puerto Rican trade man-hours for Seatrain. The hours of TTT which operates only in the Puerto Rican trade were accepted and stipulated as substantially correct by NYSA.

These Puerto Rican hours for the 1969-70 year, as stipulated for these proceedings were 175,756 for TTT, 240,000 as a minimum figure for Seatrain, and 599,604 for Sea-Land, or a total of about 1,015,360 hours. This figure compares reasonably with the corrected figure of 941,300 hours above. NYSA on brief says that it does not believe that Sea-Land purposely misled NYSA, and likewise states that NYSA

did not as a result purposely mislead the Commission in its petition *for reconsideration in its statement of the Puerto Rican hours.*

Of course, any person in making allocations might unconsciously be affected by the purpose of the statistics. If the tonnages to be reported were to be used for the purpose of calculating dollar assessments, the natural tendency at the time would be for a member carrier not to make allocations in such a manner as to overstate the tonnages. At another time if the tonnage statistics were not any longer the basis of assessments in one trade (assessments having changed from a combination hours and tonnage basis in one trade to an hours basis only), then the natural human tendency of a member carrier in making tonnage allocations might have been to allocate higher tonnages to that trade not assessed on a tonnage basis, and to allocate lesser tonnage to a trade assessed on a tonnage basis.

NYSA had the thankless job of policing itself, that is, of policing its members' estimates of man-hours and tonnages used for making NYSA assessments. No matter what the head of the department of NYSA charged with the responsibility of determining the proper figures for hours and tonnages of NYSA member lines did in executing his duties, nor no matter what his subordinates did, it is natural for any one NYSA member to feel that maybe another NYSA member was reporting inaccurately. The record is convincing that NYSA and Captain Haynes, the NYSA official responsible for the many assessment calculations of NYSA, did their jobs to the best of their abilities under the most trying of circumstances. None of their figures as to tonnage and hours can ever be said to be completely accurate, but the figures appear to be substantially as accurate as is humanly feasible.

This record contains a vast assortment of figures and statistical conclusions, but it must not be allowed to form a smokescreen over the essential facts and issues. In summary the containership and other highly productive carriers obtained great benefits from the 1968-71 labor contract by the elimination of the highly onerous demands of the ILA, which were principally designed to affect these highly productive carriers, and having thus benefited it ill behooves these same highly productive carriers to seek preferential treatment by way of very light assessments per ton of cargo handled.

The emphasis of the Puerto Rican carriers on shortfall and on the increased GAI statistics would through their conclusions amount to statistical legerdemain, and to a mistaken, misleading and mischievous viewpoint of these factors.

If one must rely on statistical showings, then let us look at costs per ton of cargo handled.

For the 1970-71 year, as stated on page 14 of the prior initial decision the excepted cargo rate was calculated to be \$1.84 per man-hour for the fringe benefit assessments (including 75 cents for pensions, 49.5 cents for welfare and clinics, 55.5 cents for GAI, and 4 cents for NYSA support). To the \$1.84 was added 71.9 cents for vacation and holidays, or a total assessment on the man-hours basis of \$2.559.

As of December 7, 1970, because of the increased costs of GAI, (GAI being a flexible cost which could not be precisely estimated, whereas contributions of NYSA to pensions, and welfare and clinics funds were based on minimum dollar obligations and could be precisely predicted because no one expected that the 40 million hours basis for these two fringe benefits would be exceeded), the GAI assessment was increased by NYSA from 55.5 cents to 139 cents per man-hour. This 83.5 cents increase made the total fringe benefit man-hours assessment \$2.675 (\$1.84+\$0.835). This increase of 83.5 cents also made the total man-hours assessment for excepted cargo, including the assessment for vacation and holidays, \$3.394 (\$2.559+\$0.835). This explanation is necessary because some of the parties refer to the amount of \$2.675 and other parties refer to the amount of \$3.394, but both figures are correct, and they depend on whether or not vacations and holidays are included.

Using the \$2.675 figure, excluding vacation and holiday assessments, as of December 7, 1970, the Puerto Rican carriers would be paying fringe benefit assessments of only about \$1.05 per ton of cargo, calculated by dividing the \$2.675 by the agreed productivity rate for containership carriers of 2.54 tons per hour). In truth, TTT admitted a productivity of 3.34 tons per hour, and on this basis it would be paying fringe benefit assessments of 80 cents per ton ($\$2.675 \div 3.34$). NYSA used a Puerto Rican productivity of 2.98 hours per ton, and on this basis the Puerto Rican carriers would pay only 90 cents per ton for fringe benefit assessment as of December 7, 1970.

Contrast the higher payments per ton of other carriers in other trades. When the per ton portion of the combination man-hours-tonnage T-2390 basis was only \$2.23 per ton on January 1, 1971, the other container carriers in other trades would pay \$2.60 per ton for fringe benefits (calculated using the productivity of 2.54 tons per man-hours divided into 98.1 cents per man-hour=37 cents, plus \$2.23 per ton). Similarly, other ro-ro carriers, using a productivity of 3 would pay \$2.54 per ton. The breakbulk operators would pay \$4.02 per ton for fringe benefits, based on the productivity of \$0.52.

The above labor costs for fringe benefits obviously benefit the Puerto Rican carriers and any others on the excepted cargo basis with high productive labor.

Going one step further, which is essential to get the complete picture, one should add the costs of wages, vacations, and holidays, and container royalty, to get total labor costs per ton of cargo under T-2390, and under the excepted cargo basis for the Puerto Rican carriers, using the productivity of 2.98 for the Puerto Rican carriers.

The following chart is illustrative as of January 1, 1971:

Total Labor Costs Per Ton Under T-2390

	T-2390 breakbulk	T-2390 container	Puerto Rico
Wages—\$4.60 per hour.....	\$8.84	\$1.81	\$1.54
Vacation and holiday—\$0.72.....	1.38	.28	.24
Fringe benefits (T-2390 at 98.1 cents per man-hour plus \$2.23 per ton; and excepted cargo at \$2.67 per hour).....	4.02	2.60	.90
Container royalty.....		.28	.28
Total cost per ton.....	14.24	4.97	2.96

The Puerto Rican carriers fare very well under the above total labor cost comparison at \$2.96 per ton under the excepted cargo basis. Even if the Puerto Rican carriers were placed on the T-2390 combination man-hours-tonnage basis, they would fare very well at \$4.97 per ton, compared with breakbulk carriers at \$14.24 per ton.

In order for NYSA to meet its fringe benefit obligations,³ the ton factor in the combination hours-tons T-3490 formula has been increased from time to time, from the original \$1.23 to \$1.73, to \$2.23, and recently to \$3.23 (effective July 5, 1971). With such an increase in the figures in the table next above, the breakbulk carriers would bear total labor costs per ton of cargo of \$15.24, the container carriers in the foreign trades \$5.97, but the Puerto Rican carriers would remain at \$2.96 per ton.

Obviously, the Puerto Rican carriers are underassessed on the above basis. And it is concluded again that they should pay on the same combination man-hours tonnage basis as do container carriers in the foreign trades. Even on this basis, the Puerto Rican carriers' labor costs will be far below the labor costs of the breakbulk carriers and sufficiently so to not discourage continued innovation.

To add insult to injury, Seatrain and TTT are not even satisfied with the excepted cargo basis of \$2.675 per man-hour, and are insisting in their companion complaint proceedings that they should not pay the increased man-hours assessment of 83.5 cents. In other words, they

³ With GAI costs on the increase, early in January 1971, NYSA was obliged to borrow \$5 million, giving its demand note to a New York bank, in order to meet NYSA's fringe benefit obligations. Presumably, the note has been, or is being, paid off.

insist that they are not bound to pay any more than \$1.84 per man-hour for fringe benefits (or no more than \$2,559 per man-hour including the payment of \$0.719 for vacations and holidays). The \$1.84 per man-hour amounts to only about 62 cents per ton of cargo, using the Puerto Rican productivity of 2.98.

Seatrain and TTT insist that NYSA was not authorized by agreement No. T-2390 to increase the hourly payment for GAI beyond the rate of 55.5 cents. These sentiments are echoed by the four passenger line complainants, and in their complaint with lesser emphasis by the two newsprint importers (complainant Daniels & Kennedy, Inc., and intervener the Madden Corp.). These newsprint interests in their briefs emphasize other bases for the relief which they seek.

Seatrain, TTT, and the four passenger lines on brief insist that the terms of agreement No. T-2390 do not allow for any variation in the excepted cargo assessment other than by formal amendment of T-2390. This agreement provided that assessment payments on excepted cargo were to be made on the basis of the man-hour assessment "presently in effect for pension, welfare, clinics, GAI and NYSA administration (but not for shortfall) through September 30, 1970." "Thereafter, there shall be added to such present hourly rates the collective bargaining agreement escalations effective October 1, 1970." "Excepted cargo shall also continue to pay any royalty which may be applicable."

The terms of T-2390 are quite clear insofar as they relate to pension, welfare, and clinics because the present hourly rates in the collective bargaining agreement were precisely stated in that agreement. The same is not true as to GAI, because the collective bargaining agreement provided no set dollar amounts nor no set cents per man-hour amounts for GAI. In contrast, for pensions and welfare and clinics, specific cents per hours were prescribed in the collective bargaining agreement with specific escalations from 1 contract year to the next contract year.

On the matter of GAI, only the guaranteed yearly hours were stated. All regular employees having active seniority status were guaranteed an annual income of 2,080 hours multiplied by the applicable basic straight time.

Thus, by terms of the ILA-labor agreement the dollar amount needed for GAI had to fluctuate from quarter to quarter, depending on the numbers of longshoremen eligible for GAI. As a matter of historical fact the assessment for GAI has fluctuated from time to time during the course of the 1968-71 labor contract. The mere fact that agreement T-2390 is NYSA's means of collecting moneys for the fringe benefit obligations for GAI in no wise made the GAI obligation

a precise amount, nor did it limit GAI to 55.5 cents per hour. While the 55.5 cents per hour may have been in effect as a best estimate of the amount needed to be collected at one time, it was not locked into effect for the duration of the ILA labor agreement, because T-2390 specifically allowed for escalations according to the ILA agreement. Unfortunately T-2390 provided a partially unclear choice of words, insofar as it may have seemed to indicate that the ILA agreement gave specific dollar amounts per hour as of September 30, 1970, and as of October 1, 1970. This was true as to pensions and welfare and clinics, but not true as to GAI, because on neither date did the ILA labor agreement specify GAI in dollars and cents per hour. Some of the complainants would make up this lack of specificity for GAI in the labor agreement by jumping to the specific figure used by NYSA as of October 1, 1970, for GAI. This jump is contrary to the labor contract and contrary to logic and equity.

GAI collected by NYSA has to change as the costs of GAI to be paid by NYSA change. GAI was as low as 12 cents as of September 30, 1968. It was increased from time to time before it became 55.5 cents, and before it became 139 cents, as it is now. At one early time GAI had been as low as 2 cents.

The man-hour assessment for excepted cargo was understood, by both the assessment committee of NYSA and by the members of NYSA as a whole, to include a flexible amount for GAI, and it was understood that the excepted cargo rate would have to be increased to reflect increases in GAI costs from time to time.

It is noted that aside from the parties complaining about the increase in GAI, there are a number of other parties subject to the excepted cargo status (lumber interests, bulk including scrap and sugar, intracoastal and intercoastal) which have not complained about the increase in the excepted cargo rate.

The underlying principle of the excepted cargo category was that such cargo would continue to pay for all benefits except shortfall as if the man-hour method of assessment were still in effect.

In brief the GAI escalations stem from the ILA agreement. The 55.5 cents collected at one time was only an estimate of GAI costs. If the GAI costs actually had gone down, then some reduction of the 55.5 cents would have been made by NYSA, and surely the carriers subject to this payment would have accepted the reduction. Likewise, as the GAI costs have gone up, and the 55.5 cents had to be increased, the carriers must accept the increase, because all of them are parties to the ILA labor contract and are bound by it.

The complaints in these proceedings insofar as they protest the increase in GAI of 83.5 cents are without merit.

Bananas is a noncontroversial subject at this stage of the proceedings. It has been stipulated by NYSA and United Fruit Co. that the T-2390 tonnage assessment for bananas should be fixed at 55 percent of measurement without further qualification. Such agreement was reached in view of the administrative difficulty in having to determine on a ship-by-ship basis whether 55 percent or the excepted cargo rate is the greater because of the necessity in the case of certain carriers of allocating terminal labor, maintenance men and other crafts between banana and other general cargo operations, and in order to permit uniformity of assessment as between all carriers in the port handling bananas. Accordingly, it is concluded that the tonnage assessment for bananas under the man-hour/tonnage formula applied under agreement No. T-2390 shall be fixed at 55 percent of a measurement ton without further qualification or reference to excepted cargo status.

Automobiles, trucks, and buses are treated by the Commission in its report of November 20, 1970, in accordance with the basis proposed by NYSA in agreement No. T-2390, which is 20 percent of the cubic measurement of the vehicles under the combination man-hours-tonnage assessment formula. The record as reopened remains essentially unchanged regarding automobiles.

Wolfsburger Transport (Wobtrans) representing Volkswagen automobile interests asks that automobiles be placed in the excepted cargo category so that rough justice would be done, or preferably that automobiles be placed under the man-hours-tonnage formula but with the automobile tonnage definition changed from 20 percent to 5.85 percent of cubic measurement. Wallenius continues to ask that automobiles be placed in the excepted cargo status. Wallenius also asks that automobiles which are transported by Wallenius be given no less favorable treatment than is accorded automobiles carried by the Puerto Rican carriers. Some of the arguments of the automobile interests parallel the arguments of the Puerto Rican carriers. The automobile carriers say that they are not responsible for shortfall and they are not responsible for increased G.A.I. But, the automobile carriers go further, and say that the Puerto Rican carriers benefited greatly from innovation and therefore from the dropping of the demands to stuff and strip containers, et cetera, but that the automobile carriers did not benefit at all or very little in this respect. The automobile carriers aver that the need for the new combined man-hours-tonnage basis of assessment largely was brought on by containerization, and is justified by the container revolution, but add that there is no container revolution in the shipload handling of automobiles. The fact is that the automobile handling revolution is ancient history.

The automobile carriers after enjoying extremely low assessments for many years now are experiencing increased costs per automobile for fringe benefits. These increases might now be unlawful but for the fact that automobiles were very much underassessed in the past, and are relatively lightly assessed if not underassessed at present. The automobile carriers conjure up the same old man-hour comparisons but generally avoid tons comparisons.

Again we must remember that freight revenues are based upon tons of cargo and not upon man-hours of longshore labor, and we must remember that the union expects to obtain its fringe benefits from the carriers hauling the cargoes, and not from the carriers leaving the trade. Again, it falls upon those carriers remaining in the trade and those with increased tonnages to pay the increased benefits, including benefits not only brought about by the container revolution, but also brought about by inflation and by an enlightened viewpoint of management as to what is fair in the way of increased benefits due the laboring man.

The productivity of the automobile carriers in tons per man-hour is very substantially greater than the high productivity of the containership carrier. So, naturally if automobiles are assessed for fringe benefits on the excepted cargo man-hours basis only, the automobile carriers will be paying very low fringe benefit assessments. To share in their responsibility as part of the NYSA industry, the automobile carriers must pay fringe benefits at least in part on a tonnage basis.

About 8.94 measurement tons of Volkswagens are unloaded per man-hour from life-on/lift-off vessels, and about 17.9 measurement tons of Volkswagens are unloaded per man-hour from ro-ro vessels. On the 20 percent of measurement tons basis, this means that about 1.8 assessable tons per man-hour are unloaded from lift-on/lift-off vessels, and about 3.6 assessable tons per man-hour are unloaded from ro-ro vessels.

On the January 1, 1971, basis of \$2.23 per ton for the tonnage factor in the combination formula, automobile lift-on/lift-off carriers would pay fringe benefits of \$2.75 per assessable ton, and automobile ro-ro carriers \$2.49 per assessable ton compared with \$4.02 per assessable ton for breakbulk carriers, \$2.60 per ton for containership carriers in the foreign trades, and \$0.90 per ton for the Puerto Rican carriers if they were assessed on the excepted cargo basis.

On the July 5, 1971, basis of \$3.23 per ton for the tonnage factor in the combined formula, the fringe benefits assessments would be \$3.75 for the automobile lift-on/lift-off carriers, \$3.49 for the automobile ro-ro carriers, \$5.02 for the breakbulk carriers, and \$3.60 for the containership carriers in the foreign trade.

If wage, vacation and holidays and container royalty costs are added to the fringe benefit costs, the totals per ton would be \$15.24 for breakbulk carriers compared with \$6.70 for lift-on/lift-off automobile carriers and \$4.96 for ro-ro automobile carriers. To the extent that the ILA labor agreement increased wages and vacation and holiday costs instead of increasing fringe benefit costs, the automobile carriers benefited and the breakbulk carriers suffered. It must be remembered that automobiles will be assessed on the T-2890 basis at only 20 percent of measurement tons, whereas the assessable ton for other cargoes is the so-called stevedore or revenue ton, which is the ton of 2,240 pounds or of 40 cubic feet whichever is greater. Overall it is clearly apparent that the automobile carriers will not be overassessed on the basis of the combination man-hours and tonnage formula of T-2890.

Newsprint was not in issue in the prior proceeding. Newsprint is the sixth largest inbound commodity of the port of New York. In the year 1970, about 809,000 tons of newsprint were shipped into the port of New York by water. For the past 6 years in each year Daniels & Kennedy, Inc. (D & K), handled more than 280,000 long tons of newsprint. Tonnage of D & K has increased recently, from 241,055 long tons in the contract year 1969-70 to 255,124 long tons in the contract year 1970-71, the latter based on 7.5 months actual and 4.5 months estimated. Newsprint for D & K is shipped in large rolls about 60 inches high with a radius of 40 inches, weighing about 1,740 pounds per roll. Three rolls are picked up in a single lift from the hold of a ship and deposited on the pair. On D & K newsprint generally four holds of a ship are worked simultaneously by four gangs of ILA longshoremen of about 17 men in each basic gang. D & K employs other personnel not assigned to particular gangs. D & K has a productivity for its ILA ships unloading labor of about 3.29 long tons per man-hour. The productivity of D & K converted by a 1.4 density factor would be 3.9 assessable tons per man-hour.

The newsprint rolls of D & K are placed on conveyors by ILA labor on the wharf. The conveyors carry the rolls into a terminal warehouse owned and operated by the publisher of the New York Daily News. No ILA labor is employed after the rolls are placed on the conveyors. D & K is not the employer of any person in the warehouse. D & K thus does not use any ILA terminal labor, but only uses ship ILA labor. Many more men would be employed by a breakbulk carrier to handle the same tonnage, because the breakbulk carrier uses both ship and terminal ILA labor.

NYSA argues that even a containership or ro-ro operator would employ more ILA labor because they also use terminal ILA labor. D & K uses its ILA labor only a few days at a time and these laborers must

be employed by other members of the NYSA industry at other times, or possibly impose GAI obligations on the industry. In other words, we have the same situation referred to in the prior initial decision, which is that longshoremen are industry employees, their vacations, pensions, welfare, and clinic costs, and GAI are paid for by the industry, and the labor contract provisions and fringe benefit obligations must be dealt with on an industrywide basis, rather than on a carrier-by-carrier basis.

The Madden Corp., an intervener, is the exclusive agent of the Finnish Paper Mill Association, for the importing and marketing of newsprint and other paper products from Finland to the United States. The newsprint imported by Madden includes that used for magazines. Rolls weigh from 1,800 to 3,000 pounds and are lifted from the holds of ships in a single lift and deposited on the pier. Madden's rolls of newsprint are then generally stored in adjoining warehouses by ILA labor which is part of the gangs used to discharge the Madden newsprint. There has been no substantial change in the method of handling Madden's newsprint for 30 years. Productivity for Madden is about 2.1 long tons per man-hour. Madden imports have decreased from 64,700 tons in 1968 to 44,943 tons in 1970. Newsprint used for magazine printing imported by Madden is mostly destined for inland points and has been diverted to some extent from New York to other east and gulf ports. It is estimated that 15,000 tons will be diverted during the calendar year 1971.

D & K also brings up the matter of diversion of its newsprint or of possible diversion from the present method of ocean steamship to a combination truck-rail movement from Baie Comeau, Quebec, Canada, which is the principal source of D & K newsprint. Since April of 1971, some newsprint has been moved from Baie Comeau about 90 miles, and then has been transferred to rail cars for movement to New York City. All of the newsprint handled by D & K comes from the north shore of the St. Lawrence River. There is no rail service direct from Baie Comeau, nor has there been any. The continued increase in cargoes handled by D & K by ocean carrier in the last 2 contract years indicates that the danger of diversion of D & K's newsprint is minimal. The Madden Corp. recently entered a long term lease for a pier on the Jersey side of the Hudson River, and this would indicate that Madden plans to continue to use the port of New York for its imports.

The principal issue raised by the newsprint interests is that the assessments under No. T-2390 will greatly increase percentagewise the prior assessments of the newsprint interests for fringe benefits. The newsprint interests assume that their past assessments on the man-

hour basis were fair, when in fact they were greatly underassessed in the past.

Under T-2390, the newsprint interests fare relatively well on the basis of their fringe benefit assessments per assessable ton. Exhibit 106 offered by the newsprint interests shows that D & K newsprint under the old man-hours assessment (prior to the present 1968-71 contract) at 93.1 cents per man-hour, using a D & K productivity factor of 3.29 was assessed at only 28 cents per ton and that it would be increased 796 percent to a new rate of \$2.51 per ton under the T-2390 combined man-hour/tonnage formula using the \$2.23 per assessable ton tonnage factor. But look at the comparable figures shown in exhibit 106 for the breakbulk carriers, which are \$1.79 prior to the 1968-71 contract and \$4.02 per ton under the T-2390 basis using the \$2.23 tonnage factor. The dollars and cents increase for both the newsprint and the breakbulk carrier was the same, \$2.23 per ton. Costs of doing business are based to some extent on percentages, but what is most important is the dollars paid out. Again considering all labor expenses, including wages, vacations, and holidays, the breakbulk carriers bear an even higher overall burden under the terms of the 1968-71 ILA labor contract because of their low productivity, and the newsprint carriers are comparatively well off because of their higher ILA labor productivity. It is concluded that no good reason has been shown for giving any special treatment in fringe benefit assessments to the newsprint interests.

On opening brief hearing counsel, heeding the desire of the Commission for alternate solutions, have proposed their compromise solution for treatment of the assessments problem relative to the Puerto Rican trade. Hearing counsel propose that the excepted cargo treatment of the Puerto Rican trade be modified so that the trade will contribute a fair share of GAI costs, but leaving the Puerto Rican trade to pay pensions, welfare, and clinics, and NYSA administration at the man-hour excepted cargo basis with no assessment for shortfall. This is a complicated proposal apparently based upon much work and consideration by hearing counsel, but it is apparently unacceptable to any of the parties. Upon reply brief, hearing counsel have proposed a weight-ton assessment as a solution to the automobile issue, and "excepted" status for all costs but GAI for newsprint. The parties have not had the opportunity to comment upon these last proposals, and they have not asked permission to comment on them.

Expedient handling of this proceeding does not permit detailed comments regarding these proposals made on brief by hearing counsel. However, from an overall viewpoint, it is concluded that the only compromise solution with the most substantial merit is the T-2390 compromise.

It must be remembered that the first proposed agreement No. T-2336, approved by the membership of NYSA and submitted to the Commission, would have assessed all the shortfall of hours under 40 million against only the tons of cargo handled in containers, including cargoes in every type of vessel, including, but not limited to roll-on/roll-off, side port and Lash vessels; with the caveat that any shortfall in hours caused by strikes should be assessed against all cargoes (in containers and otherwise), excluding cargoes in the domestic trade of the continental United States. This No. T-3490 formula was not implemented, but it hardly was one favorable to the containership carrier.

Nor was the second agreement, No. T-2364, approved by the NYSA membership and submitted to the Commission, favorable to the containership carrier, because it was based entirely on a tonnage assessment.

No. T-2390, which was the third basis submitted to the Commission, was a reasonably fair compromise agreement, and as modified with respect to cargoes of bananas, the Alaskan and Hawaiian trades, is approvable under the standards of the *Volkswagen* case above.

The present (NYSA) proceedings are not general freight rate cases, and in fact they are not rate cases at all. In the present No. 69-57 et al. cases, there is absolutely no need shown for any special treatment of the Puerto Rican carriers.

Now, let us turn to the Commonwealth of Puerto Rico. It is not directly concerned herein, but indirectly is concerned that in time the Puerto Rican carriers will increase freight rates in the Puerto Rican trade. For this concern about freight rates, we can, and we should, defer to another proceeding which is directly concerned with the freight rates. This other proceeding is being heard by another presiding examiner, on another record (involving consolidated docket Nos. 71-30, 71-42 and 71-43). In this other consolidated proceeding, the Puerto Rican carriers and the Commonwealth can paint the entire picture necessary to a just decision relative to Puerto Rico, including the effect of the Puerto Rican carriers proposed 18-28 percent rate increases.

At one time, the effective date of our approval of agreement No. T-2390 was a big issue, but it may not any longer be quite so important from a practical standpoint. We approved in our prior decision⁴ the effective date of October 1, 1969, for No. T-2390. However, it is difficult to make assessments effective retroactively, particularly where

⁴ Both the presiding examiner's prior initial decision and the Commission's decision of November 20, 1970.

carriers have gone out of business; and most assessments have been made by NYSA effective for future applications. With the passage of time, we are nearing the expiration date of No. T-2390, which is September 30, 1971, and there is little or no room for NYSA to make changes in the assessment basis for future application. Thus, even though the Puerto Rican carriers do not win "excepted cargo status" under this decision, by the passage of time they appear to have won assessments on this basis for the largest part of the 1968-71 contract years. Our decision herein again is to approve No. T-2390 retroactive to October 1, 1969, and this would mean retroactive collections of assessment from the three Puerto Rican carriers and many other assessment adjustments.

To the extent that the issue of retroactivity remains an issue, and there remains any problem of adjustment of retroactive assessments, the parties and the Commission may yet have another chance at achieving some compromise solution acceptable to all. Perhaps this could be brought out on oral argument. In any event, one of the principal effects of our approval of No. T-2390 presumably will be the bearing of that approval on future assessment agreements of the parties, bearing in mind again that T-2390 expires September 30, 1971, and presumably that a new assessment agreement will be filed for our approval in due course.

While attention herein has been focused to a great extent on the Puerto Rican trade, to the extent that this trade were to be favored by "excepted cargo" status, the result would follow that the other trades of the port of New York would be disfavored by the imposition on them of higher assessments to make up for assessments not collected by the Puerto Rican trade. These foreign trades of the port of New York would be disadvantaged to the extent that some cargoes in the foreign trades would be diverted from the port of New York to other ports. The foreign automobile interests already have alluded to this possibility. Again to avoid undue discrimination between the various trades of NYSA, the fairest action under all the circumstances would be to spread the assessments herein on the same basis for all trades of the port of New York.

Not forgotten in reaching the conclusions herein is the fact that the carriers in the Puerto Rican trade all must be under the U.S. flag, using U.S. built ships and U.S. crew, making the operations of the Puerto Rican carriers somewhat more expensive than operations with other ships and crews in the foreign trades, but this is only one factor in the public interest considerations, and is not entitled to major

weight in reaching a just conclusion herein, particularly when compared with the other factors, such as the costs of longshore labor per ton of cargo handled.

As Federal taxpayers generally share both the benefits and the costs of Government for many purposes, all the parties herein who are directly or indirectly affected by the ILA labor contract should share not only the benefits of said contract, but also the costs of that contract, including the fringe benefit costs.

The Puerto Rican carriers are not the only ones which have increased their man-hours labor in recent years. Although no witness was produced, it was stipulated that Barber Lines has increased its longshore hours in the port of New York over the past 3 years, and that Barber Lines operates about 37 vessels, of which 30 are normal breakbulk vessels, and seven are especially fitted for and carry containers. Barber Lines does not seek "excepted cargo" treatment for itself but if such treatment were to be accorded Puerto Rican carriers on the basis of their increased man-hours in recent years, then Barber Lines and perhaps others should be accorded "excepted cargo" treatment also. One must remember that the Puerto Rican trade in 1958 generated 1,250,000 man-hours when it was entirely breakbulk, and that with increases in tonnages, the trade has not yet reached that figure in man-hours of labor. And, the union viewpoint no doubt is that Puerto Rican containerships have cost many union jobs, including both old jobs lost and new jobs not generated in proportion to new tonnages handled. Taking the opposite tack, U.S. lines showed a drop in man-hours of over a million hours between 1967 and 1969. Of course, no one is insisting that U.S. lines be penalized or specially assessed for fringe benefits because of its drop in man-hours. Its witness looked upon this situation as an *industry problem*. That is the just and lawful answer. All of the carriers recognize in a general way that the assessments of ILA labor fringe benefits are an *industry problem*, and that all carriers must share not only in the benefits of the ILA contract, but also in the costs of the contract. Some carriers and parties seek exceptions to the uniform assessment basis of T-2390. But, granting an exception here and another exception there has a snowballing effect, and the result of granting too many exceptions can only be chaos. Exceptions must be limited to recognized hardships and no others.

The president of the ILA, Thomas W. Gleason, has been understood (exhibit 97) to say that for a future contract beginning October 1, 1971, he would be willing to consider "a guarantee of benefits rather than hours." This statement confirms the view herein that it is the

FEDERAL MARITIME COMMISSION

DOCKET No. 71-81

OCEAN FREIGHT CONSULTANTS, INC.

v.

ITALPACIFIC LINE

June 19, 1972

ADOPTION OF INITIAL DECISION

This proceeding is before us on exceptions to the initial decision of Examiner Stanley M. Levy, served December 28, 1971, in which the examiner concluded that the alleged misdescription was done by the shipper not the carrier and thus the claimant* had failed to establish any basis for granting relief.

In his exceptions, claimant points out that the freight forwarder, not the shipper, was actually responsible for the description of the goods in the bill of lading, and urges that in any event the importer has a right to expect the carrier to assess the proper rate for those goods actually carried.

Claimant urges that notwithstanding the bill of lading designation of the shipment as toys, the examiner, having been furnished a packing list which indicated that 1,200 tricycles and 400 bicycles were actually carried, was duty bound to go beyond the alleged facts raised wholly by supposition and to "search further in what the carrier felt was a toy and what is not." Finally, claimant request oral argument and states that additional evidence of the correct identity of the goods shipped can be introduced.

*Ocean Freight Consultants is the assignee of the claim of Fred Myer, Inc., an importer.

We do not feel that at oral argument any new facts can be elicited to change the examiner's initial findings.

It is undisputed by the parties that the freight forwarder initiated the bill of lading. It is also agreed that the carrier charged the rate as specified in the tariff for that commodity as described on the bill of lading. It is further agreed that the consignee had taken possession of the cargo without voicing any claim at that time.

In a recent decision, informal docket No. 283 (I), *Western Publishing Co., Inc. v. Hapag Lloyd A.G.*, served May 4, 1972, we chose to review the examiner's decision not to award reparation because we have determined the test for reparation to be what the claimant can prove based on all evidence as to what was actually shipped. In that case there were clear commodity descriptions upon the bill of lading and an equally obvious error in the assessment of a single charge to two different commodities. Here, however, the issue is not as simple. Since the shipment has been removed from the custody of the carrier and carrier verification of the claim is impossible, claimant has not, to our satisfaction, sufficiently established that anything other than that which was described on the bill of lading was actually shipped, or that any error in weight, measurement or description was made by the respondent upon which reparation can be based.

Accordingly, upon careful consideration of the record and the exceptions, we conclude that the examiner's factual findings and his conclusions with respect thereto were supported and correct. We therefore adopt the initial decision as our own and make it part hereof.

By the Commission.

[SEAL]

(S) FRANCIS C. HURNEY,
Secretary.

FEDERAL MARITIME COMMISSION

No. 71-81

OCEAN FREIGHT CONSULTANTS, INC.

v.

ITALPACIFIC LINE

Complaint dismissed

Henry Wagner for complainant.

R. Bruce Maxwell for respondent.

INITIAL DECISION OF STANLEY M. LEVY, PRESIDING EXAMINER¹

Ocean Freight Consultants, Inc. (OFC or claimant), as assignee of a claim, seeks reparation in the amount of \$1,014.60, arising out of a shipment from Genoa, Italy, on August 1, 1969, to Portland, Oreg., aboard Italtropic Line's (respondent) vessel *MS Svolder*.²

The shipment, as described by the bill of lading, consisted of 267 cartons of toys, having a gross weight of 9.467 kilos. The respondent assessed it at the rate of \$28.50 per cubic meter and based on 82.65 cubic meters the charges totaled \$2,355.58 plus 0.50 B/L fee.³

Claimant contends the correct bill of lading description should have been 267 cartons of bicycles and tricycles, pedal operated, for which, it says, the rate should be \$139 per 1,000 kilos as per tariff rate item 02-102, page 219, by reference thereby to third revised page 102, effective date April 1, 1969. Inasmuch as the shipment had a gross weight of 9.647 kilos and measured 82.650 cubic meters it qualified for the rate for goods cubing over 7x up to 10x (7 times 9647:67.599 m³; 10 times 9647:96.470 m³).

¹ This decision became the decision of the Commission June 19, 1972.

² Bill of lading No. 9.

³ M.N.P. freight tariff No. 10—section 1-F.M.C. 2.

Since at \$139 per 1,000 kilos the total charge should have been only \$1,340.93 plus 0.50 B/L fee rather than the assessed \$2,355.53 plus 0.50 B/L fee, an overcharge of \$1,014.60 is asserted.

Respondent denies that an incorrect tariff rate was applied, and, as a further and complete defense, asserts that the claim is barred by the statute of limitations set forth in section 22 of the Shipping Act, 1916, which requires that claims for reparation must be filed within 2 years.

The cause of action is deemed to have accrued at the time of shipment or payment, whichever is later. *Louisville Cement Co. v. Int. Comm. Comm.*, 246 U.S. 638 (1918). In the instant case the shipment was "Freight Collect."⁴ The cause of action thus accrued on September 8, 1969, when the shipment reached Portland, and the complaint having been filed with the Secretary of the Commission on August 31, 1971, it was filed within 2 years after the cause of action accrued. Section 22, Shipping Act, 1916.

Accordingly, the claim must be decided on the merits. Both claimant and respondent consent that the complaint be conducted under shortened procedure without oral hearing (rule 11(a)).

The shipment consisted of a total of 1,600 bicycles and tricycles, of which 1,200 were tricycles and 400 bicycles. There is no doubt that if the bill of lading had been broken down into component parts the bicycles would have qualified for a bicycle rate, whatever the appropriate rate to be assessed the tricycles.

The tariff has two items which are at the core of the controversy:

TRICYCLES: Juvenile—As Toys—[Item No. 20-110], pedal operated, N.O.S. (Not Toys)—As Bicycles—[Item No. 20-102].

OFC relies on the subsentence to the tricycle commodity description which says "Pedal operated." In doing so, claimant overlooks the limitation "N.O.S." which is also a part of the subsentence description. On the bill of lading prepared by the freight forwarder agent of the manufacturer⁵ the items were otherwise specified as "Toys." Analysis of the subsentence description establishes that in addition to the N.O.S. exclusion, a second exclusion is present, to wit "(Not Toys)." Either exclusion serves to prohibit a rating under item No. 20-102. The shipment herein fails on both counts.

To qualify as a bicycle the tricycle must not only be pedal operated not otherwise specified but, in addition, it qualifies only if it is "(Not Toys)." Hence, the tariff while permitting tricycles to be classified as

⁴ Bill of lading No. 9.

⁵ Gottardi Ruffoni, whom OFC identifies as the shipper (exhibit A attached to complaint).

bicycles strictly limits the type of tricycles thus ratable. Under the tariff limitation a tricycle could still be rated as a toy even if it were pedal operated whereas O.F.C.'s position is that a pedal operated tricycle is by definition a bicycle and not a toy.

In hopes of establishing the proposition that the goods are not toys OFC introduces a letter and catalogue material of the manufacturer (exhibits O and M). These exhibits establish that all the items are pedal operated. However, these exhibits do not establish that being pedal operated they are hereby "not toys." To establish such premise OFC merely asserts:

. . . One will recall that there are indeed tricycles on the market which are NOT pedal operated and are used for very young children, where it apparently is felt unsafe to have pedals or where these children are unable to propel the tricycle by a pedal device. It would further appear from the picture material of the manufacturer that only one item was truly a tricycle, while the others are bicycles with additional wheels for balancing safety, but all were pedal operated.

Such assertion by OFC lacks the probative value and quality required to meet the burden imposed on it as a claimant for reparation.

In *Colgate Palmolive Co. v. United Fruit Co.*, informal docket No. 115(I), Commission order served September 30, 1970, the Commission held that claims for reparation involving alleged errors of weight, measurement or description of necessity involve "heavy burdens of proof" once the shipment has left the custody of the carrier. It is often the case, as it is here, that the carrier in classifying and rating a shipment must look to the information given him by the shipper or freight forwarder. Fairness would seem to entitle the carrier in most of these cases to rely on such information and to charge and collect freight in accordance with the description provided by the shipper. It is the claimant, not the carrier, who must bear the heavy burdens of proof, and establish sufficient facts to indicate with reasonable certainty or definiteness the validity of the claims.

OFC in support of its claim attaches to its complaint copies of commercial invoice 414/69 (exhibit B, Bureau of Customs form 7521 (exhibit C), and a packing list—illegible (exhibit D). Perusal of these documents indicates that only the packing list—if it could be read—would offer any clue as to the number of cartons containing bicycles, their weight and dimensions. In any event, there is no computation by the claimant as to the amount which it is claimed should be assessed against that part of the shipment comprising bicycles based on stowage factor cube measurements.

Thus, although about a fourth of the shipment consisted of bicycles which could qualify for the bicycle rate, which OFC alleges should be

at the rate of \$139 per 1,000 kilos rather than at the rate of \$28.50 per cubic meter as assessed, yet this aspect of the claim must fail for lack of any clear, and certainly not any substantial evidence, as to the weight or measurements of the specific cartons.

The importance of declaring in bills of lading the correct description of the cargo shipped cannot be overemphasized. The carrier has a right to expect that a shipper will properly identify the shipment. The shipper similarly has the right to expect the carrier to charge the proper rate for the actual goods carried. Where a mistake occurs the party who commits it has the heavy burden of proof to support a claim for rectification. Here, the shipper committed the mistake and has failed to sustain its burden of proof.

Complaint dismissed.

(S) STANLEY M. LEVY,
Presiding Examiner.

WASHINGTON, D.C., *December 28, 1971.*

TABLE OF COMMODITIES

	Page
<i>Poultry equipment. U.S. Atlantic and Gulf to Indonesia, Portuguese Timor, and West Irian</i> -----	206
<i>Freight, All Kinds. U.S. Pacific Coast/Hawaii Trade</i> -----	200, 218
<i>General. U.S. Pacific Coast/Puerto Rico Trade</i> -----	4
<i>General. U.S. Pacific Coast/Hawaii Trade</i> -----	161

INDEX DIGEST

[Numbers in parentheses following citations indicate pages on which the particular subjects are considered]

ABSORPTIONS

Nonabsorption provisions contained in a conference tariff and proposed tariff were in direct contravention of section 205 of the Merchant Marine Act of 1936 and, therefore, contrary to the public interest within the meaning of section 15 of the 1916 Act. Member lines of a conference must be free to exercise their business judgment with respect to service offered by a federally-improved port absent conference-imposed restrictions. *Sacramento-Yolo Port District v. Pacific Coast European District*, 15 (22-23).

ADMINISTRATIVE PROCEDURE ACT: See Practice and Procedure

AGREEMENTS UNDER SECTION 15: See also Absorptions; Ports; Terminal Operators

—In general

The Commission, though not vested with jurisdiction over section 205 of the Merchant Marine Act of 1936, must consider the impact and policy of the section in deciding whether to approve section 15 (1916 Act) agreements. Reorganization Plan No. 7 of 1961 did not repeal section 205. A federal district court has declared that the FMC must take account of section 205 and that which would contravene the section would be grounds for disapproval under section 15. *Sacramento-Yolo Port District v. Pacific Coast European Conference*, 15 (19-20).

The legislative history of section 205 of the Merchant Marine Act of 1936 makes clear that activity which contravenes the prohibitions of the section may not continue to be approved under section 15 of the 1916 Act. The purpose of section 205 was to remove the agency's power to make determination with respect to the lawfulness of a conference's restrictions against federally-improved ports on a case-by-case basis under sections 15 and 16 of the 1916 Act, and to make all such restrictions illegal. *Id.* (20).

The language of section 205 of the Merchant Marine Act of 1936 speaks of "preventing or attempting to prevent, directly or indirectly any . . . [common carrier by water] from serving any [federally-improved] port . . . at the same rates which it charges at the nearest port served by it." The vast bulk of the legislative history of section 205 shows that its purpose was to forbid conferences from imposing restrictions on their member lines which would interfere with the free exercise of the line's discretion in the determination of which ports they choose to serve. Congress intended to include indirect service as well as direct service. *Id.* (20-21).

The burden of proof on federally-improved port that a conference provision prevents a member from serving the port which the member desires to serve applies only when the conference agreement does not expressly prevent a member from serving the port. *Id.* (21).

The fact that different agencies may bear primary responsibility for enforcing section 205 of the Merchant Marine Act of 1936 and section 15 of the 1916 Shipping Act does not mean that the substantive or policy content of those sections exist in a vacuum independent of each other. In implementing section 15, the Commission is not free to ignore section 205 or any other relevant policy of Congress as expressed in law. Accordingly, section 205 has removed from the Commission's jurisdiction all authority to approve under section 15 any activity proscribed by section 15 and requires the Commission to disapprove such activity. Associated Latin American Freight Conference and the Association of West Coast Steamship Companies, Amended Tariff Rules Regarding Wharfage and Handling Charges, 151 (154).

The fact that section 205 of the Merchant Marine Act of 1936 was not assigned to the Commission by Reorganization Plan No. 7 of 1961 affords no indication whatsoever that it was the intent of Congress to dilute the policy and prescriptions of that section. That section and section 15 of the 1916 Shipping Act are all part of a coordinated regulatory scheme and remain the law of the land. *Id.* (155).

Little would be left of the concept of the "public interest" were the Commission to exclude from it that clear interest of the public in the just application and enforcement of those statutes enacted by Congress which are relevant considerations in the overall regulatory program for the waterborne commerce of the United States. It is beyond doubt that the prohibitions of section 205 of the 1936 Merchant Marine Act form an essential part of any consideration of the public interest under section 15 of the 1916 Act. *Id.* (156).

Commission reliance on section 205 of the 1936 Merchant Marine Act, as constituting a complete prohibition against differences in rates between ports does not emasculate sections 16 and 17 of the 1916 Shipping Act. A single activity may violate several laws simultaneously and sections 16 and 17 are broad in scope, applying to a number of things besides discriminatory conference rates. The conference activities in question may be equally violative of the broader and more general preference and prejudice provisions of those sections. This does not relieve the Commission of the obligation to apply section 205 in considering whether respondents actions are contrary to the public interest within the meaning of section 15 of the 1916 Act. *Id.* (157-158).

—Assessment formula

Agreement of the New York Shipping Association, providing an assessment formula to meet certain fringe benefit obligations in collective bargaining agreements with the International Longshoremen's Association should be modified to provide that the Puerto Rican Trade pay on a man-hour basis for pension, welfare and clinic, and NYSA administration, on a tonnage basis for guaranteed annual income, and be relieved of shortfall. Thus, the trade, like all others, would be required to contribute toward the industry problem of escalating GAI costs in an adequate fashion, and the trade would be cushioned against the severe increase in costs for containerized operations which results from a shift from a strictly man-hours basis of assessment to tonnage. Agreement No. T-2336—New York Shipping Assn. Cooperative Working Arrangement, 259 (271-272).

Argument raised by Puerto Rican interests that one should look to other "excepted" cargoes and/or trades to cover any deficits (in assessments to meet

fringe benefits in collective bargaining agreements with the ILA) rather than to the Puerto Rican Trade, i.e., intercoastal, coastwise, bulk sugar, lumber at lumber terminals, bananas, automobiles, Alaska and Hawaii, is rejected. None of these other interests are truly comparable to the Puerto Rican trade. Any extremely productive cargoes such as bulk would suffer a drastic increase in costs in a shift from hours to tonnage basis for assessment. These cargoes had little to do with the central issue in the labor negotiations and derived relatively few benefits compared to containerized operators. No tonnage moves between New York and Alaska and the Hawaiian trade is negligible. Intercoastal and coastwise trades are subject to rail and truck competition which is not true of Puerto Rico. The basic principle underlying the "excepted" cargo category is that such cargo, if forced to bear an assessment on tonnage, might be diverted from the port of New York and thereby cease even limited or marginal support of fringe benefit costs. *Id.* (273-275).

Assessment on automobiles, to meet fringe benefit obligations in collective bargaining agreements with the ILA, on a weight-ton basis would be fair and reasonable. A 5.85 percent measurement rate, based on an equalization of costs with breakbulk operators, ignores the fact that breakbulk and automobiles are not completely comparable. Breakbulk operators, having the lowest productivity, suffered the greatest cost burdens under the previous man-hour rates of assessment and were therefore probably overassessed in the past compared to more productive operators. If automobiles were placed under the "excepted" rate of assessment, they would contribute at the rate of \$2.67 per hour. This is practically the same as what they would pay at the 5.85 percent measurement basis and would be enjoying rates which were designed to protect marginal traffic. *Id.* (278-279).

Assessment on newsprint, to meet fringe benefit obligations in collective bargaining agreement with ILA, on a regular man-hour/tonnage basis fails to relate benefits to burdens and fails to determine whether the cargo bears a disproportionate increase in assessment. As a non-innovative commodity, newsprint was not involved in the containerization issue which led to the sizable increases in fringe benefits and consequently newsprint derived fewer benefits from the labor contract than did the innovators. Newsprint should be placed in the "excepted" category for all costs except guaranteed annual income as to which it should remain on the tonnage basis, and newsprint should be credited with or refunded the excess payments already made under the regular rate of assessment. *Id.* (279-281).

—Cooperative working arrangements

The incorporation papers and bylaws of the Boston Shipping Association constitute "cooperative working arrangements," within the meaning of section 15 of the 1916 Shipping Act. There is ample opportunity for such an organization (of carriers, stevedores, terminal operators and others) to engage in practices which the Act contemplates shall be subject to regulation. The association makes decisions and carries out functions relating to the shipping business, in this case distributing labor-loading and unloading ships, which have significant competitive effects on stevedores and carriers serving the port of Boston. Thus, the incorporation papers and bylaws must be submitted for approval. Since these papers have not been filed with the Commission, they are unlawful and failure to file them constitutes a violation of section 15. *United Stevedoring Corp. v. Boston Shipping Assn.*, 33 (42-43).

Agreement among the members of the Boston Shipping Association to allocate labor gangs to various stevedores at the port of Boston, and a later agreement providing for a first call-recall system with respect to labor gangs, are cooperative working arrangements within the meaning of section 15 of the 1916 Shipping Act. Both agreements must be filed with the Commission for approval. Since they remain unfiled, they are unlawful and failure to file constitutes a violation of the Act. Id. (45).

In order for a cooperative working arrangement to fall within the purview of section 15 of the 1916 Shipping Act, the principle of *ejusdem generis* requires that the category of "or in any manner providing for an exclusive, preferential, or cooperative working arrangement" relates back to the six prior subheadings in the section (fixing rates; giving special rates, accommodations, etc.; regulating competition; pooling agreements; allotting ports, etc.; and regulating the volume of traffic to be carried). Agreement among the members of the Boston Shipping Association to allocate labor gangs at the port of Boston, and an agreement providing for a first call-recall system with respect to labor gangs, are of the same general nature as those enumerated in the six subheadings. The allocation of gangs and the first call-recall system agreements clearly give special accommodation or other special privileges or advantages to certain members of the association. They also regulate competition among the various stevedores since those assigned fewer gangs cannot hold themselves out as able to handle as much work as a stevedore with more gangs. Id. (46).

—Freight forwarders

While nonexclusive, cooperative working agreements between licensed ocean freight forwarders which provide for the completion of documentation and performing of other services on export shipments on behalf of the parties have been granted an exemption from the provisions of section 15 of the Shipping Act, 1916, such is not the situation where, as in the instant case, there has been a gradual overt absorption of one forwarder by another by means of a thorough and comprehensive working arrangement. Where it was evident that two forwarding companies were not operating as entities separate and apart from each other, the failure to file a memorandum of this arrangement for approval under section 15 constituted a violation of the section. *York Forwarding Corp., J. B. Wood Shipping Co., Inc., and Edwards Fuge Corp.*, 114 (121-122).

—Jurisdiction

The Boston Shipping Association, an association of carriers, stevedores, ship agents, terminal operators and other maritime concerns, and a nonprofit corporation organized under state law primarily to negotiate and administer collective bargaining agreements with labor, is an "other person" subject to the Shipping Act, 1916. The Act explicitly defines the term "person" to include "corporations, partnerships and associations," existing under state laws. This alone is sufficient basis for jurisdiction over the association as an entity. *United Stevedoring Corp v. Boston Shipping Assn.*, 83 (85, 41).

Agreement among the members of the Boston Shipping Association to allocate labor gangs to various stevedores at the port of Boston, and the later agreement to provide for a first call-recall system with respect to labor gangs are subject to section 15 of the 1916 Shipping Act. That the latter agreement is embodied in

a labor agreement by no means removes it from Commission jurisdiction. The agreements were first worked out among and between the members of the Association and only then were they incorporated into the labor agreement. The Commission is not suggesting that preapproval clearance of the negotiating positions of management during collective bargaining need be obtained from the Commission. However, if an agreement subject to section 15 is embodied in a collective bargaining agreement, the agreement must be filed for approval. *Id.* (44-45).

—Rates

There was no evidence that respondent conference had carried out an unfiled section 15 agreement to maintain a rate disparity between rates on U.S. relief cargoes from Great Lakes ports and Canadian relief cargoes from Canadian Great Lakes ports. The fact that the disparity was eliminated when the competitive situation returned to normal would negate such a conclusion. Respondent conference rates were, with some exceptions, at the general level of rates of conferences serving U.S. Gulf and Atlantic ports. Something more than a mere inference is needed to support a finding that carriers operated under an unfiled agreement. "Every" agreement contemplated by section 15 does not include routine operations relating to conventional rate charges. *Commodity Credit Corp. and United States Agency for International Development v. American Export Isbrandtsen Lines, Inc.*, 171 (191).

—Voting

An agreement between two carriers which provides, inter alia, for coordination of sailing and sharing of revenue and expenses, and that each party shall remain an individual member of a conference with a separate vote, is not found to be contrary to section 15 of the Shipping Act, 1916. Whether the agreement is labeled as a "cooperative working arrangement" or a "joint service" is not decisive on the issue of single or multiple conference votes for the parties thereto. In the vast majority of cases the approvability of an agreement will depend on the operational impact of the joint service or cooperative arrangement on the conference operating in the trade involved. In the present case, the conference has six members and requires a three-quarters' majority to carry an item of business. Thus "bloc" voting by the two parties involved cannot control the conference voting. The record contains nothing in the way of past experience which would dictate a single membership and one vote in the conference for the two carriers, nor does the record contain anything concerning the future which would require the imposition of such a restriction. *Maritime Fruit Carriers Co., Ltd., and Refrigerated Express Lines (A/Asia) Pty., Ltd.*, 223 (225-228).

The fact that a conference member, composed of several lines, is restricted to one vote in the conference does not require, on the basis of equality, that two conference members, who have entered into a cooperative working arrangement for coordination of sailing and sharing of revenue and expenses, be restricted to one vote in the conference. The equality sought is an abstract equality based on nothing more than the fact that the objecting member has one vote. An agreement is unfair as between carriers only in a particular and given circumstance. Here, the circumstance is the impact voting status on conference operations. *Id.* (226-227).

DEVICES TO DEFEAT APPLICABLE RATES

Although the term "deferred rebate" is not used, the plain meaning of the terms "rebate," "refund," and "remit" as used in section 18(b) (3) of the 1916 Shipping Act is that a violation of that nature must involve a return of a portion of the rates or charges received by the carrier. However, the section is not limited to rebating. Carriers are prohibited from receiving a lesser compensation for the transportation of property than the rates specified in their tariffs. This portion of the section is not limited to repayments, rebates or refunds. It is violated if the carriers ultimate compensation is less than the tariff rate. Although carriers received from an importer the correct freight, it must be concluded that the exporters received compensation from the vessels at the time of shipment and when according the importer credits, had the funds on hand which related to the shipment; and, that it was out of these funds that credit was passed on to the importer. Payment to the exporter by the carriers and by them passed on, in whole or part, to the importer by means of credits emanating from the payments was an unjust or unfair device or means of allowing the importer to obtain transportation at less than the regular rates and charges established. Thus, certain carriers violated both sections 18(b) (3) and 16 Second of the Act. Malpractices—Brazil/United States Trade, 55 (81-82).

DISCRIMINATION

Whenever possible, governments should permit commercial initiative to be the chief catalyst in solving problems in ocean commerce. The government at either end of a trade route should intervene only when carriers or conferences are unable to resolve the issues, or when there is actual or imminent harm to the country's foreign waterborne commerce. The United States will intervene to prevent all unjust discriminations or protective devices against our ships or cargoes, and any other conditions causing detriment to our foreign commerce. The Commission will do so whether the detriment is caused by commercial or governmental action. Malpractices—Brazil/United States Trade, 55 (61-62).

Carriers which failed to impose a surcharge on the carriage of military cargo for the Military Sealift Command, while imposing the surcharge on the carriage of commercial cargo, did not violate section 14 Fourth of the 1916 Shipping Act. The question was whether such an imposition of a surcharge constitutes an unfair or unjustly discriminatory contract with a shipper based on the volume of freight offered. It was apparent that the imposition of the surcharge had absolutely nothing to do with the volume of freight offered; it was imposed on one shipper and not on another merely because one shipper had stated it would not acquiesce in the surcharge. The volume of freight offered was irrelevant. Violations of Sections 14 Fourth, 16 First and 17, Shipping Act, 1916, in the Nonassessment of Fuel Surcharges on MSC Rates, 92 (97).

Carriers which failed to impose a surcharge on the carriage of military cargo for the Military Sealift Command, while imposing the surcharge on the carriage of commercial cargo, violated section 17 of the 1916 Shipping Act. The failure to collect this charge from MSC and to collect it from commercial shippers only constituted the collection of a "charge which is unjustly discriminatory between shippers" in violation of section 17. Id. (99).

Members of a conference carrying U.S. relief cargoes from the Great Lakes to the Mediterranean were not legally obliged to reduce their rates because, as members of another conference, they had lowered the rates on relief cargoes from Canadian Great Lakes ports to the Mediterranean. The premise of the argument that the competitive situation in the two trades was comparable was not borne out by the facts as they related to the relief cargoes. If there was competition for U.S. relief cargoes from independent carriers, it did not appear that such competitors offered rates so far below respondents' rates that a drastic reduction was necessary to avoid the loss of relief cargoes. As members of the Canadian conference, the carriers were faced with competition from a Russian flag line which offered rates substantially below conference rates, and thus the conference was eventually forced to reduce its rates. Also, all U.S. relief cargoes were loaded at U.S. Great Lakes ports while all but 2% of the Canadian shipments were loaded at ports east of the Seaway. *Commodity Credit Corp. and United States Agency for International Development v. American Export Isbrandtsen Lines, Inc.* 171 (183-185).

Where complainants were relying on a rate disparity between two conferences carrying cargoes from the Great Lakes to the Mediterranean as establishing a prima facie case of unlawfulness, it was proper to consider the evidence that the disparity was justified by differences in the transportation conditions in the two trades. Carrier costs at U.S. Great Lakes ports where the commodities (relief cargoes) were loaded exceeded costs at Canadian ports east of the Seaway where similar commodities were loaded. Also, inter alia, carriers of U.S. relief cargoes assumed greater responsibility than did carriers of Canadian relief cargoes, as to whom responsibility began and ended at ship's tackle. U.S. relief cargo could not be transhipped or discharged onto lighters, restrictions not imposed on Canadian relief cargoes. *Id.* (185-187).

FREE TIME

Where a consignee was thwarted in its bona fide effort to pick up its goods by a steel haulers strike, and the situation was brought about through no fault of its own, the assessment of the penalty element in demurrage charges was an unreasonable practice. However, the circumstances did not justify the assessment of no demurrage at all. Although the attempt at pickup was made while the goods were still on free time, the actual pickup did not begin until 5 days after free time expired. Thus, the consignee was required to compensate the terminal operator for keeping the goods and providing services incidental thereto for the 5 days after free time expired. However, for the period of 5 days thereafter until the last day of pickup, a penal element should be assessed for the remaining goods. *Midland Metals Corp., New York, N.Y. v. Mitsui O.S.K. Line, New York, N.Y. and Its Subcontractor, The Luckenbach Steamship Co., Phila. Pa.*, 193 (199).

FREIGHT FORWARDING: See also Agreements Under Section 15

Where prior to 1960, an owner and officer of a shipper was an owner of a freight forwarding company, and while he divested himself of ownership, he never relinquished control as advisor on matters relating to freight forwarding, as evidenced by the fact that 1960 a long-time friend of his, inexperienced as an ocean freight forwarder, was given 100 percent ownership of the forwarding company and made its president, the forwarding company was never an inde-

pendent ocean freight forwarder. Moreover, an employee of the shipper was made secretary of the forwarding company and was responsible for its operations, which actually involved performing the same services, for the same clients, as he did as an employee of the shipper. York Forwarding Corp., J. B. Wood Shipping Co., Inc., and Edwards Fuge Corp., 114 (120).

A forwarding company lost its independence as an ocean freight forwarder when it became controlled by a shipper through a pattern of interrelationships. Id. (120-121).

Sections 1 and 44 of the Shipping Act, 1916 were intended to prevent even the opportunity for a shipper to exercise control over a freight forwarder. Neither the shipper's intention not to exercise control nor the forwarder's intention to prevent such exercise is material. Id. (121).

Payment by a freight forwarder of an auto repair bill for an owner of a shipper; certain attorneys fees for the shipper; a sum of money to an owner of a shipper for accompanying her husband (also an owner) while entertaining a foreign purchase mission; and a salary and traveling expenses to an owner of a shipper for performing some ill-defined "consultant services," did not constitute any violation of section 16 of the 1916 Shipping Act or of section 510.24(c) of General Order 4. There was no meaningful showing that the wages received by the owners of the shipper were anything other than for services rendered to the forwarder. Nor was it entirely clear that the automobile repairs were not paid for on the basis of the use of the automobile in the forwarder's business. Finally, there was no asserted correlation between the wages and the cost of repairs (and the legal expenses) and the rates and charges of any shipments. Id. (122).

Where persons not employed by a freight forwarding company were permitted to perform forwarding services under the company's license, the forwarding company violated section 510.28(a) of General Order 4. Id. (123).

License of a freight forwarder which was such in name only, which had no qualified personnel, and whose dissolution would be without impact on the shipping public is revoked. Id. (123).

Where a freight forwarding company had been an established and respected forwarder since 1922, providing valuable service to shippers; the company employed 25 people; and, if it terminated its association with a shipper, it could again meet all the requirements of an independent ocean freight forwarder, the company would be allowed to retain its license, provided, *inter alia*, it completely disassociated itself from all relationship with shippers; and guaranteed that shippers would not become employees or become involved in the day-to-day management of the company. Id. (123-124).

The Commission is charged with the responsibility of maintaining the high degree of responsibility required in the profession of ocean freight forwarding. Congress has required that license applications be reviewed and that access to the profession be limited to those who are "fit, willing, and able" to carry on the business. The Commission has therefore established a high standard of moral conduct to which an applicant as well as a licensee must conform. Anything less is considered conduct unsuited to the profession and will result in swift action to remedy the misconduct. Guy G. Sorrentino, 127 (128).

An important matter to be considered in determining the fitness of an applicant for a freight forwarder license is the fact that the prospective licensee will be a fiduciary for clients and, in addition, will occupy a unique position of trust in dealing with carriers and the public. Hence, it must appear that the applicant

will maintain a standard of professional conduct reflecting the highest degree of business responsibility and integrity, not only with clients but also with carriers and with the public. *Id.* (134).

Despite his relationship as fiduciary to his shipper-clients, acts or conduct which do not comport with the freight forwarders responsibility to carriers and the public may not be justified or excused by the plea that they were engaged in to forward the client's interest or to retain his favor. Nor may a manager or executive of a licensed freight forwarder avoid responsibility by claiming lack of knowledge or actual participation in improper acts or conduct by his employees. *Id.* (135).

Where a licensed freight forwarding company, owned by an individual who was an applicant for a license, was convicted on 16 counts of misclassification of export shipments in violation of the Shipping Act, 1916; the applicant was at least aware of the course of dealing through which the misclassification was accomplished; applicant was aware that the method used to prepare the shipping documents was calculated to and did result in obtaining lower freight rates; applicant admitted that he should have used better judgment in the matter; applicant had severed his connection with the company and had not engaged in freight forwarding for some time; and, had not applicant divested himself of his interest in the company, the practical result of a show cause order issued by the Commission against the company would apparently have been no more severe than a 60-day suspension of the company's license (after the applicant disassociated himself from the company the show cause proceeding was discontinued), the applicant was found to be fit, willing and able to properly carry on the business of freight forwarding. Applicant had a long history of useful and profitable service in the shipping industry and was technically well qualified to serve shippers, carriers, and the public. This history, coupled with his frank admission of guilt, in addition to the fact that he had suffered economic and professional loss by his voluntary self-exclusion from the profession for 11 months, tended to mitigate the effects of his culpability. *Id.* (136-139).

An arbitrary denial of a freight forwarder license constitutes 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 may draw differing judgment from the same set of facts. An applicant's qualifications must be tested within the framework of "delicate judgment." *Fabio A. Ruiz d/b/a Far Express Co.*, 242 (243).

Prior Commission decision granting a freight forwarder license, partly on the ground that there was an extended processing period between the time when the applicant acted without a license and the grant of the application, may not be used as a precedent for granting a license in every case where the action of applicant in acting as a freight forwarder without a license is combined with normal delay in processing an application; otherwise the Freight Forwarder Act could be frustrated by operating without a license until it suited the convenience of the individual to file an application, without encountering the hazard of denial of license based on absence of fitness. *Id.* (243).

Where an applicant for a freight forwarder license engaged in the business of forwarding without a license and knowing that his activities were unlawful at the time; the applicant was willing to conform with the law and the Commission's rules; and there was considerable evidence that the applicant possessed the requisite fitness to be licensed, the violations (23 shipments with a gross profit of \$416.90) did not provide sufficient ground for denial of license. *Id.* (245-247).

A licensed freight forwarder which failed to conduct its operations under its freight forwarder license number violated General Order 4, Rule 510.5(e). The forwarder also violated Rule 510.23(d) by reporting false information to its principals; Rule 510.23(e) by knowingly withholding information from its consignee concerning the actual price of merchandise; Rule 510.23(f) in failing to promptly account to its consignees for any overpayment of the merchandise price; Rule 510.23(b) by filing false documents; Rule 510.23(f) by failing to use invoices which listed separately the actual cost of ocean freight assessed by the common carrier, the insurance rate, and the price of merchandise it had purchased for its consignees; and Rule 510.9(c) by willfully making false statements in connection with an application for a license or its continuance in effect. *Bolton & Mitchell, Inc.—Independent Ocean Freight Forwarder License No. 516, 248 (254, 255-256).*

Licensed freight forwarder did not possess the required independence from shipper connections in compliance with the law, where it acted either as a purchaser of shipments to foreign countries (as purchasing agent of the consignee), or as a person having a beneficial interest in shipments to foreign countries (as a financier of the merchandise), or a seller and shipper of shipments to foreign countries (as one who has exercised proprietary rights over the merchandise). By retaining a proprietary interest in merchandise and collecting compensation from the carrier for shipment thereof, the forwarder willfully obtained transportation by water at less than the rates or charges as would otherwise be applicable, thus violating section 16 First of the Shipping Act. However, since the forwarder appeared to have acted in good faith on the advice of counsel; had been operating as a licensed forwarder for ten years, and formerly provided good and valuable service for 40 years without serious complaints, the forwarder's license would not be revoked, but the forwarder would be ordered, *inter alia*, to cease and desist from its illegal activities, and to report to the Commission within 90 days on the manner in which it has complied with the cease and desist order. *Id.* (255-256).

GENERAL ORDER 4: See Freight Forwarding

GENERAL ORDER 20: See Security for the Protection of the Public

HANDLING CHARGES: See Wharfage

OVERCHARGES: See Reparation

PORTS: See Also Absorptions; Agreements Under Section 15

Conclusion that if conference provisions, standing alone, do not prevent a conference member from providing direct service to a federally-improved port, they are not contrary to the meaning of section 205 of the Merchant Marine Act of 1936, is squarely contrary to the legislative history and wording of section 205. *Sacramento-Yolo Port District v. Pacific Coast European Conference*, 15 (19).

The language of section 205 of the 1936 Merchant Marine Act clearly makes it applicable to all federally-improved ports, regardless of size, if they be within the continental United States. *Associated Latin American Freight Conference and the Association of West Coast Steamship Companies, Amended Tariff Rules Regarding Wharfage and Handling Charges*, 151 (156).

Attempted restriction of the 1936 Merchant Marine Act to the coastwise and intercoastal trade ignores the existence and purpose of section 2 of the *Intercoastal Shipping Act 1933* which makes it unlawful for any carrier or conference to prevent or attempt to prevent any carrier from extending service to any federally-improved terminal at the same rates which it charges at its nearest regular port of call. Section 2 was specifically designated to regulate common carriers in the intercoastal trade. *Id.* (157).

PRACTICE AND PROCEDURE

—In general

The examiner properly rejected a contention that respondents were denied due process because a finding of fact relating to rebating was based on an incident which occurred after an amended order of investigation. The order included present tense verbs and the word "current," and respondents received adequate warning of the parameters of the investigation in order to prepare their defense. *Malpractices—Brazil/United States Trade*, 55 (59-60, 82).

An unsworn, uncontroverted statement is admissible in evidence and may be given weight. *Midland Metal Corp., New York, N.Y. v. Mitsui O.S.K. Line, New York, N.Y. and Its Subcontractor, The Luckenbach Steamship Co., Phila., Pa.*, 193 (197).

—Administrative Procedure Act

Respondents' exceptions to the examiner's decision, based on the proposition that under the Administrative Procedure Act an agency's ultimate finding must be supported by substantial and probative evidence, which respondents contend hearing counsel failed to adduce with respect to allegations of rebating, are rejected. There was sufficient reliable evidence in the record to corroborate the hearsay testimony in the record. Moreover, the argument that uncorroborated hearsay may not constitute reliable, probative and substantial evidence to support a finding in the Commission's administrative proceeding is unfounded. There is a well-developed trend favoring increased relaxation of the so-called jury trial rules when making findings in administrative proceedings. When conditions are appropriate, there is nothing to prevent an examiner from basing his decision, which is adverse to a claimant, on hearsay evidence, if such evidence has sufficient probative force to support the decision. The sufficiency of hearsay to support a finding must be judged by taking into account the convincing quality of the particular hearsay or lack of it, the opposing evidence or lack of it, and the circumstances. *Malpractices—Brazil/United States Trade*, 55 (57-58).

The right to cross-examination has sacred stature in order to obtain "a full and true disclosure of the facts under both the Administrative Procedure Act and Rule 10(n) of the Commission's rules. However, under Rule 10(n) the examiner is given the right to limit cross-examination of the witness when, in his judgment, such evidence is cumulative, or is productive of undue delay in the conduct of

hearings. The determining factor is the independent judgment of the examiner, and his judgment should be upheld unless it results in some serious miscarriage of justice. *Id.* (60-61, 82).

The substantial evidence test is flexible and when direct evidence of the actual payment by carriers to Brazilian exporters is not available, the test is whether the hearsay is supported by the evidence, direct or circumstantial, which a reasonable mind might accept as logically probative of the existence of the fact sought to be shown. *Id.* (72).

—Cross-examination

The right to cross-examination has sacred stature in order to obtain "a full and true disclosure of the facts under both the Administrative Procedure Act and Rule 10(n) of the Commission's rules. However, under Rule 10(n) the examiner is given the right to limit cross-examination of the witness when, in his judgment, such evidence is cumulative, or is productive of undue delay in the conduct of hearings. The determining factor is the independent judgment of the examiner, and his judgment should be upheld unless it results in some serious miscarriage of justice. *Malpractices—Brazil/United States Trade*, 55 (60-61, 82).

PRACTICES: See also *Discrimination; Rebates*

Practices of the Boston Shipping Association with respect to the allocation of labor gangs at the port of Boston were not shown to violate sections 16 or 17 of the 1916 Shipping Act, since a complaining stevedore failed to show that it has more than one vessel in port on a given day, thus establishing a need for additional gangs; that all other gangs are unavailable because they have been called or recalled; and that at least one of complainant's stevedore competitors is working only one vessel with all of its seven gangs. *United Stevedoring Corp. v. Boston Shipping Assn.*, 33 (47).

PREFERENCE AND PREJUDICE

Carriers which failed to impose a surcharge on the carriage of military cargo for the Military Sealift Command, while imposing the surcharge on the carriage of commercial cargo, violated section 16 First of the 1916 Shipping Act. A competitive relationship is necessary before a violation of this section can be found in the ordinary rate disparity case, since it is only logical that the cost of shipping bananas should bear no relationship to the cost of shipping heavy industrial equipment. Thus, to find an unlawful discrimination in transportation charges quite properly requires a showing of competitive relationship between two shippers who are assessed different rates. However, when dealing with a service which is absolute or an across-the-board fixed charge on all cargo carried regardless of the commodity involved (the instant surcharge), the competitive relationship is no longer required. The carriers were obligated to impose the surcharge equally on all commodities. Failure to do so constituted a clear situation of undue prejudice to a "description of traffic" vis-a-vis other commodities in violation of section 16. Violations of Sections 14 Fourth, 16 First and 17, Shipping Act, 1916, in the *Nonassessment of Fuel Surcharges on MSC Rates*, 92 (97-98).

As to the necessity of showing a competitive relationship between shippers to support a violation of sections 16 and 17 of the 1916 Shipping Act, Chairman Bentley and Commissioner Day express neither agreement or disagreement with the views of the Examiner. Commissioners Morse and Hearn would reject the

view that such a relationship is necessary where the United States or its agencies are shippers. *Commodity Credit Corp. and United States Agency for International Development v. American Export Isbrandtsen Lines, Inc.*, 171 (172, 189).

There was no requirement of law that respondent carriers reduce their rates on U.S. relief cargoes when reducing their rates on Canadian relief cargoes. The competitive situation required a reduction in the rates of the Canadian conference, which reduction was not below the level necessary to retain those cargoes, a competitive situation which was not present as to U.S. relief cargoes. As to the issue of whether the rate disparity was justified, the evidence showed that transportation conditions in the two trades warranted a higher rate for U.S. relief cargoes loaded at Great Lakes ports than for Canadian relief cargoes loaded at ports east of the Seaway. *Id.* (190).

RATES: See also **Tariffs**

Proposed increases in rates for the carriage of about one-fourth of the commodities in the U.S. Pacific Coast/Puerto Rico trade of Sea-Land Service were just and reasonable. Financial reports to the Commission showed that the carrier's rate of return in the trade ranged from 0.73 to 2.43 percent for the years 1968 and 1969. Such a rate of return is marginal. *Sea-Land Service, Inc.—Increases in Rates in the U.S. Pacific Coast/Puerto Rico Trade*, 4 (9-10).

Rate-making is not an exact science, and it is enough if the results obtained with respect to determining the reasonableness of rates and in making the underlying cost and revenue computations represent a reasonable approximation to what must be assumed to be the reality. The degree of approximation adequate to satisfy the requirement with respect to the propriety of rates will vary from case to case, depending on the nature of the operations involved and the data submitted. *Id.* (9-10).

In considering the lawfulness of a carrier's proposed rate increases vis-a-vis an alleged change in the carrier's method of operation subsequent to seeking approval of the increases, it is noted that a carrier's operations are always subject to change, and one can never know with certainty that the method of operation employed in the past will be used in the future. For purposes of the present proceeding, it is more reasonable to base determinations with respect to the probable results of future operations more heavily on the results shown in the carrier's reports to the Commission than on projections based on changes in operation which may or may not occur. While the carrier had increased its carrying capacity, the history of its operations showed frequent changes in vessel deployment had been made. The carrier's witness testified that no changes were planned which would materially affect the profitability in the trade. A different conclusion would be required with respect to the use of past experience as a guide where the change in carrying capacity was of a degree and type unprecedented for the carrier in the trade and the subject of a possible change in manner of operation had not been considered when the increase was proposed. *Id.* (10-11).

The Examiner properly treated an investigation into a carrier's proposed rate increases as one involving individual commodity increases rather than a general revenue investigation, although about one-fourth of the commodities carried in the trade were affected by the increases. The increases were a "step-by-step" revision of the carrier's tariff which was the result of careful consideration giving weight to such factors as whether a shipper might lose his market if the rate on certain commodities was increased. Further, contrary to Puerto Rico's

assertions, there was nothing relating to the proceeding (rate increases in the West Coast/Puerto Rico Trade) to indicate that the carriage of commodities basic to its economy had been materially affected by the rate increases, or that there was a need for other commodities to subsidize the carriage of beans, rice and plywood. The requirement that the Commission act with respect to the public interest as it relates to the needs of the Puerto Rican economy must appear from the record in the proceeding, and must be based on a showing that carriers need a revenue "cushion" from the movement of nonessential commodities and that such cushion would increase their carriage of commodities essential to Puerto Rico. Such a showing was not made. *Id.* (12).

Carrier's arbitrary charge for carriage of cargo from Seattle to Oakland, where it is transferred to vessels operating regularly in the trade from Oakland to Puerto Rico, was not shown to be unlawful. While the costs of service at Seattle to which the carrier is entitled in the computation of the expenses relating to the arbitrary should be limited to those which actually reflect the additional expense of serving Seattle, in the absence of a showing of a duty in law or fact to serve Seattle directly, all of the additional costs contained in the carrier's computation are properly allocable to the additional expense incurred in serving that port. In fact, the additional cost of service at Seattle exceeds the arbitrary charged. *Id.* (13-14).

Increased rates of tug and barge carrier at the port of Honolulu in the U.S. Pacific Coast and Hawaii trade are just and reasonable and not unlawful on the basis of the data of record. A rate of return of 8.5 or 9.27 percent is within the zone of the reasonableness in the trade. The number of carriers presently in the Hawaii trade is not large, but there are enough carriers apparently to constitute brisk competition and to entail risks which would seem to justify a 10 percent rate of return on rate base. Dillingham Lines, Inc.—Increase in Freight Charges in the U.S. Pacific Coast/Hawaii Trade, 161 (169-170).

Traditionally, the test of reasonableness of rates is based on the rate of return of equipment. However, where a carrier has little or no investment in equipment, it is usual to consider, at least as an important factor, the "operating ratio" method to determine reasonableness of rates. Mid-Pacific Freight Forwarders—Increases in Freight, All Kinds Rate in the U.S. Pacific Coast/Hawaii Trade, 200 (204).

Where, based on previous rates, a non-vessel operating common carrier's operating ratio for a particular six-month period was 115.8, 101.1, 112.1 or 111.9 percent depending on the method used for allocation of expenses between its Hawaiian and other trades and treatment of revenues derived from purchased transportation charges advanced by it and subsequently collected from its customers; the carrier operated at a loss in its Hawaiian operation; the carrier had experienced increased costs which were likely to increase further; under its proposed rate increase, the loss would be reduced about 5 percent; and the increased rates were not shown to be detrimental to the Hawaiian economy, the increased rates were not unjust, unreasonable or otherwise unlawful under the 1916 Shipping Act or the 1933 Intercoastal Shipping Act. *Id.* (204-205).

Operating ratios often are a matter of dispute when comparisons are made between past actual results and projected results. In addition, the weight which should be given to non-vessel operating common carriers' operating ratios, as well as to the area of permissible ratios has never been quantitatively determined by

the Commission. It is usual to consider, at least as an important factor, in proceedings relating to the reasonableness of rates of carriers with little capital investment in comparison with their total costs of operation, the operating ratio of such carriers, i.e., the margin between revenue and expenses of operation. Pacific Hawaiian Terminals, Inc.—Increases in Freight, All Kinds Rate in the U.S. Pacific Coast/Hawaii Trade, 213 (218).

A 93 percent operating ratio is not necessarily proper as a standard for non-vessel operating common carriers. With this in mind, it cannot be concluded that any operating ratio which is reflected in the various positions of the parties (93.6 percent in 1968, 85.87 percent in 1969, and 94.04 percent in 1970) is such as to require disapproval of the 12½ percent rate increase for a NVOCC in the Pacific Coast/Hawaii Trade. Even if the projected operating ratio of 106.2 percent is unduly pessimistic the record does not reveal that the past average operating ratio of 93.1 percent or the 1970 ratio of 94.04 percent exceeds the 93 percent ratio found in a prior Commission decision to be no bar to approval of rate increases. The record is devoid of any basis to establish an operating ratio in excess of 93 percent; hence there is no reason to conclude that if projected figures are in error that such error would be sufficient to change the operating ratio from the projected 106.2 percent to the 93 percent level. It is concluded that the increased rates of the carrier are just and reasonable. *Id.* (218-219).

REBATES

The fact that a carrier may not have known that its soliciting agent for freight engaged in rebating transactions was not vital to a finding of violation of law by the carrier. The Shipping Act cannot be circumvented through the medium of an agent and therefore, whether the carrier authorized the agent to rebate, or knew of such activity, was not the fundamental concern. *Malpractices—Brazil/United States Trade*, 55 (59).

If hearsay alone may support findings when other evidence is not conveniently available, the fact of rebating by carriers in the Brazil/United States Trade was well established. There was, however, reliable evidence to corroborate the hearsay. *Inter alia*, the fact that dual-quotations dependent on the selection of the vessel were made by Brazilian exporters to U.S. importers was established by direct and uncontradicted evidence. It was well established by the testimony of individuals directly engaged in dealing with Brazilian exporters that U.S.-flag carriers were refused cargo because they did not rebate. Logically probative of the fact that rebating exists was that there was no basis whatsoever for a belief that the Brazilian exporter would accept a substantial loss of revenue merely for the privilege of selecting the vessel. The fact that the importer pays the full freight and does not directly receive a rebate from a carrier would not detract from the conclusion that rebating is practiced. If monetary consideration given to a shipper by any device is traceable to the freight paid by that shipper rebating is shown. It was concluded that the practice of rebating existed in the trade since 1964. *Id.* (73-75).

Although the term "deferred rebate" is not used, the plain meaning of the terms "rebate," "refund," and "remit" as used in section 18(b)(3) of the 1916 Shipping Act is that a violation of that nature must involve a return of a portion of the rates or charges received by the carrier. However, the section is not limited to rebating. Carriers are prohibited from receiving a lesser compensation for the transportation of property than the rates specified in their tariffs.

This portion of the section is not limited to repayments, rebates or refunds. It is violated if the carriers ultimate compensation is less than the tariff rate. Although carriers received from an importer the correct freight, it must be concluded that the exporters received compensation from the vessels at the time of shipment and when according the importer credits, had the funds on hand which related to the shipment; and, that it was out of these funds that credit was passed on to the importer. Payment to the exporter by the carriers and by them passed on, in whole or part, to the importer by means of credits emanating from the payments was an unjust or unfair device or means of allowing the importer to obtain transportation at less than the regular rates and charges established. Thus, certin carriers violated both sections 18(b) (3) and 16 Second of the Act. Id. (81-82).

REPARATION

Carrier was authorized to refund a portion of freight charges on a shipment of cargo from New York to the Arabian Gulf where the carrier intended to file a new rate covering the cargo involved, if a rate making organization to which it belonged failed to do so; and, through administrative inadvertence, the carrier was not informed that the organization would not file such rate and thus failed to give 48 hours notice to other members of the organization of its intent to file the new rate in accordance with its commitment to the shipper. Subsequently, when matters were clarified, the organization filed the new rate. *Chicago Bridge & Iron Co. v. States Marine Lines*, 1 (3).

Carrier was authorized to waive a portion of freight charges collected on shipments of wheat flour to Indonesia where the carrier and shipper had agreed on a particular rate, but the carrier filed a higher rate, inadvertently, due to an incorrect rate given to the tariff clerk. On the discovery of the error, the lower rate was filed. *Commodity Credit Corp., Dept. of Agriculture v. Isthmian Lines, Inc.*, 25 (26-27).

Under section 22 of the 1916 Act which time bars a claim for reparation which is not filed within two years after the cause of action accrued, the statute is not tolled during the period of negotiations between the shipper and the carrier and the two-year period does not commence when the carrier rejects a claim. Thus, a complaint filed more than two years after the time of shipment or time of payment is time-barred. *Tyler Pipe Industries, Inc. v. Lykes Bros. Steamship Co., Inc.*, 28 (29-30).

Under section 18(b) (3) of the Shipping Act, 1916, no carrier may charge less than the filed tariff in effect at the time of shipment unless it is granted permission by the Commission. Before any such permission can be granted the carrier must file a new tariff and thereafter file an application requesting the new tariff be made applicable to the prior shipment. Failure to take timely either of these two steps precludes the Commission from considering whether to permit a lesser charge than was actually in effect at the time of the shipment. Failure of the carrier to comply with the statutory prior conditions deprives the Commission of jurisdiction. Although the carriers, in the present case, filed applications to make refunds to a shipper within 180 days of the shipments involved, the filing was a nullity for failure to file a new tariff prior to filing the applications. If a new tariff were now filed and the carrier filed another refund application, the application would fail for not having been filed within the statutory period of 180 days. *Oppenheimer Intercontinental Corp. v. Moore McCormack Lines, Inc.*, 49 (52-53).

Carrier is permitted to refund a portion of freight charges on snowmobiles from Japan to Chicago where the carrier agreed to establish a special rate, but, through a clerical error in transmission, the new rate was not timely filed with the Commission. *Yamaha Motor Co., Ltd. v Parties to Japan/Great Lakes Memorandum 86 (87-88)*.

Carrier is permitted to waive a portion of freight charges assessed on a shipment of wheat bulgar from New Orleans to Georgetown, Guyana. At the time of shipment, the carrier thought the commodity to be a wheat flour for which the tariff provided a particular rate. The parties intended that the shipment be transported at that rate. Having no specific rate, wheat bulgar would otherwise have to be rated at the much higher cargo N.O.S. rate. The carrier, in order to rectify the error, filed an amendment to the tariff to reflect a rate for wheat bulgar. *Commodity Credit Corp. v. Mini Carriers Systems, Inc. 89, (90)*.

Carrier is permitted to waive collection of a portion of freight charges assessed on shipment of bagged flour from U.S. Great Lakes ports to Israel. The carrier's tariff did not contain a rate for bagged flour, but the carrier had agreed to carry the shipments at a particular rate, and had intended to file the rate with the Commission. Through inadvertence it failed to do so prior to the shipments. *A.I.D.-U.S. Department of Agriculture, 105 (106)*.

Carrier is permitted to waive collection of a portion of freight charges assessed on shipments of grain products from Great Lakes ports to Thailand. The carrier had inadvertently failed to file a revised tariff in accordance with its negotiations with the shipper. *U.S.D.A. v. Amber Maritime Corp., 108 (109-110)*.

Carrier is permitted to waive collection of a portion of freight charges assessed on shipments from Milwaukee to Cyprus. Due to clerical and administrative error, the carrier failed to file the rate agreed upon with the shipper, prior to the times of shipments. *Commodity Credit Corp. v. San Rocco Line, 111 (112-113)*.

Carrier is authorized to waive collection of a portion of charges assessed on shipments of bagged bulgar from Seattle to Indochina. The carrier and shipper had contracted for the shipments at a particular rate and the carrier inadvertently neglected to file the agreed rate prior to the shipments, but filed a rate which, by reason of clerical error, failed to set forth a provision that the rate included a bunker surcharge. *A.I.D.-U.S. Department of Agriculture, 145 (146-147)*.

Carrier is authorized to waive collection of a portion of freight charges assessed on shipments of flour from Kenosha to Beirut. Due to clerical and administrative error, the carrier failed to file the agreed rate prior to the shipments. *Commodity Credit Corp. v. San Rocco Line, 148 (149-150)*.

Assuming that there was a violation of law when carriers, as members of one conference, reduced rates on Canadian relief cargoes from the Great Lakes to the Mediterranean, while the carriers, as members of another conference, maintained higher rates on U.S. relief cargoes from U.S. Great Lakes ports to the Mediterranean, the amount of damage would not necessarily be the difference in the rates. The difference is not how much better off the shippers would be if they had paid a lower rate. The question is how much worse off they are because others have paid less. Complainants were no worse off than they would have been if the Canadian conference had not reduced its rates. Fundamentally, complainants sought to derive benefit from a situation which did not have an effect on the basic reasonableness of the rates charged and paid. To award reparation

under the circumstances would be inequitable. Had respondent conference reduced its rates to the Canadian conference level, the rates would have been lower than the rates of carriers serving the U.S. Atlantic and Gulf trades for carrying relief cargoes. In the absence of any competitive justification relating to the trade served by respondents, the lawfulness of such a reduction would have been questionable. *Commodity Credit Corp. and United States Agency for International Development v. American Export Isbrandtsen Lines, Inc.*, 171 (188).

Even had it been shown that respondents' rates were unreasonably high, complainant could not rely on a violation of section 18(b) (5) as a basis for reparation. There had been no determination by the Commission that respondent's rates were violative of that section prior to the assessment of such rates. Only after the Commission has determined that a rate serves to violate section 18(b) (5) may its assessment constitute a violation for which reparation may be awarded. Moreover, no evidence was adduced to support a conclusion that the rates paid by complainant to respondents were unreasonably high by the application of the usual rate making factors. *Id.* (190).

Where the bill of lading and dock receipt clearly identified the goods shipped as "stencil base paper;" and nowhere on the shipping documents was there any description or language which would have indicated that the commodity was "Paper, Stencils;" and the shipper certified that the goods were in fact stencil base paper, the proper tariff rate was "Paper, Stencil Base," rather than "Paper, Stencils," and the shipper was entitled to reparation accordingly. A conference tariff rule requiring prompt submission of claims for adjustment was not a barrier to recovery. The Commission has repeatedly ruled that a claim arising out of alleged overcharges cannot be barred from a determination on the merits if it is filed with the Commission within two years of accrual of the claim. *Polychrome Corp. v. Hamburg-America Line-North German Lloyd*, 220 (221-222).

Carrier is permitted to waive collection of a portion of freight charges where, in compiling an entirely new tariff, it inadvertently changed the rate on the goods involved from one computed on a weight basis to a weight or measurement basis. The shipper was unaware of the change (made four days before shipment). A new tariff was filed to eliminate measurement as a basis and restore weight as the sole basis for assessing charges. The application falls within the purview and intent of section 18(b) (3) of the 1916 Act as amended by Public Law 90-298. *Bekaert Steel Corp. v. Hapag-Lloyd AG*, 239 (240-241).

Where a shipment as described by the bill of lading consisted of toys and claimant contended that the correct bill of lading description should have been bicycles and tricycles (which would have been assessed at a lower rate), claimant was not entitled to reparation. It is often the case that the carrier in classifying and rating a shipment must look to the information given by the shipper or freight forwarder. It is the claimant, not the carrier, who must bear the heavy burdens of proof, and establish sufficient facts to indicate with reasonable certainty or definiteness the validity of the claim. Although about a fourth of the shipment consisted of bicycles would could qualify for the bicycle rate, this aspect of the claim fails for lack of any clear, and certainly any substantial evidence, as to the weight or measurements of the specific cartons involved. The shipments had been removed from the custody of the carrier and carrier verification of the claim

was impossible. *Ocean Freight Consultants, Inc. v. Itaipacific Line*, 314 (315, 318-319).

A complaint filed August 31, 1971, respecting a shipment of goods "Freight Collect," with the shipment arriving at its destination on September 8, 1969, was timely filed. The cause of action occurred on September 8, 1969. Id. (317).

SECURITY FOR THE PROTECTION OF THE PUBLIC (GO 20)

Wall Street Cruises, Inc. violated section 3 of Public Law 89-777 and section 540.3 of General Order 20 when it advertised cruises from United States ports without first having qualified for and received a Certificate of Financial Responsibility for Indemnification of Passengers for Nonperformance of Transportation. While respondent collected no money from any prospective passenger, and while the law was primarily designed to protect cruise passengers from loss of money, the law clearly bars all advertising prior to establishment of a person's financial responsibility. *Wall Street Cruises, Inc.*, 140 (141-143).

Contention of *Wall Street Cruises, Inc.*, that its advertisements of cruises were "to test the market," and thus it was not required to have a Certificate of Financial Responsibility was rejected. The advertisements quoted specific fares and named specific dates and purported to solicit business for actual cruises. There was no indication in the advertisements that they were for the purpose of determining the travelling public's reaction to the proposed cruise program. Id. (142).

SURCHARGES

Carriers which failed to impose a surcharge on the carriage of military cargo for the Military Sealift Command, while imposing the surcharge on the carriage of commercial cargo, did not violate section 14 Fourth of the 1916 Shipping Act. The question was whether such an imposition of a surcharge constitutes an unfair or unjustly discriminatory contract with a shipper based on the volume of freight offered. It was apparent that the imposition of the surcharge had absolutely nothing to do with the volume of freight offered; it was imposed on one shipper and not on another merely because one shipper had stated it would not acquiesce in the surcharge. The volume of freight offered was irrelevant. Violations of Sections 14 Fourth, 16 First and 17, Shipping Act, 1916, in the Non-assessment of Fuel Surcharges on MSC Rates, 92 (97).

Carriers which failed to impose a surcharge on the carriage of military cargo for the Military Sealift Command, while imposing the surcharge on the carriage of commercial cargo, violated section 16 First of the 1916 Shipping Act. A competitive relationship is necessary before a violation of this section can be found in the ordinary rate disparity case, since it is only logical that the cost of shipping bananas should bear no relationship to the cost of shipping heavy industrial equipment. Thus, to find an unlawful discrimination in transportation charges quite properly requires a showing of competitive relationship between two shippers who are assessed different rates. However, when dealing with a service which is absolute or an across-the-board fixed charge on all cargo carried regardless of the commodity involved (the instant surcharge), the competitive relationship is no longer required. The carriers were obligated to impose the surcharge equally on all commodities. Failure to do so constituted a clear situation of undue prejudice to a description of traffic" vis-a-vis other commodities in violation of section 16. Id. (97-98).

Carriers which failed to impose a surcharge on the carriage of military cargo for the Military Sealift Command, while imposing the surcharge on the carriage of commercial cargo, violated section 17 of the 1916 Shipping Act. The failure to collect this charge from MSC and to collect it from commercial shippers only constituted the collection of a charge which is unjustly discriminatory between shippers" in violation of section 17. *Id.* (89).

TARIFFS

The rate on shipments of cast iron soil pipe and fittings should have been assessed on certified public railroad weights instead of manufacturer's weights as assessed by the carrier. The certified railroad weight more accurately reflected the actual weight as shipped. *Tyler Piper Industries, Inc. v. Lykes Bros. Steamship Co., Inc.*, 28 (82).

As between tariff classifications which might be applicable on iron or steel pipe and fittings, namely "bent, shaped, or prefabricated" and "not bent or shaped, or fittings," bell or flange end pipe was not to be considered "bent shaped or prefabricated." Even though fittings may be bent, shaped and have belled or flange ends, they are included in the "not bent" classification because they do not occupy appreciably more space than does comparable diameter straight pipe. *Id.* (82).

The Examiner was in error, in dismissing a complaint against a carrier involving the proper tariff rate to be applied to shipments, in relying entirely on a proviso of the tariff which gave the conference sole authority to interpret its rates and commodity descriptions. In a matter of contractual interpretation, any ambiguity is to be construed most strongly against the writer of the contract. More specifically, in tariff matters this rule has been used time and again. The threshold issue is determining whether an ambiguity in fact exists. If it exists, the tariff must be construed in such a manner so as to resolve the ambiguity in favor of the shipper. *United Nations Children's Fund v. Blue Star Line*, 206 (208-209).

Where a tariff contained no specific commodity rate for poultry equipment; the carrier originally assessed the goods as machinery N.O.S.; "the conference was doubtful of the proper classification and placed the matter before its full membership for a vote (the vote was for the higher "cargo N.O.S." rate, with certain exceptions); and, most importantly, the use of the classification "machinery N.O.S." gave rise to a bona fide dispute over the interpretation of the tariff provision, i.e., whether poultry equipment could be considered to be machinery N.O.S.," it was clear that a tariff ambiguity existed. *Id.* (209, 211).

Applying the principle of construing a tariff ambiguity strongly against the carrier, the Commission finds that it is not difficult to classify the poultry equipment involved as machinery N.O.S." The carrier's argument that debeakers, candlers, and incubators are not machines but apparatus" is unsound. The commonly accepted usage of the word "apparatus" is as a generic term used to encompass the entire collection or set of materials, instruments, appliances, or machinery, designed for a particular use. The commonly accepted definition of machine includes devices with no moving parts which have as their function the conversion of energy from one form to another for the purpose of performing useful work. In the instant case, all three devices can reasonably be considered to be machines, as they convert energy from one form to another. Thus, the shipper was entitled to the "machinery N.O.S." rate (rather than the higher "cargo N.O.S." rate). *Id.* (209-211).

TERMINAL OPERATORS: See also Wharfage

Practices of the Boston Shipping Association with respect to the allocation of labor gangs at the port of Boston were not shown to violate sections 16 or 17 of the 1916 Shipping Act, since a complaining stevedore failed to show that it has more than one vessel in port on a given day, thus establishing a need for additional gangs; that all other gangs are unavailable because they have been called or recalled; and that at least one of complainant's stevedore competitors is working only one vessel with all of its seven gangs. *United Stevedoring Corp. v. Boston Shipping Assn.*, 33 (47).

WHARFAGE

Tariff rules of conferences imposing different wharfage and handling charges between ports contravene section 205 of the 1936 Merchant Marine Act and are therefore contrary to the public interest within the meaning of section 15 of the 1916 Shipping Act. *Associated Latin American Freight Conference and the Association of West Coast Steamship Companies, Amended Tariff Rules Regarding Wharfage and Handling Charges*, 151 (158).