

DECISIONS OF THE
FEDERAL MARITIME COMMISSION

VOLUME 24

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FEDERAL MARITIME COMMISSION

WASHINGTON, D.C.

June 30, 1982

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FEDERAL MARITIME COMMISSION

INFORMAL DOCKET NO. 1049(1)

INGERSOLL RAND COMPANY

v.

HAPAG-LLOYD

ORDER OF PARTIAL ADOPTION

July 10, 1981

The Commission determined to review the decision of Settlement Officer Joseph T. Farrell in which he denied the claim of Ingersoll Rand Company (I-R) for alleged freight overcharges collected by Hapag-Lloyd on three shipments from New York to Le Havre, France, and ordered I-R to pay Hapag-Lloyd \$81.48 with 11.4 percent interest from June 1979, and \$198.83 with 11.5 percent from July 1979.

The shipments were described in the bills of lading as "Spiral Rods," "Road Building Machinery Pts.," "Pneumatic Hand Tools," and "Pneumatic Wrenches."

The shipment was assessed the rate of \$89.50 applicable to "Roadbuilding, Road Maintenance and Earthmoving Equipment." I-R contends that it should have been rated as "Components Parts For - Roadbuilding Equipment, Road Maintenance Equipment, Earthmoving Equipment" at \$78.00 per 2,240 pounds.*

The Settlement Officer denied the claim on the ground that I-R had not sustained its burden of proving that freight was overcharged. On the contrary, he found that two of the items shipped were undercharged and therefore ordered I-R to pay to Hapag-Lloyd the amount of \$198.83 plus interest.

Section 22 of the Shipping Act, 1916, provides that the Commission may award reparation for injury caused by a violation of the Act "by a common carrier by water or other person subject to this Act." The definition of "other person" in section 1 of the Act does not include shippers or consignees. Therefore, section 22 confers no jurisdiction on the Commission to order the payment of reparation, in any form, by a shipper or consignee. As a result, the Settlement Officer had no authority to direct I-R, a shipper, to pay to Hapag-Lloyd any amount. Accordingly, this portion of the Settlement Officer's decision must be vacated.

* North Atlantic French Atlantic Freight Conference Tariff No. (3), FMC-4.

Except as stated above, the Commission finds that the Settlement Officer's findings and conclusion are correct. Hapag-Lloyd should therefore take the steps necessary to collect from Ingersoll Rand Company freight undercharges in the amount of \$280.31.

THEREFORE, IT IS ORDERED, That that portion of the Settlement Officer's decision directing Ingersoll Rand Company to pay to Hapag-Lloyd the amount of \$280.31 plus interest is reversed and vacated;

IT IS FURTHER ORDERED, That in all other respects, the decision of the Settlement Officer is adopted and made a part hereof.

By the Commission.**

(S) FRANCIS C. HURNEY
Secretary

Commissioner Richard J. Daschbach's separate opinion.

I am not participating because I do not believe that the Commission should review the decisions of Settlement Officers in informal docket proceedings. Under Subpart S of the Commission's Rules of Practice and Procedure (46 C.F.R. 502.301), parties consent to waive the rights and obligations associated with normal adjudicatory proceedings for the express purpose of receiving prompt consideration of a small claim. Commission review precludes the inexpensive and expeditious handling of small claims which is the foundation of the informal docket process. The Settlement Officer's decisions in informal dockets do not have precedential value. Commission review therefore imposes unnecessary expense and delay in an arbitration process designed to settle minor commercial disputes in a prompt and responsive manner.

** Commissioner Richard J. Daschbach's separate opinion is attached.

FEDERAL MARITIME COMMISSION

INFORMAL DOCKET NO. 1049(I)
INGERSOLL RAND COMPANY

v.

HAPAG-LLOYD

DECISION OF JOSEPH T. FARRELL, SETTLEMENT
OFFICER ¹

Partially Adopted July 10, 1981

Reparation Denied

By its complaint filed with the Commission on February 17, 1981, Ingersoll Rand Company (I-R) claims \$1,939.89 plus interest of Hapag-Lloyd, this amount representing an alleged overcharge arising out of three I-R shipments transported by Hapag-Lloyd from New York, New York to Le Havre, France, pursuant to bills of lading dated June 1, 1979, July 6, 1979, and July 27, 1979, respectively. I-R prepaid freight charges in all instances,² and each shipment was transported by container under terms of "house-to-house movement." The bill of lading descriptions are as noted in Appendix A to this decision.

I-R's complaint centers on the contention that all or part of each shipment was erroneously freighted in accordance with item 718.4001.001 of the controlling tariff:³ "Roadbuilding, Road Maintenance and Earth Moving Equipment, viz. . . ." at a rate of \$89.50 per 40 cubic feet. Complainant cites item 931.0078.0000, "Shipments of Straight or Mixed Loads of . . . Component Parts For - Roadbuilding Equipment, Road Maintenance Equipment, Earthmoving Equipment . . .," \$78.00 per 2,240 pounds. This special rate is limited to "house-to-house" service.

I-R further contends that, in the case of one item, it was in fact undercharged, although the logic of this contention was not delineated in the original claim.

Hapag-Lloyd notes that I-R's claim was denied on the basis of the Conference 6-Month Rule, but also disputes the complaint on its merits:

¹ Both parties having consented to the informal procedure under Subpart S of the Commission's Rules of Practice and Procedure (46 C.F.R. 502.301-304), this decision will be final unless the Commission elects to review it within 30 days from the date of service thereof.

² The original submissions left it unclear whether I-R had actually prepaid these charges. In response to the Settlement Officer's query, I-R provided copies of invoices from its forwarder which demonstrate that I-R, in fact, has standing to pursue this complaint.

³ North Atlantic French Atlantic Freight Conference Tariff No. (3) FMC-4.

. . . As to the merits of the claim itself we find ourselves in a difficult position in that since the containers are no longer available for inspection we cannot verify the contents. The Merchant claims that the cargo shipped was components for road building, road maintenance and road moving equipment. However, the documents furnished particularly invoices from Ingersoll Rand do not state anywhere that these parts are for road building, road maintenance and road moving equipment. Furthermore, the bills of lading have been annotated (sic.) in some cases (sic.) in "pen and ink" with the word roadbuilding. It is impossible to determine whether this was done before or after the fact in order to justify complying with the Tariff item description.

Finally we want to point out to you that the entry claim of the Merchant i.e. item number 931.0078.000 has a reference "Rule 25E2 not applicable." This of course is the weight/measure part of the minimum utilization rule and in effect gears the entry to minimum revenue portion i.e. Rule 25E3.

Should you find in favor of the Merchant please be sure you apply the minimum revenues.⁴

Although not specified in the complaint, I-R's contentions constitute an alleged violation of section 18(b)(3) of the Shipping Act.⁵ In support of its claim, I-R attached to the complaint lengthy invoices addressed to its French consignee, Ingersoll Rand OSC (I-R OSC). As noted by Hapag-Lloyd, these invoices fail to specify that the parts shipped were intended for any particular type of equipment.⁶ It was clear to the Settlement Officer that more data was required to clarify the invoices.

An exchange of several letters between the Settlement Officer and complainant has helped to clarify the description of at least some of the disputed items. A discussion of each partial shipment cited in I-R's complaint follows:

1. June 1, 1979: "11 bdls. Spiral Rods; 8415 pounds, 51 cubic feet."

This item includes (on the Bill of Lading) the hand-written notation: "Road Building." The Settlement Officer concurs with Hapag-Lloyd's comments on such notations, and has discounted these added words in the ensuing discussion.

This item can be found on one of the attached invoices as Package 17210/02-12; i.e., 11 packages of 765 pounds each (8,415 pounds). I-R has supplied a "Rock Drill Division Product Code Listing" which demonstrates that the parts included with order 074-17210 are intended

⁴ Letter from respondent dated March 16, 1981.

⁵ 46 C.F.R. 502.304(a) Appendix A. No specific violation of the Shipping Act need be cited by the complainant in overcharge cases.

⁶ Each part is identified with such terminology as: "Drill Rod"; "Chuck"; "Hub/Tire Assy."; "Sleeve DHD 24"; "Feed Mtr. Cpt."; etc.

as components of rockdrills; underground mining equipment; surface drills; etc. Included in this code listing is "Code 129: I-R Manufactured Steel: Spiral Steel System Rods, Couplings, Shanks, Other I-R Manufactured Steel & Accessories." This code and the entry "spiral rod" can be found in the itemized invoice for order 074-17210.⁷

Sales literature submitted by complainant at the request of the Settlement Officer clearly demonstrates that spiral rods are intended for use in "Surface Drilling, Mining, and Tunneling" operations. The "I-R Spi-Ral Steel System" is described as useful for "Construction jobs, pioneer roadbuilding, quarry drilling, pipeline drilling, underground mining, tunneling . . . Spi-Ral Steel transmits drill energy to the rock as efficiently as possible in both underground and surface applications"

It is clear that complainant relies upon use as the major determinant of proper rating in this case. The Settlement Officer concurs that "road building machinery" is a potential use for spiral rods, but, when use is a factor, our concern must be with the "controlling use."⁸ Unfortunately, no evidence exists that "road building machinery" best describes the intended use of these particular spiral rods. However, no such reliance upon use is necessary. The Settlement Officer is forced to conclude that the best description of this commodity can be found in yet another tariff item: (No. 718.4) "Construction and Mining Machinery (N.E.S.) . . . Equipment, Earth Boring, Viz: - Rock Driller." Spi-Ral rods are essentially parts⁹ of rock drillers, and this is clearly the most specific description (especially barring knowledge of the ultimate use of the product).¹⁰

The rate sought by complainant pertains to ". . . Component Parts For - Road Building Equipment, Road Maintenance Equipment, Earth-moving Equipment"

⁷ "129 A 275 50249226 Spiral Rod." Page 3 of invoice no. 074-17210.

⁸ "When 'use' is a factor in deciding the proper designation of an article, it is the 'controlling use' that determines the nature and character of a shipment at the time tendered and the fact that an article may have other subordinate or secondary uses does not alter the nature of the product. See *Continental Can Co. v. U.S.*, 272 F. 2d 312 (2d Cir., 1959)." *C.S.C. International, Inc. v. Lykes Bros. Steamship Co., Inc.*, 20 F.M.C. 552, 560 (1978).

⁹ Tariff Rule 2(J)(3): "Where in this tariff rates are provided for articles, the same rate will also be applicable on parts of such articles where so described on the Bill of Lading, except where specific rates are provided for such parts."

¹⁰ It occurred to the Settlement Officer that a knowledge of consignee's business might help establish the intended use of the questioned shipment. I-R, however, advises that I-R OSC is engaged in "distribution." Without information concerning the ultimate destination of I-R's products, shipper's advice on this point is of little use.

This item cannot be matched with any of the data on any of the attached invoices, and none of the other submissions introduced by complainant in any way assist. The proof advanced therefore rests on two factors. The first of these is the bill of lading description. In this case, the designation "road building machinery parts" is *not* a handwritten addition, but, rather, a part of the bill of lading description as originally completed. Nevertheless, the Settlement Officer is persuaded that this description alone is not adequate to establish complainant's case.¹¹

The second factor which might help establish the precise nature of this segment of the shipment in question is the previously cited "Rock Drill Division Product Listing." This submission clearly demonstrates that nearly all of the items listed on the unidentifiable invoices accompanying the listing pertain to earthmoving, drilling, etc. Unfortunately, neither the commodity descriptions, the weight (993 pounds), nor the measurement (250 cubic feet) can be related to any items (or group of items) reflected on the invoice upon which this particular facet of the claim is predicated. Without such linkage, no corroboration exists for the bill of lading description; it cannot be verified that 993 pounds of road building machinery parts were included in the shipment. The burden of proof is clearly on the complainant to establish that its shipment was misrated.¹² In this instance, it has failed to do so to the satisfaction of the Settlement Officer. Accordingly, reparation is denied.

3. June 1, 1979: "1 pcs. Air Compressor Parts; 386 pounds, 19 cubic feet."

This is the item on which complainant contends that it was undercharged. Although the original complaint failed to explain the rationale for this contention, subsequent correspondence resulted in the following remarks from I-R:

These parts are for stationary air compressors and tariff item # 718.4005.001 should apply. The steamship company rated the item as Road Building Equipment which covers only Ingersoll Rand Portable Air Compressors used mostly for road building and earth moving purposes.¹³

The material was rated in accordance with item 718.4001.001: "Road-building, Road Maintenance and Earth Moving Equipment, viz.: . . . (b.) Air Compressors, over 15 HP . . . and (c.) Parts for above. Not otherwise specified elsewhere in this tariff." Item 718.4005.001, which

¹¹ For example, consider the following remarks: "Furthermore, we have recently taken the approach that the description on the bill of lading should not be the single controlling factor in cases of this nature. Rather, the test is what claimant can now prove based on all the evidence as to what was actually shipped, even if the actual shipment differed from the bill of lading description." *Western Publishing Company v. Hapag-Lloyd A.G.*, Docket No. 283(I), May 4, 1972, 13 S.R.R. 16.

¹² *Sanrio Company, Ltd. v. Maersk Line*, Informal Docket No. 681(F), 23 F.M.C. 150 (1980).

¹³ Complainant's letter of April 1, 1981.

complainant believes to contain the proper rate, applies to: "Air Compressors (Not Applicable to Engines, for which see Tariff Items 711.4001 - 711.5004 - 711.5012 - 711.5016."

The Settlement Officer is inclined to agree with I-R that item 718.4005.001 should apply to the product as described. First, the bill of lading description in no way indicates the use for which the "air compressor parts" were intended, nor is there any indication that the air compressors of which they are alleged to be components are "over 15 HP" as required by item 718.4001.001 - More importantly, complainant has provided us with straight-forward testimony which is decidedly not self-serving. The Commission has consistently held that even self-serving testimony is not automatically to be discredited.¹⁴ Such testimony when it weighs against the witness would seem to be of even greater probative value. Finally, the tariff provides an unambiguous rate for "air compressors." The tariff also contains Rule 2(J)(3), footnote 9, *supra*, whereby parts of compressors are entitled to the same rate. In this light, given the bill of lading description, it is difficult to comprehend the reason for the application of item 718.4001.001. A preponderance of the evidence indicates that item 718.4005.001 is applicable, and this portion of the shipment should have been rated at \$147.25 per 40 cubic feet.¹⁵

4. June 1, 1979: "8 pcs. Portable Compressor Parts; 23 pounds, 188 cubic feet."

The problem with this portion of the complaint is the same as that posed for the "11 pieces Road Building Machinery Parts." That is, this description can in no way be identified with anything in the invoice notations. It is therefore impossible to determine the actual nature of what was shipped.¹⁶ In light of the lack of supporting data, reparation is denied.

5. July 6, 1979: "28 bdls. Road Building Machinery Parts (Spiral Rods); 34624 pounds, 210 cubic feet."

This appears to be the same commodity discussed in the first section. The weight can be related to 28 packages noted on the accompanying invoice, and, once again, portions of the shipment are introduced with

¹⁴ For example, confer *Unapproved Sect. 15 Agt. - Coal to Japan, Korea*, 7 F.M.C. 295, 302 (1962).

¹⁵ This portion of the shipment cannot be correlated with any particular items or groups of items on the invoice, and, without complainant's additional comments, I-R's claims concerning proper rating would have to be dismissed for lack of evidence. However, in light of I-R's admission of an under-charge, it appears justified to conclude that parts so described were in fact shipped on June 1, 1979.

¹⁶ I-R has supplied some fascinating sales literature which provides the following information: "Although most portable compressors provide air to power rock drilling equipment, they're also used for" In light of this principal (i.e., controlling) use, and supporting photographs, the best description of the commodity appears to be that found in item 718.4260.001: "Construction and Mining Machinery (N.E.S.) Equipment, Earth Boring, Viz.: - Portable Compressor on wheels or skids mounted on a truck." If it could be demonstrated that the parts shipped are related to the commodity described in the sales literature, the proper rate would be \$100.50 per 40 cubic feet.

code number "129." The bulk of the entries including that number are identified with the word "rod." Accordingly, reparation is denied for the same reasons originally outlined above. Complainant was undercharged; the proper rate is \$100.50 per 2,240 pounds.

6. July 6, 1979: "15 pcs. Road Building Machinery Parts; 7355 pounds, 248 cubic feet."

The remaining 7355 pounds encompasses all of the remaining invoice items pertaining to the shipment of July 6, 1979. The numerous items involved include "A few prefixed with the codes 115 ('I-R Manufactured Bits') and 129 ('I-R Manufactured Steel'); the bulk of the items bear no such designation, but are described with such terms as 'elbow rubber,' 'oil ring,' 'hose,' etc." Nothing contained in the invoices or anywhere else outside of the bill of lading descriptions demonstrates or even indicates that the commodities involved were component parts for road building machinery. Accordingly, reparation is denied.

7. July 27, 1979: "11 ctns. Road Building Machinery; 1969 pounds, 144.5 cubic feet."

The invoices provided in support of this part of the complaint do correlate with the data on the bill of lading. Some items are identified with the usual Rock Drill Division codes, while some are not; all items are identified on a summary invoice as being subject to "Rock Drill Division Payment Plan #354." However, no evidence has been provided that the shipment consisted of parts for "road building machinery" - other than the words appearing on the bill of lading.¹⁷ The Settlement Officer concludes that the evidence presented by claimant is insufficient, and reparation is denied. However, a slight adjustment should be made in the freight charges for another reason. The bill of lading measurement of 144.5 cubic feet (calculated as 145 cubic feet) is clearly indicated on the invoices as only 143.7 cubic feet. The Settlement Officer calculates the total of individual measurements to be 143.9 cubic feet; in either case, there is no rationale for the calculation based on 145 cubic feet.

The effects on overall freight charges resulting from this slight overcharge, as well as from the undercharges previously discussed, are calculated in Appendix B to this decision. I-R is ordered to pay Hapag-Lloyd \$280.31; in addition, it is the opinion of the Settlement Officer that interest should be awarded. The Commission has determined that interest is not to be considered a penalty, but, rather, as compensation for the use of the money involved during the period covered by the interest. Accordingly, Hapag-Lloyd is awarded 11.4 percent interest per annum on undercharges of \$81.48 from June 1979, and 11.5 percent interest per annum on undercharges of \$198.83 from July 1979. The

¹⁷ Part of the original description rather than pen and ink additions.

interest figures of 11.4 percent and 11.5 percent are based on the average monthly rates on U.S. Treasury bills in the secondary market from the months freight charges were paid to March 1981, the most recent quote available to the Settlement Officer. So ordered.

(S) JOSEPH T. FARRELL
Settlement Officer

Appendix A

The bills of lading identified the shipments thusly:
 Bill of Lading No. 17106578 dated June 1, 1979:

	Gross Weight	Measurement
¹ 11 bcls. Spiral Rods	8,415#	51 cft.
¹ 11 pcs. Road Building Machinery Pts.	993#	250 cft.
¹ 1 pc. Air Compressor Parts	386#	19 cft.
24 pcs. Pneumatic Tool Parts	14,931#	797 cft.
¹ 8 pcs. Portable Compressor Pts.	2,360#	188 cft.

Bill of Lading No. 17128547 dated July 6, 1979:

	Gross Weight	Measurement
¹ 28 bcls. Road Building Machinery Parts (Spiral Rods)	34,624#	210 cft.
¹ 15 pcs. Road Building Machinery Parts Page No. 218 Item #718.4001.001	7,355#	248 cft.

Bill of Lading No. 17139889 dated July 27, 1979:

¹ 11 ctns. Road Building Machinery Parts Item 718.4001.001	1,969#	144.5 cft.
29 boxes Air Compressor Parts Item 718.4005.001	10,366#	506.1 cft.
50 boxes Pneumatic Hand Tools Item 695.0001.001 (Separate Container)	20,753#	1036.6 cft.
15 ctns. Pneumatic Wrenches Item 695.0001.001	18,676#	519.8 cft.

¹ Only items so indicated are in dispute.

Note: Several other notations (e.g., Road Building) can be found on the bill of lading. They have, however, been omitted, inasmuch as the Settlement Officer cannot determine when these notations were added.

Note: The bill of lading of June 1, 1979, is actually a revised bill of lading. Ingersoll Rand originally paid freight charges of \$4,860.99, but this figure was reduced to \$4,247.53 as a result of an earlier overcharge claim adjusted directly by the carrier.

Appendix B

Bill of Lading Dated June 1, 1979:

11 bds. Spiral Rods	8,415 pounds at 89.50/2240	=	\$ 336.22
11 pcs. Road Building Machinery Pts.	250 cts. at 89.50/40	=	559.38
1 pcs. Air Compressor Parts	19 cft. at 89.50/40	=	42.51
24 pcs. Pneumatic Tool Parts	797 cft. at 103.75/40	=	2,067.22
8 pcs. Portable Compressor Parts	188 cft. at 89.50/40	=	420.65
			<hr/>
			\$3,425.98
	18.5% Currency Adjustment Factor:		633.81
	\$5.00 per 40 cft. (as freighted)		
	Fuel Adjustment Factor:		156.75
	\$8.25 per 2240 pounds (as freighted)		
	Fuel Adjustment Factor:		30.99
			<hr/>
			\$4,247.53

Correct Rating of Shipment of June 1, 1979:

11 bds. Spiral Rods	8,415 pounds at 100.50/2240	=	\$ 377.55
11 pcs. Road Building Machinery Pts.	250 cft. at 89.50/40	=	559.38
1 pcs. Air Compressor Parts	19 cft. at 147.25/40	=	69.94
24 pcs. Pneumatic Tool Parts	797 cft. at 103.75/40	=	2,067.22
8 pcs. Portable Compressor Parts	188 cft. at 89.50/40	=	420.65
			<hr/>
			\$3,494.74
	18.5% Currency Adjustment Factor:		646.53
	\$5.00 per 40 cft. (as freighted)		
	Fuel Adjustment Factor:		156.75
	\$8.25 per 2240 pounds (as freighted)		
	Fuel Adjustment Factor:		30.99
			<hr/>
			\$4,329.01

Amount of Undercharge:

	\$4,329.01
	<hr/>
	— 4,247.53
	<hr/>
	\$ 81.48

Bill of Lading Dated July 6, 1979:

28 bds. Road Building Machinery Parts (Spiral Rods)	34,624 pounds at 89.50/2240	=	\$1,383.41
15 pcs. Road Building Machinery Parts Page No. 218 Item #718.4001.001	248 cft. at 89.50/40	=	554.90
			<hr/>
			\$1,938.31
18.5% Currency Adjustment Factor:			358.59
\$5.00 per 40 cft. (as freighted)			
Fuel Adjustment Factor:			31.00
\$8.25 per 2240 pounds (as freighted)			
Fuel Adjustment Factor:			127.52
			<hr/>
			\$2,455.42

Correct Rating of Shipment of July 6, 1979:

28 bds. Road Building Machinery Parts (Spiral Rods)	34,624 pounds at 100.50/2240	=	\$1,553.44
15 pcs. Road Building Machinery Parts Page No. 217 Item #718.4001.001	248 cft. at 89.50/40	=	554.90
			<hr/>
			\$2,108.34
18.5% Currency Adjustment Factor:			390.04
\$5.00 per 40 cft. (as freighted)			
Fuel Adjustment Factor:			31.00
\$8.25 per 2240 pounds (as freighted)			
Fuel Adjustment Factor:			127.52
			<hr/>
			\$2,656.90

Amount of Undercharge:

\$2,656.90
<hr/>
- 2,455.42
<hr/>
\$ 201.48

Bill of Lading Dated July 27, 1979:

11 ctns. Road Building Machinery Parts Item 718.4001.001	145 cft. at 89.50/40	—	\$ 324.44
29 boxes Air Compressor Parts Item 718.4005.001	506 cft. at 147.25/40	=	1,862.71
50 boxes Pneumatic Hand Tools Item 695.0001.001 (Separate Container)	1037 cft. at 103.75/40	=	2,689.72
15 ctns. Pneumatic Wrenches Item 695.0001.001	520 cft. at 103.75/40	=	1,348.75
			<hr/>
			\$6,225.62
18.5% Currency Adjustment Factor:			1,151.74
\$5.00 per 40 cft. (as freighted)			
Fuel Adjustment Factor:			<hr/>
			276.00
			<hr/>
			\$7,653.36

Correct Rating of Shipment of July 27, 1979:

11 ctns. Road Building Machinery Parts Item 718.4001.001	144 cft. at 89.50/40	=	\$ 322.20
29 boxes Air Compressor Parts Item 718.4005.001	506 cft. at 147.25/40	=	1,862.71
50 boxes Pneumatic Hand Tools Item 695.0001.001 (Separate Container)	1037 cft. at 103.75/40	=	2,689.72
15 ctns. Pneumatic Wrenches Item 695.0001.001	520 cft. at 103.75/40	=	1,348.75
			<hr/>
			\$6,223.38
18.5% Currency Adjustment Factor:			1,151.33
\$5.00 per 40 cft. (as freighted)			
Fuel Adjustment Factor:			<hr/>
			276.00
			<hr/>
			\$7,650.71

Amount of Overcharge:

\$7,653.36
— 7,650.71
<hr/>
\$ 2.65

Total Undercharge:

\$ 81.48
+ 201.48
<hr/>
\$ 282.96
— 2.65
<hr/>
\$ 280.31

FEDERAL MARITIME COMMISSION

DOCKET NO. 80-55
DOW CORNING CORPORATION

v.

ATLANTIC CONTAINER LINE, ET AL.

NOTICE

July 28, 1981

Notice is given that no exceptions have been filed to the June 22, 1981 initial decision in this proceeding and the time within which the Commission could determine to review that decision has expired. No such determination has been made and, accordingly, that decision has become administratively final.

(S) FRANCIS C. HURNEY
Secretary

FEDERAL MARITIME COMMISSION

DOCKET NO. 80-55

DOW CORNING CORPORATION

v.

ATLANTIC CONTAINER LINE, ET AL.

Complainant found to have been overcharged based upon an uncertainty resulting from a tariff provision susceptible of two interpretations. Complainant entitled to reparations.

Complainant failed to sustain its evidentiary burden that certain commodity descriptions in the shipping papers were of the character within the description on which the rate claimed was applicable.

David L. Weiser, Traffic Service Bureau, Inc., for complainant, Dow Corning Corporation.

John M. Ridlon for respondent Sea-Land Service, Inc.

Frederick L. Shreves, II, for respondent Dart Containerline Company Limited.

Leo S. Fisher and *Anthony J. Ciccone, Jr.*, for respondent Hapag-Lloyd Aktiengesellschaft.

William Karas for respondent Atlantic Container Line.

Peter J. King for respondent Seatrains International, S.A.

INITIAL DECISION ¹ OF PAUL J. FITZPATRICK, ADMINISTRATIVE LAW JUDGE

Finalized July 28, 1981

Dow Corning Corporation of Midland, Michigan,² seeks in its complaint, as amended,³ reparations totalling \$96,569.48 against five carriers because of a claimed assessment of an incorrect rate involving sixty-eight shipments of silicone emulsion, silicone elastomer⁴ and silicone rubber compound from ports in Baltimore, New York, Norfolk, and Portsmouth during the period from August 2, 1978, to July 5, 1979.

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

² By letter to Traffic Service Bureau, Inc., Dow provided permission "to file a formal complaint with the Federal Maritime Commission on Claims you have processed."

³ The complaint states that the rates charged ". . . are unjust and unreasonable in violation of Section 18(b)(3) of the Shipping Act." During the prehearing conference, permission was granted to amend the complaint to the seeking of reparations on the basis of claimed assessment of incorrect rates. Complainant also abandoned its request for a "cease and desist" order.

⁴ Elastomers appears in the pertinent tariff provisions as "Elestomers." In those instances where the tariff provision is cited, the decision will use the spelling as it appears in the tariff.

Atlantic Container Line (Atlantic), Dart Orient Service, Inc. (Dart), Hapag-Lloyd Aktiengesellschaft (Hapag-Lloyd), Sea-Land Service, Inc. (Sea-Land), and Seatrain International, S.A. (Seatrain) were named as respondents. According to the complaint, reparation is sought against Atlantic in the amount of \$78,898.83, Dart - \$7,058.80, Hapag-Lloyd - \$2,877.02, Sea-Land - \$7,260.72, and Seatrain - \$474.11, and all subject to a requested imposition of interest in the amount of 12 percent. Complainant also requested that the proceeding be conducted under the Shortened Procedure provided by the Commission's Rules of Practice and Procedure (46 C.F.R. 502.181-187).

A review of the responses to the complaint coupled with complainant's failure to file either an answering memorandum or response to a pending motion to dismiss necessitated the convening of a prehearing conference. Moreover, Atlantic, in a letter addressed to the Secretary of the Commission, stated: "We have examined the claimant's memorandum of facts and arguments and found his tariff authority to be in good order. The governing conference, North Atlantic Continental Freight Conference, has confirmed that the claimant's interpretation of tariff item 931.0118 is correct. In view of this fact we acknowledge the overcharge."

At the prehearing conference, Atlantic submitted an "agreement" which provided that it "will pay \$78,898.83 to complainant, without interest, upon dismissal, with prejudice, of the complaint." Atlantic also agreed to make a like adjustment for any other shippers "similarly situated." This agreement, signed by the complainant, requested dismissal of the complaint as to Atlantic. Prior to the conference, Hapag-Lloyd submitted a motion to dismiss and proposed a settlement wherein it would pay complainant the sum of \$2,877.02 without interest. Also prior to the conference, Seatrain filed a motion to dismiss, claiming complainant failed to meet "its heavy burden of proof" and also adding that it "does not expect to participate further in this proceeding, and agrees to be bound by the final determination of the Commission herein." After a discussion of the issues and submissions of the parties, it was agreed that: (1) complainant was to supply supplemental evidentiary material; (2) Sea-Land and Dart would reply to the complainant's submission coupled with a proposed procedural course for the future conduct of the proceeding; (3) a legal memorandum of position (regarding the terms and effect of the proposed settlement agreements of other respondents) was to be filed by Sea-Land and Dart; and (4) a reply memorandum was to be filed by Hapag-Lloyd, Atlantic and complainant.⁵ Thus, as it stands now, as to the merits of the complaint, Sea-Land and Dart oppose the claim for reparations, Hapag-Lloyd has

⁵ Prehearing Conference Report served October 23, 1980.

submitted a supplement agreement and supporting affidavit on March 3, 1981, Seatrain has not participated beyond the filing of its motion to dismiss, and Atlantic has not participated beyond submission of its "agreement" of October 22, 1980. The arguments posed by Sea-Land and Dart focus upon the major areas of disagreement, i.e., a dispute as to an interpretation of a tariff provision and a question of whether the complaint carried its evidentiary burden in establishing the character of certain commodities warranting the imposition of the rate sought herein.

Sea-Land, pursuant to the provisions of the North Atlantic Continental Freight Conference Tariff Nos. (29) FMC-4 and (30) FMC-5, serves the eastbound trade between North Atlantic ports in the range from Eastport, ME, to Hampton Roads, VA, and Antwerp, Rotterdam, Amsterdam, Hamburg, Bremen, and Bremerhaven on the other. Between August 5, 1978, and May 2, 1979, it transported on behalf of complainant six (6) shipments of various commodities.

Under its Bill of Lading No. 901-026202 dated August 5, 1978, Sea-Land carried a mixed load of cargo composed of "silicone rubber compound" and "chemicals" as described by the complainant. Each of the commodities was rated separately under its specific commodity description. "Silicone rubber compound" was rated under Tariff Item 581.1020.001 at \$138.50 W/M applicable to "Silicon(e) Rubber Compounds Packed" pursuant to the terms of 31st Rev. Pg. 175, North Atlantic Continental Freight Conference Tariff No. (29) FMC-4, effective May 24, 1978. As to this bill, the issue is whether the cargo should have been assessed a rate of \$88.50 applicable on a weight basis to a minimum load of 29,120 pounds per container pursuant to Item No. 931.0118.576 of the Conference's tariff, 9th Rev. Pg. 270-M, effective May 24, 1978, which provides for the application of the following rates:

				(Item No.)
Straight or Mixed Shipments of:				
Silicone Antifoam Emulsion	W	—	119.50	931.0118.000
Silicone Elastomer	W	150.25	171.75	931.0118.000
Silicone Monomer	W	179.75	198.25	931.0118.000
Minimum 29,120 lbs. per Container	W	88.50	—	931.0118.576

According to Sea-Land, the minimum rate, provided under Item No. 931.0118.576, by virtue of its location in the tariff provision applies only to straight or mixed shipments of "Silicone Monomer" and not to containers of straight or mixed shipments of any other commodity named in that particular section of the tariff. It observes that even if the minimum rate was to apply to each of the three items under No. 931.0118, then under no circumstances could that minimum apply to

"silicone rubber compound" specifically covered under Item 581.1020.001.

Freight Bill 901-031564 dated October 14, 1978, presents identical issues except that the cargo consisted of "silicone rubber compound" in a mixed shipment with "synthetic resins" rather than simply "chemicals." Complainant, on the other hand, again claims that the shipment should have been rated pursuant to the minimum weight rate provided under Item 931.0118.576.

Bill of Lading No. 901-042317, dated December 16, 1978, involved a mixed shipment of cargo consisting of: (1) "silicone emulsion"; (2) "flammable liquid NOS (Acetoxysilane)," a "synthetic resin"; and (3) a third portion of the cargo described only as "synthetic resin." Again this cargo was rated as a mixed cargo of "silicone emulsion" and "synthetic resin." Complainant claims that the rate applied to the "silicone emulsion" was improper. Respondent assessed the rate applicable to mixed container loads of "Silicone Antifoam Emulsions," pursuant to Item No. 931.0120.587 of the tariff, 9th Rev. Pg. 270-M, effective May 24, 1978.⁶ Here the complainant seeks the application of the minimum per container weight rate under Item No. 931.0118.576.

The cargo carried by respondent under Bill of Lading No. 901-049366 dated January 27, 1979, consisted of a mixed cargo of "silicone emulsion" and "synthetic resin," and Sea-Land applied the specific commodity rate applicable to "Silicone Antifoam Emulsions, Packed," i.e., a minimum 38,080 pounds per container rate of \$99.75 under Tariff Item 581.1042.769, 35th Rev. Pg. 175, effective November 30, 1978. Sea-Land individually rated the synthetic resin, which complainant did not dispute; but complainant urges that it should have been assessed the rate applicable to a minimum of 29,120 pounds per container of straight or mixed shipments of specific items under Tariff Item No. 931.0118.013.⁷

Under Bill of Lading No. 984-748354, dated May 2, 1979, Sea-Land transported cargo consisting of another mixed shipment of "silicone elastomers" and "chemicals no label." Again, it was rated under

⁶ The tariff provision utilized by Sea-Land provides:

Mixed Containerloads of the Following:

Silicone Fluids, Silicone Resin,
Solutions, Silicone Rubber Compounds,
Silicone Base Adhesive and Sealers,
Silicone Antifoam Emulsions,
Silicone Base Lubricating Greases-

Minimum 40,320 lbs. per Container	W	(R)139.00	-	931.0120.587
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⁷ Conference Tariff, Orig. Pg. 323, effective January 1, 1979, provides:

Straight or Mixed Shipments of:

Silicone Antifoam Emulsion	W	-	125.50	931.0118.003
Silicone Elastomer	W	158.00	180.50	931.0118.003
Silicone Monomer	W	188.75	208.25	931.0118.003
Minimum 29,120 lbs. per Container	W	93.00	-	931.0118.013

specific commodities separately. The rate application with respect to "chemicals" is not disputed. According to Sea-Land, the specific commodity rate applicable to straight or mixed shipments of "Silicone Elastomer" is \$158.00 on a weight basis under the provisions of Tariff Item No. 931.0118.102.⁸ Again, complainant alleges that it should have been billed a minimum rate applicable to 29,120 pounds per container of \$93.00 on a weight basis pursuant to Item 931.0118.310. The last claim under Bill of Lading No. 984-748598 dated May 2, 1979, consisted of a mixed shipment of "silicone elastomers" and "silicone rubber compound." This cargo was rated under Item No. 931.0120.018 at a rate of \$146.00 on a weight basis applicable to a minimum container load of 40,320 pounds per container, the rate applicable to "mixed container loads" containing silicone rubber compound.⁹ Again, complainant seeks the application of the minimum 29,120 pound per container rate of \$93.00 provided in Item No. 931.0118.013. Sea-Land, on the other hand, considers the minimum is applicable only to minimum weight per container of mixed shipments of "Silicone Monomer."

As noted above, complainant was provided an opportunity to submit a more complete description of certain commodities involved herein. In its Supplemental Evidentiary Statement, it submitted advertising literature addressing the nature of the commodities. In particular, advertising bulletins addressing: (1) silastic 731 RTV adhesive/sealant; (2) HV 490 emulsion; (3) Dow Corning 1111 emulsion; (4) Dow Corning 3145 RTV adhesive/sealant; (5) sylgard 170 A & B silicone elastomer; and (6) Dow Corning 3140 RTV coating were submitted. In each case, the commodities such as coatings, sealant and other compounds are referred to and shown to be silicone elastomer compounds. Sea-Land points out that there is no dispute that the commodities shipped were "silicone emulsion" or "silicone elastomers" with the exception of the claims Freight Bill Nos. 901-026202 and 901-031564. Of the six claims, four involve either "silicone emulsion" or "silicone elastomer" shipments where the commodity description is not disputed. Sea-Land, in effect, does not question the complainant's submissions showing that

⁸ *Ibid.*, 2nd Rev. Pg. 323, effective April 12, 1979, provides:

Straight or Mixed Shipments of:				
Silicone Antifoam Emulsion	W	-	125.50	931.0118.003
Silicone Elastomer	W	158.00	180.50	931.0118.102
Silicone Monomer	W	188.75	208.25	931.0118.202
Minimum 29,120 lbs. per Container	W	93.00	-	931.0118.310

⁹ *Ibid.*, the tariff provides:

Mixed Containerloads of the Following:				
Silicone Fluids, Silicone Resins				
Solutions, Silicone Rubber Compounds,				
Silicone Base Adhesive and Sealers,				
Silicone Antifoam Emulsions,				
Silicone Base Lubricating Greases-	W	146.00	-	931.0120.018
Minimum 40,320 lbs. per Container				

silicone emulsions and silicone elastomers are as represented. However, as to those commodities, the only claim outstanding is that there should have been applied to those shipments the minimum billing per container. As to the remaining two shipments, the dispute involves the description of "silicone rubber compounds" which Sea-Land rated under tariff Item No. 581.1020.001 (Silicon(e) Rubber, Compounds, Packed, WM \$138.50). Complainant submitted packing lists in which the commodities are described only as "SGM-35" and "Rubber COMPD UNVUL." However, the documentation submitted by complainant does not clarify the precise nature of "SGM-35." This commodity is shown in the packing list as rubber compound unvulcanized paralleling the description on the disputed bills of lading of silicone rubber compounds. According to Sea-Land, there has been no showing that its rating of commodities described as silicone rubber compounds is inconsistent with the commodity known as "SGM-35" and described as rubber compound unvulcanized on the packing lists.

Dart transported three shipments for the complainant from Baltimore to Antwerp, Belgium, one in July and two in November 1978. The shipping documents prepared by the complainant described the commodities as silicone rubber compound in each instance. Dart rated the commodity under Item No. 581.1020.001 (Silicon(e) Rubber, Compounds, Packed).¹⁰ Complainant originally contended that the commodity shipped was a "silicone elastomer." However, in a monument to brevity, complainant has filed a pleading entitled "Response to Legal Memorandum of Position Filed by Dart Containerline Company Limited & Sea-Land Service Corporation." This one-page document, supposedly addressing the arguments of Sea-Land and Dart, fails to reflect any response to Sea-Land but does manage to reveal the following observation:

Mr. Shreves, attorney for Dart Containerline, stated a number of times at our pre-hearing conference that their situation was not the same as the other respondents.

Since SGM-35, which we still contend to be an elastomer, constitutes only a small portion of the shipments involved in Atlantic Container Line's and Hapag Lloyd's portion of the formal, Mr. Shreves is correct.

DISCUSSION AND CONCLUSION

Basically the primary issue here is the uncertainty resulting from an ambiguous tariff provision which is susceptible of two interpretations, one technical and the other fair and reasonable in light of the circum-

¹⁰ *Ibid.*, 31st Rev. Pg. 175, effective May 24, 1978, at \$138.50 W/M.

stances and the undisputed intent of the framers. In this proceeding, the latter interpretation should prevail.

The tariff provision claimed by the complainant to be the properly applicable provision for the shipments involved may be found in the following form:

Straight or Mixed Shipments of:	
Silicone Antifoam Emulsion	W
Silicone Elestomer	W
Silicone Monomer.....	W
Minimum 29,120 lbs. per Container.....	W

In the view of Sea-Land and Dart, the indentation of the minimum rate under the item applicable to "Silicone Monomer" would, under any standard of tariff interpretation, make clear that the minimum is applicable to straight or mixed shipments of silicone monomer alone. They contend that were the minimum provision to have been carried out to the same margin as the items listed as "Silicone Antifoam Emulsion," "Silicone Elastomer" and "Silicone Monomer," then it would be clear that the minimum could be applied to a straight or mixed shipment of any of those three items.

Complainant, of course, contends that the minimum rate should apply to all three items. As noted above, Atlantic has stated: "The governing conference, North Atlantic Continental Freight Conference, has confirmed that the claimant's interpretation of tariff Item 931.0118 is correct. In view of this fact, we acknowledge the overcharge." And the Conference took the necessary steps to clarify the provision in the following form: ¹¹

Straight or Mixed Shipments of:	
Silicone Antifoam Emulsion	W
Silicone Elestomer	W
Silicone Monomer.....	W
(C) Minimum 29,120 lbs. per Container.....	W ¹¹

Sea-Land argues that it "will readily admit that tariff classification determination should not be dependent upon typesetting (*U.S. v. Hellenic Lines, Ltd.*, 14 F.M.C. 254, 258 (1977), (but) it is also a fundamental principle that the provisions of the tariff published and in effect at the time of shipment are the only applicable terms which may be applied, and those terms have the force and effect of law. *Atchison T. & S.F. Railway Co. v. Bouziden*, 307 F.2d 230, (10th Cir. 1962); *Silent Sioux Corp. v. Chicago & N.W. Railway Co.*, 262 F.2d 474, (8th Cir. 1959);

¹¹ *Ibid.*, 8th Rev. Pg. 323, effective June 12, 1980.

Louisville & Nashville Railway v. Maxwell, 237 U.S. 94, 59 L.Ed. 853 (1914) and cases cited therein. Clearly, modification of that tariff by implication or interpretation as sought here simply is not consistent with the stringent and admittedly harsh, principles governing the applications of tariff rates." In short, Sea-Land contends that the tariff terms as published control irrespective of intent.

And while the representative of the complainant provided no legal support whatever for the position of Dow in this proceeding; nonetheless, the principles governing the application of tariff rates are such that relief is not precluded. Furthermore, this is not a situation where the conference has outright denied that the tariff provision is not susceptible of the interpretation urged by the complainant. In my opinion, the tariff change by the conference merely clarified the existing tariff provisions. Admittedly, there is no need to inquire to the intent of the tariff framer when the language of the provision is clear and unambiguous. However, this is not the situation presented here.

In *National Van Lines, Inc. v. United States*, 355 F.2d 326, 332 (1966), the Court concluded that where an uncertainty or ambiguity created in a tariff gives rise to feasible alternative interpretations, the traditional rules of construction of written instruments control. The court determined that, under such circumstances, the intent of the framers and other considerations become relevant in the proper application of the tariff. Furthermore, in construing tariffs, as any other contract, all pertinent provisions must be considered together. "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." *United States v. Missouri-Kansas-Texas R. Co.*, 194 F.2d 777, 778 (5th Cir. 1952).

The conference has a duty to express its intent in a tariff in clear and plain terms so that those referring to them may readily understand their meaning and act accordingly. As the Court said in *Atlantic Coastline R. Co. v. Atlantic Bridge Co.*, 57 F.2d 654, at page 655 (5th Cir. 1932), the tariffs "may not be contrived in catchpenny terms to catch the ignorant and unwary. If they are ambiguous, or permit of two meanings, the shipper may construe them in the most favorable way to himself which the terms permit."

Just as in *National Van Lines, supra*, this proceeding involves an uncertainty resulting from an ambiguous tariff provision susceptible of two feasible interpretations. Here, there is an uncertainty about whether the minimum rate applies to the three items of straight or mixed shipments or just one item. In *National Van Lines*, the crucial fact, and the one emphasized by the Court, was the existence of an ambiguity or an uncertainty, not the manner in which it was created. Here, since this Commission is faced with contradictory interpretations, such a tariff

provision is inherently ambiguous. As the Interstate Commerce Commission stated in *August Plantz, Inc. v. Atlantic & E.C. Ry. Co.*, 291 I.C.C. 771, 773 (1954), "Where there is ambiguity, the shipper will be given the benefit of the doubt, in conformity with the principle often enunciated by the Commission that vague or indefinite tariffs will be construed strictly and in favor of the shipper rather than the maker of the tariff." See also, *I.M. Dach Underwear Co. v. Central of Georgia Ry. Co.*, 287 I.C.C. 797, 799 (1953). The principles of these cases apply here and it is concluded that the minimum rate should apply to straight or mixed shipments of "Silicone Antifoam Emulsion," "Silicone Elastomer" and "Silicone Monomer" for all of the involved shipments.

The next area of dispute involves those commodities described as "silicone rubber compounds." As noted above, the commodity known as "SGM-35" and "Rubber Compd Unvul" are claimed to be a "silicone elastomer" subject to the application of minimum rate discussed above. On the other hand, both Dart and Sea-Land applied the separate commodity description and tariff provision applicable to "silicone rubber compounds."

It is well settled that there is a duty upon the shipper to pay and the carrier to collect charges on the articles actually shipped, regardless of their description in shipping papers. *Janice, Inc., v. Acme Fast Freight, Inc.*, 302 I.C.C. 596, 597 (1958). And, the burden is upon the complainant to show by convincing evidence that the commodity descriptions in the shipping papers were erroneous and that the commodity was of a character embraced within the description on which the rate claimed was applicable. *Brewster Co., Inc. v. National Carloading Corp.*, 273 I.C.C. 419, 421.

A review of the submissions by the complainant fails to establish that the actual commodity was that of an elastomer. Indeed, complainant makes the concession that, at least as to Dart, the contention that the commodity was actually "silicone rubber compounds" "is correct." Presumably, that concession should extend to all respondents as well and it is so concluded.

One final matter requires some discussion. As earlier noted, both Atlantic and Hapag-Lloyd submitted an "agreement" or settlement joined by the complainant. Both Sea-Land and Dart oppose the acceptance of these settlements for a variety of reasons. However, in view of the decision here, it will be unnecessary to discuss this issue since the dollar amounts contained in the proposals must be adjusted in view of the treatment of those shipments involving commodities described only as "SGM-35" and "Rubber Compd Unvul" on the packing list. And the complainant concedes that those shipments involving "SGM-35" applicable to Atlantic and Hapag-Lloyd are affected by the Dart argument which complainant concedes as "correct." The argument posed by Sea-Land has been found to have merit here as well. The precise amount of

traffic subject to the applicable rates is capable of determination by the parties pursuant to the findings in this proceeding. In any event, the amount of reparations as originally sought and as permitted herein will not be the same as contained in the proposals as submitted. In addition, both proposals agreed to by the complainant are "without interest." Under these circumstances, it would appear that complainant may have abandoned its original request for the imposition of interest at "12 percent" at least as to two respondents. It has made no showing or argument that interest should be imposed upon the other respondents. Indeed, the fact that Sea-Land and Dart have chosen to dispute the award of reparations should not operate as the sole reason why interest should be awarded against them when apparently abandoned as a condition in settlement with other respondents for claims arising under similar circumstances.

ULTIMATE FINDINGS

Upon consideration of all the evidence of record, this Administrative Law Judge ultimately finds and concludes:

- (1) That respondents' Sea-Land and Dart interpretation of tariff provisions governing the application of a minimum rate applicable to only one item of a tariff provision involving straight and mixed shipments of silicone antifoam emulsion, silicone elastomer and silicone monomer is improper when applied to complainant's shipments herein and in violation of section 18(b)(3) of the Shipping Act, as amended;
- (2) That the assessment of charges by respondents is in violation of section 18(b)(3) to the extent that it exceeds the proper application of the tariff provision as interpreted herein;
- (3) That complainant is entitled to reparations, without interest, on charges for the movement of shipments involved to the extent that charges were assessed in excess of the appropriate charges under the disputed tariff provision; and
- (4) That the commodities described as "SGM-35" and "Rubber Compd Unvul" are properly rated as "silicone rubber compounds packed" within the meaning of applicable tariffs.

(S) PAUL J. FITZPATRICK
Administrative Law Judge

FEDERAL MARITIME COMMISSION

DOCKET NO. 80-38
THE STACKPOLE CORPORATION

v.

SEA-LAND SERVICE, INCORPORATED

NOTICE

July 29, 1981

Notice is given that no exceptions have been filed to the June 23, 1981 initial decision in this proceeding and the time within which the Commission could determine to review that decision has expired. No such determination has been made and, accordingly, that decision has become administratively final.

(S) FRANCIS C. HURNEY
Secretary

FEDERAL MARITIME COMMISSION

DOCKET NO. 80-38
THE STACKPOLE CORPORATION

v.

SEA-LAND SERVICE, INCORPORATED

Held:

- (1) Where a shipper identified cargo as "carbon composition resistors" and failed to establish that they were television parts, the carrier properly classified the cargo under the tariff heading, "Not Otherwise Specified," in the absence in the tariff of a specific commodity description for carbon composition resistors.
- (2) Where cargo was shipped as "carbon composition resistors," the fact that from 40.1 percent to 50 percent of such resistors may be sold to television manufacturers does not establish that the resistors were properly described or ratable as "television parts."
- (3) Where it is argued that a tariff is ambiguous because it is unclear as to whether or not the commodity description, "Video and Television Equipment," includes parts of television equipment, the complainant cannot have any alleged ambiguity resolved in its favor, where it fails to establish that the cargo shipped was television parts.

Eugene L. Stewart and Paul W. Jameson for complainant, The Stackpole Corporation.
John M. Ridlon for respondent, Sea-Land Service, Inc.

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

Finalized July 29, 1981

This case began with the filing of a complaint by the Stackpole Corporation (Stackpole; formerly known as Stackpole Carbon Company) against Sea-Land Service, Inc. (Sea-Land). In its complaint Stackpole alleged that Sea-Land incorrectly classified merchandise shipped to it which resulted in freight charges higher than those "properly applicable in accordance with issued tariff filed with the Federal Maritime Commission and in effect at the time of this shipment," all in violation of section 18(b)(3) of the Shipping Act, 1916 (46 U.S.C. § 817). Actually there were several shipments involved and the merchandise shipped was described by the complainant as, "carbon composition resistors, used principally in radios, televisions, and other audio and visual equipment."

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

After the original complaint was filed, the complainant filed an amended complaint, which contained substantially the same allegations as the first. It sought reparations in the amount of \$6,081.30. Also, counsel for both parties agreed that the proceeding should be conducted under the rules applicable to Shortened Procedure (46 C.F.R., Part 502, Subpart K, Sections 502.181 et seq.). Such procedure has been followed. Before proceeding with the findings of fact section of this decision it should be noted that during the pendency of these proceedings the parties reached agreement as to the proper treatment of certain shipments. This decision will address itself to those issues which remain.²

FINDINGS OF FACT

1. Respondent, Sea-Land, is a common carrier by water in the foreign commerce of the United States, subject to the Shipping Act, 1916, and serving the eastbound trade between Japan/Korea and ports in the United States Gulf and Atlantic Coast pursuant to the terms of the Trans-Pacific Freight Conference of Japan/Korea Eastbound Intermodal Tariff No. 1 and No. 2, ICC No. 1, FMC No. 4, and ICC TPC 111, FMC No. 5, respectively (hereafter referred to as "Tariff No. 1 and Tariff No. 2"), at all times relevant to the carriage of the cargoes involved in this proceeding. (Complaint, page 1; Complainant's Memorandum, page 3 and Exhibit 3.)

2. The complainant is a corporation whose principal place of business is in St. Mary's, Pennsylvania. It is engaged in the business of manufacturing and selling electrical components and electrical parts, involving the use of carbon in their manufacture. (Amended Complaint, page 1.)

3. Between June 2, 1978, and March 30, 1979, the complainant moved, via Sea-Land, 17 shipments of cargo as follows:

Bill of Lading (Freight Bill) Date	Vessel	Voyage	Freight Bill Number	Container Number	Commodity Code	Tariff Item	Number of Cartons	Cubic Measure	Weight (Kilograms)
06/02/78	Exchange	65E	937114102	311681	7299700	R-51	465	24.42	9,612
06/16/78	McLean	100E	937115445	312018	7299700	4160-00	56	2.73	1,013
06/30/78	Finance	54E	937116833	NC009	7299700	4160-00	373	20.42	7,566
07/13/78	Commerce	63E	937117840	29191	7299700	4160-00	232	12.29	4,759
08/04/78	Finance	55E	937121685	107036	7299700	4160-00	59	3.05	1,190
08/30/78	Philadelphia	296W	937127337	302547	7299700	4160-00	473	24.11	9,504
09/07/78	Finance	56E	937129026	106947	7299700	4161-00	74	4.02	1,519
09/29/78	McLean	103E	937133813	302370	7299700	4160-00	644	33.69	12,380
10/27/78	Commerce	66E	937159734	70162	7299700	4161-00	657	34.78	12,296
10/27/78	Commerce	66E	937159735	70162	7299700	4160-00	199	14.63	5,101
11/23/78	Exchange	70E	937165289	302148	7299700	4160-00	596	31.69	11,445
01/26/79	Finance	60E	937176843	61463	7299700	R-70	27	.99	406
01/26/79	Finance	60E	937176844	61463	7299700	R-70	1	.04	17

² The areas of agreement will be identified in the Findings of Fact.

—Continued

Bill of Lading (Freight Bill) Date	Vessel	Voyage	Freight Bill Number	Container Number	Commodity Code	Tariff Item	Number of Cartons	Cubic Measure	Weight (Kilograms)
01/26/79	Finance	60E	937176859	61463	7299700	3610-10	522	20.21	9,131
01/26/79	Finance	60E	937176860	61463	7299700	3610-10	97	3.91	1,732
03/02/79	Finance	61E	937184676	301829	7299700	4160-00	728	28.63	12,641
03/30/79	Trade	71E	937190684	262442	7299700	4160-00	652	25.37	11,313

See freight bills attached to complaint.
(Amended Complaint, page 3.)

4. Each shipment herein involved moved from Yokohama, Japan, to Baltimore, Maryland, and was consigned to Mellon Bank, N.A. The real party in interest was the complainant. (Amended Complaint, page 2; Answering Memorandum, page 3.)

5. The complainant originally averred that it was overcharged by the respondent as follows:

Freight Bill Number	Rated As	Rate	Charges	Was		Total	Rated As	Rate	Charges	Should Be		Total	Overcharge
				Currency Sur-charge	Sur-charge					Currency Surcharge	Handling		
937114102	100.00	25.50	\$2,550.00			\$2,550.00	24.42	66.50	\$1,623.93			1,623.93	\$ 926.07
937115445	2.72	82.50	224.90	15%	\$ 33.74	268.18	2.72	66.50	180.88	\$ 27.13	\$ 9.54	217.55	50.63
937116833	20.42	82.50	1,684.73	15%	252.71	2,008.91	20.42	66.50	1,357.93	203.69	71.47	1,633.09	375.82
937117840	12.28	82.50	1,013.76	20%	202.75	1,259.52	12.28	66.50	816.62	163.32	43.01	1,022.95	236.57
937121685	3.05	83.50	255.01	20%	51.00	319.75	3.05	67.50	205.88	41.18	13.74	260.80	58.95
937127337	24.11	83.50	2,103.27	20%	402.65	2,415.92	24.11	67.50	1,627.43	323.49		1,952.22	463.00
937129026	4.01	83.50	335.50	20%	67.10	420.68	4.01	67.50	270.68	54.14	18.08	342.90	77.78
937133813	33.68	83.50	2,812.86	20%	562.57	3,375.43	33.68	67.50	2,273.40	454.68		2,728.08	647.35
937159734	34.78	83.50	2,904.30	30%	871.29	3,775.59	49.40	67.50	3,334.50	1,000.35		4,334.85	1,028.72
937159735	14.62	83.50	1,221.52	30%	366.46	1,587.98							
937165289	31.68	83.50	2,646.03	30%	793.81	3,439.84	31.68	67.50	2,138.40	641.52		2,779.92	659.92
937176843	1.00	85.50	85.50	30%	25.65	111.15							
937176844	1.00	85.50	85.50	30%	25.65	111.15	25.15	67.50	1,697.63	509.29		2,206.92	433.08
937176859	1.00	16.65	1,665.53	30%	409.15	2,074.68							
937176860	3.90	67.50	263.86	30%	79.16	343.02							
937184676	28.63	83.50	2,390.77	30%	717.23	3,108.00	28.63	67.50	1,932.53	579.76		2,512.29	595.71
937190684	25.37	83.50	2,118.40	30%	635.52	2,868.09	25.37	67.50	1,712.48	513.74	114.17	2,340.39	527.70
													\$6,081.30

See Freight Bill No. 937196182, attached to complaint, for example of a bill with the proper item number description and charges. (Amended Complaint, page 5.)

6. Subsequently, the complainant submitted a "Recalculation of Amount of Overcharge Claim," as follows:

Recalculation of Claimed Amounts of Overcharge ³
 (See page 5 of Amended Complaint)

Freight Bill Number	Was				Should Be						
	Rated As	Rate	Charges	Currency Sur-charge	Rated As	Rate	Charges	Currency Surcharge	Handling	Total	Overcharge
937114102	100.00	25.50	\$2,550.00					Correct			\$0
937115445	2.72	82.50	224.90	15%	2.72	77.50	210.80	\$ 31.62	\$ 9.54	251.96	\$ 16.22
937116833	20.42	82.50	1,684.73	15%	20.42	77.50	1,582.55	237.38	71.47	1,891.40	117.51
937117840	12.28	82.50	1,013.76	20%	12.28	77.50	951.70	190.34	43.01	1,185.05	74.47
937121685	3.05	83.50	255.01	20%	3.05	77.50	236.38	47.28	13.74	297.40	22.35
937127337	24.11	83.50	2,103.27	20%	24.11	77.50	1,868.53	373.71		2,242.42	173.68
937129026	4.01	83.50	335.50	20%	4.01	77.50	310.78	62.16	18.08	391.02	29.66
937133813	33.68	83.50	2,812.86	20%	33.68	77.50	2,610.20	522.04		3,132.24	283.19
937159734	34.78	83.50	2,904.30	30%	34.78	78.50	2,730.23	819.07		3,549.30	226.29
937159735	14.62	83.50	1,221.52	30%	14.62	78.50	1,147.67	344.30		1,491.97	96.01
937165289	31.68	83.50	2,646.03	30%	31.68	78.50	2,486.88	746.06		3,232.94	206.90
937176843	1.00	85.50	85.50	30%				Correct			0
937176844	1.00	85.50	85.50	30%				Correct			0
937176859	1.00	16.65	1,665.53	30%	20.21	67.50	1,363.84	409.15		1,772.99	301.69
937176860	3.90	67.50	263.86	30%				Correct			0
937184676	28.63	83.50	2,390.77	30%	28.63	67.50	1,932.53	579.76		2,512.29	595.71
937190684	25.37	83.50	2,118.40	30%	25.37	67.50	1,712.48	513.74	114.17	2,340.39	527.70
											\$2,631.38

³Those items marked, "0," overcharge have been conceded by the complainant. The item marked, "\$301.69," overcharge has been conceded by the respondent.

7. Pursuant to ten (10) bills of lading during the period June 17, 1978, through November 25, 1978, Sea-Land carried ten (10) shipments described on the bill of lading as carbon composition resistors. (Bill of Lading/Freight Bill/Invoice Nos. 937-115445; 937-116833; 937-117840; 937-121685; 937-127337; 937-129026; 937-133813; 937-159734; 937-159735; 937-165289, Answering Memorandum, Exhibit C; also Reply Memorandum, page 1.)

8. Section 4 of Tariff No. 1, includes the heading, "Electrical Equipment." It contains no specific commodity listed and rated separately described as, "carbon composition resistors." (Complainant's Memorandum, page 4; Respondent's Answer, page 5; Complainant's Reply, page 1.)

9. Respondent rated all the shipments described in paragraph 7, above, under the rate applicable to "Electrical Goods, Supplies and Parts, not otherwise covered in Section 4," at \$82.50 or \$83.50 (Answering Memorandum, Exhibit D, 21st Rev. Page 188 of Tariff No. 1, through 25 Rev. Page 188, Item No. 4160-00.)

10. Pursuant to Bill of Lading No. 937-184676, dated March 2, 1979, the respondent moved a shipment for the complainant described by the shipper on the bill of lading as, "Carbon Composition Resistors." The cargo consisting of 28.632 cubic meters, weighing 12,641 kilograms, was rated under Item No. 4160-00 of Tariff No. 2. That tariff (original page 300), under the heading, "Electrical Equipment," contains a specific commodity description as follows:

	Base Rate	Item No.
Video and Television Equipment, viz:		
Television Receiving Sets, with or without clocks		
Television Receiving Sets, Closed-circuit	78.00	4110-00
Video Monitors		
Special Rate	67.50	4110-05
Accessories and Parts of the commodities named herein		
Special Rate	67.50	4110-10

Note: The protective materials to be considered as a part of the pallet in palletized shipments subject to Rule 26.

Tariff No. 2, also includes the heading, "Electrical Goods, Supplies and Parts, not elsewhere covered in Section 6," which applies to Item No.

4160-00 and a rate of \$83.50. (Answering Memorandum, Exhibits K, M and N; Complainant's Reply, page 3.)

11. Pursuant to Bill of Lading No. 937-190685, dated March 30, 1979, the respondent moved a shipment for the complainant described by the shipper as, "Carbon Composition Resistors & Etc." The cargo consisted of 25.37 cubic meters of cargo weighing 11,313 kilograms and moved under the same facts and circumstances set forth in paragraph 10, above. (Answering Memorandum, Exhibits L, M and N; Complainant's Reply, page 3.)

12. The American Heritage Dictionary of the English Language, New College Edition, Copyright 1979, defines, "resistor," as "an electric circuit element used to provide resistance." (The American Heritage Dictionary of the English Language, New College Edition, Houghton Mifflin Company, p. 1107; Answering Memorandum, Exhibit P.)

ULTIMATE FINDINGS OF FACT

13. The cargo transported in the shipments involved here was carbon composition resistors and not television parts.

14. The tariffs here involved did not contain a specific commodity description and rate for carbon composition resistors and such resistors were properly rated under the heading, "Not Otherwise Specified."

15. The record in this proceeding fails to establish that the complainant has carried its burden of proof in factually establishing that the cargo shipped was anything other than what it was originally designated by the complainant, namely, carbon composition resistors.

16. The fact that resistors may *commonly* be used in television sets does not establish that the resistors here involved are parts of television sets.

17. The tariffs involved here were not ambiguous and even if they were complainant's failure to establish that the commodity involved was television parts would preclude a holding in its favor.

18. The respondent did not improperly classify merchandise shipped to the complainant and did not charge ocean freight rates which were higher than those set forth in the applicable tariffs, and no reparations are due or owing.

DISCUSSION AND CONCLUSIONS

The issues in this case are whether or not ten (10) shipments of "carbon composition resistors," moved by Sea-Land on behalf of Stackpole were properly rated under Tariff No. 1, and whether or not two subsequent similar shipments were properly rated under Tariff No. 2.

Tariff No. 1 provides in section 4, which has to do with commodity rates, as follows:

ELECTRICAL EQUIPMENT

This heading includes:

- (1) All apparatus that functions by the use of electrical energy
- (2) Electrical components and parts of such apparatus for conducting, connecting, insulating and switching electrical current
- (3) Non-electrical components and parts of such apparatus
- (4) Insulated wire and cable and insulated metal conduit pipe and tubing
- (5) Electrical components and parts of other commodities not elsewhere covered in section 4

Included within Section 4 were specific commodity descriptions as follows:

- (1) Item No. 3610.00, "Audio (Sound) Equipment, viz:
amplifiers
headphones
phonographs, etc."
- (2) Item No. 4110-00, "Video and Television Equipment, viz:
Television Receiving Sets, with or without Clocks
Television Receiving Sets, Closed Circuit."
- (3) Item No. 4160-00, "Electrical Goods, Supplies and Parts, not elsewhere covered in Section 4."

Tariff No. 1 remained unchanged from June 5, 1978, until January 1, 1979, so that it applied to ten (10) shipments made by Sea-Land for Stackpole.⁴ In its original complaint, Stackpole argues that the shipment "should have been classified under Tariff Item 3610-00, Television and Audio Equipment 'Accessories and Parts of the commodities named herein.'" However, in its original Memorandum of Facts and Arguments (page 6), Stackpole argues that Sea-Land was wrong to rate the shipments under Item No. 4160-00 and should have rated them under Item No. 4110-00. It bases its argument on the premise that carbon composition resistors are *commonly* used as parts of television equipment and should carry the same rate. Then, in its Reply, Stackpole builds on this argument averring that, "in the absence of a specific commodity item, cargo may in [sic] included in the classification applicable to a final product in which the commodity may be used." It also argues that if parts of a commodity may be included within the tariff item for that commodity, then the tariff item is more specific than the, "Not Elsewhere Covered" (N.O.S.) tariff item. It concludes that in this

⁴ See "Recalculation of Claimed Amounts of Overcharge," and Finding of Fact No. 7.

case, parts of television equipment (the carbon composition resistors) should, therefore, be rated under the tariff item for Video and Television Equipment, and not the NOS tariff item. Finally, Stackpole contends that the tariff is ambiguous in that Item No. 4110-00, Video and Television Equipment, "does not specify whether only complete television receiving sets may be rated under this Item." It then concludes that "Given, then that it is not clear that Parts of Television Receiving Equipment were not formerly subsumed within the classification for Video and Television Equipment, this ambiguity should be resolved against the writer of the tariff—Sea-Land."

As to the shipments made under Tariff No. 2,⁵ the tariff specifically assigns a rate to Television Receiving Sets, with or without Clocks (Item 4110-00 at \$78.50); to Television Receiving Sets, Closed-Circuit (Item 4110-05 at \$76.50); and to Accessories and Parts of the commodities named herein, Special Rate (Item 4110-10 at 67.50). The complainant argues that for the latter two shipments Sea-Land was wrong in rating carbon composition resistors at 83.50 as Electrical Goods, Supplies and Parts, not elsewhere covered in section 6 (Item 4160-00). Instead, it avers that carbon composition resistors are television parts and should have been rated under Item 4110-10 at 67.50.

When the arguments put forth by the complainant are considered separately, each in turn, fails—and for the same reason. For example, the complainant contends that:

Similarly, if parts of an [sic] commodity may be included within the Tariff Item for that commodity, then that Tariff Item is more specific than the "Not Elsewhere Covered" Tariff Item. Therefore, parts of television equipment should be rated under the Tariff Item for Video and Television Equipment before they are rated under the Tariff Item for "Not Elsewhere Covered."

Even assuming that the major premise is correct, the above argument seems to ignore the fact that the record fails to establish that the "carbon composition resistors," shipped here and so described by the complainant itself, were parts of television sets. Standing alone they were inherently resistors which by definition are "electric circuit elements used to provide resistance." They obviously were manufactured for that general purpose. They can and are used in a variety of electrical products, including but not limited to television sets. Indeed, the complainant itself provides schedules (Exhibits 1 and 2 to its Memorandum of Facts and Argument) which indicate that in 1978 and 1979 the percentage of carbon resistors sold by it to television manufacturers was 44.1 percent and 49.9 percent, respectively, and that for the period

⁵ See Findings of Fact Nos. 10 and 11.

June 1978 through March 1979 (the period during which the shipments here involved occurred), the "Weighted Average % for Video" was 40.1 percent. Stated differently, at least 50 percent of the carbon resistors the complainant sold were not destined for television manufacturers. By way of corroboration, the complainant's own witness, its product sales manager for carbon composition resistors, states:

. . . that each of the grades and tolerances of resistors included in the subject shipments are used by Stackpole's customers as parts of television equipment *as well as* as [sic] parts of other equipment. (Emphasis supplied), and

I can affirm that the grades and ratings included in the subject shipment are commonly used as parts of television equipment, and there is no other single end use for which they are more commonly used.

Given this record, one cannot justify a holding that the transistors shipped here were parts of television sets. Consequently, the complainant's argument must fail. What was shipped was, "carbon composition resistors," a commodity for which, the complainant admits, there is no specific provision in the tariff. Therefore, the "Not Elsewhere Covered" classification applied to these shipments.

Likewise, the complainant argues that, "in the absence of a specific commodity item, cargo may in [sic] included in the classification applicable to a final product in which the commodity may be used." It cites *Continental, Shellmar, Inc. v. Sea-Land Service, Inc.*, 20 F.M.C. 305 (F.M.C. No. 408(I), served November 15, 1977), in support of its contention. *Continental, supra*, is cited erroneously. It holds that where two commodity descriptions may apply to one commodity that is shipped, the rate quoted in the more specific description will be used. The case does not hold directly, nor does it infer that in the absence of a specific commodity item, cargo may be included in the classification applicable to a final product in which the commodity may be used. We think the law is clear that the final application of a product with several possible end uses is immaterial to the proper classification of commodities for tariff purposes. The applicable freight rate should depend upon the intrinsic nature and market value of the goods themselves, rather than a shipper's representation as to the intended use of the goods, as it would be virtually impossible for ocean carriers to ascertain whether each item transported is subsequently put to the use for which it was rated for ocean transportation. *Crestline Supply Corporation v. The Concordia Line & Boise-Griffin S.S. Co., Inc.*, 19 F.M.C. 207, 211 (1976), citing 6 F.M.B. 155, 159. See also *CSC International Inc. v. Waterman S.S. Corp.*, 19 F.M.C. 523, 528 (1977), holding that the nature and character of each shipment at the time tendered determines its status for rate purposes, and the use which may be subsequently made of the

material does not control.⁶ So here, where carbon composition resistors were shipped, the complainant cannot change the nature of the commodity for rate purposes, by showing an end use for which the resistors *might* be used. Even if the complainant had actually established the end use of the resistors shipped here (it established only that 40.1 percent of all resistors it sold were sold to television manufacturers), the resistors would be rated as resistors, not in accordance with the end use.

Another argument used by the complainant is that:

. . . there is an ambiguity in Tariff Item No. 4110-00, Video and Television Equipment. The commodity description does not specify whether only complete television receiving sets may be rated under this Item.

The complainant after further argument then proceeds to conclude that "Given, then, that it is not clear that *Parts* of Television Receiving Equipment were not formerly subsumed within the classification for Video and Television Equipment, this ambiguity should be resolved against the writer of the tariff—Sea-Land." It is well settled that where a tariff is ambiguous or doubtful it is to be construed against the carrier who prepared it. *United Nations Children's Fund v. Blue Sea Line*, Docket No. 71-25, 15 F.M.C. 206 (1972), which cites several other cases. However, neither the shipper nor the carrier may rely on a strained or unnatural construction of an ambiguous tariff, *Bratti v. Prudential et al.*, 8 F.M.C. 375, 379 (1965); and if a tariff is subject to different constructions, an interpretation which is reasonable and consistent with the purpose of the tariff should be preferred to a construction which is impractical or which leads to absurd consequences, *Trans Ocean Van Service v. U.S.*, 426 F.2d 329, 336-337 (1970). Here, again assuming that the tariff is ambiguous in that it is unclear as to whether or not parts of television sets should be included as Video and Television equipment, this record does not establish that the carbon composition resistors shipped here were television parts. How could one so hold when the complainant itself states that less than 50 percent are sold to television manufacturers and where it describes them as resistors. If there is an ambiguity here regarding the cargo shipped it arises not from the tariff provisions, but from the inability of the complainant to properly identify and classify the cargo. When it designated the cargo here as carbon composition resistors, how could the carrier be expected to classify them in any other manner? Was he to guess as to whether the resistors were to be used in televisions or radios or phonographs, or stereos, or in any one of hundreds of electrical products where resistors are used? Even now, given the complainant's failure to

⁶ *CSC, supra*, also held that one use of a product does not necessarily determine the tariff rate, and that different rates on the same commodity dependent upon the use made of it would lead to unjust discrimination.

properly classify the resistors, if indeed they were misclassified, we could still hold that they were television parts if the record justified such a holding, because a shipper is not forever bound by the description of the shipment contained on the bill of lading. *Rohm & Haas Co. v. Moore McCormick Lines Inc.*, 17 F.M.C. 56, 59-60 (1973). Here, however, as we have stated, the record does not establish that the shipments involved were television parts.

The last material argument made by the complainant is that, "Sea-Land misconceives the nature of the burden of proof. Stackpole has the burden of proving facts not law." We do not disagree with the complainant, but for reasons set forth above we must hold that the complainant has failed to establish the fact most necessary to all of its arguments, namely, that what was shipped were television parts and not carbon composition resistors. Perhaps, the best example of the inherent weakness in complainant's attempt to establish that the resistors were television parts is its statement that, "it is not necessary that the commodity be used entirely, or even chiefly, as parts of television equipment, only that such resistors are *commonly* used as parts of television equipment." It cites no cases supporting such a view or even defining what is meant by "commonly." Were one to apply the complainant's view of tariff construction, the results would be chaotic. If the resistors here were television parts because of *common* usage, would all resistors be television parts? If not, in what commodity classification would the other resistors fall? And if the commonality of use determines the classification are we to believe that in the future resistors might be *commonly* used in some other product?

One could continue with examples of why the complainant's arguments lack validity but in essence this case presents two questions; what commodity was shipped and what was the rate provided for that commodity in the pertinent tariffs. The respective answers are, "carbon composition resistors" and "Not Otherwise Specified."

For the reasons set forth above and in light of the entire record it is held that Sea-Land did not improperly classify merchandise shipped to the complainant and did not charge ocean freight rates which were higher than those properly applicable under the tariffs filed with the Federal Maritime Commission and in effect at the time the shipments here involved were made. Consequently, the relief sought by the complainant, including the payment of reparations,⁷ is hereby denied and the proceeding is discontinued.

(S) JOSEPH N. INGOLIA
Administrative Law Judge

⁷ Sea-Land agreed that as to Freight Bill 93176859, and the shipment made relating to such freight bill, it owed Stackpole \$301.69. If such payment has not already been made it is due and owing.

FEDERAL MARITIME COMMISSION

INFORMAL DOCKET NO. 1062(I)
THE GOODYEAR TIRE & RUBBER COMPANY

v.

MAERSK LINE

ORDER OF PARTIAL ADOPTION

July 29, 1981

The Commission determined to review the decision * of Settlement Officer Joseph T. Farrell in which he denied the claim of The Goodyear Tire & Rubber Company (Goodyear) for an alleged freight overcharge by Maersk Line, (Maersk) on a shipment of spare parts for tire manufacturing machinery from New York to Port Kelang, Malaysia, and ordered Goodyear to pay Maersk the amount of \$634.96 with interest from March 1979.

As stated in *Ideal Toy Corp. v. Evergreen Line*, Informal Docket No. 998(I) 23 F.M.C. 1008 (1981), section 22 of the Shipping Act, 1916 (46 U.S.C. 821) confers no jurisdiction on the Commission to order the payment of reparation, in any form, by a shipper or consignee. The Settlement Officer, therefore, had no authority to order Goodyear, a shipper, to pay Maersk any amount. Accordingly this portion of the Settlement Officer's decision must be vacated.

Except as stated above, the Commission finds that the Settlement Officer's findings and conclusions are correct. Maersk Line is therefore directed to take the steps necessary to collect from Goodyear freight undercharges in the amount of \$634.96.

THEREFORE, IT IS ORDERED, That the portion of the Settlement Officer's decision ordering the Goodyear Tire & Rubber Company to pay to Maersk Line the amount of \$634.96 plus interest is reversed and vacated;

IT IS FURTHER ORDERED, That in all other respects, the decision of the Settlement Officer is adopted and made a part hereof.

By the Commission.**

(S) FRANCIS C. HURNEY
Secretary

* The complaint in this proceeding was filed on March 16, 1981.

** Commissioner Daschbach's separate opinion is attached.

Commissioner Richard J. Daschbach's separate opinion.

I am not participating because I do not believe that the Commission should review the decisions of Settlement Officers in informal docket proceedings. Under Subpart S of the Commission's Rules of Practice and Procedure (46 C.F.R. 502.301), parties consent to waive the rights and obligations associated with normal adjudicatory proceedings for the express purpose of receiving prompt consideration of a small claim. Commission review precludes the inexpensive and expeditious handling of small claims which is the foundation of the informal docket process. The Settlement Officer's decisions in informal dockets do not have precedential value. Commission review therefore imposes unnecessary expense and delay in an arbitration process designed to settle minor commercial disputes in a prompt and responsive manner.

FEDERAL MARITIME COMMISSION

INFORMAL DOCKET NO. 1062(I)
THE GOODYEAR TIRE & RUBBER COMPANY

v.

MAERSK LINE

DECISION OF JOSEPH T. FARRELL, SETTLEMENT
OFFICER ¹

Partially Adopted July 29, 1981

Reparation Denied

By its complaint filed with the Commission on March 16, 1979, The Goodyear Tire & Rubber Company (Goodyear), through its agent, seeks reparation of \$1,541.41 plus interest of Maersk Line (Maersk), this amount representing an alleged overcharge arising out of a Goodyear shipment transported by Maersk from New York, New York, to Port Kelang, Malaysia, pursuant to a bill of lading dated March 23, 1979. The bill of lading described the shipment as "4 Boxes: Misc. Spare Parts for Tire Mfg. Machinery. All Materials Included in This Bill of Lading are of Wholly Proprietary Nature Not for Resale and are for Use in the Construction and/or Installation in the Tire Plant Project." Goodyear prepaid freight charges of \$5,512.71.

There is no dispute concerning the nature of the commodity shipped. Goodyear's shipment was assessed freight charges of \$128 per cubic meter in accordance with the Project Rate for a tire manufacturing plant expansion project. The bill of lading was duly claused as required by the controlling tariff,² and the materials were shipped to the proper consignee, Goodyear Malaysia Berhad, Shah Alam, Selangor, Malaysia.

Goodyear contends, however, that heavy lift charges assessed by Maersk were improperly applied. According to Goodyear, Maersk calculated such charges based on the total weight of shipment. Complainant believes that heavy lift charges should have been applied to each of the four boxes separately. Maersk, in reply, opines that Goodyear's claim should be rejected, at least insofar as the amount claimed is concerned, because Goodyear's agent has ". . . used the wrong heavy lift scale. In addition, it appears they applied the rating on the wrong

¹ Both parties having consented to the informal procedure under Subpart S of the Commission's Rules of Practice and Procedure (46 C.F.R. 502.301-304), this decision will be final unless the Commission elects to review it within 30 days from the date of service thereof.

² Atlantic and Gulf-Singapore, Malaya and Thailand Conference Freight Tariff No. 16 FMC-6.

basis, however, considering the illegibility of the Bill of Lading we are unable to comment any further.”

Although not specified, Goodyear's complaint constitutes an alleged violation of section 18(b)(3) of the Shipping Act.³ In support of its claim, Goodyear has submitted, in addition to the bill of lading previously referenced, copies of the invoice addressed to its consignee, and of the tariff page used to calculate what it considers to be the proper heavy lift charges. The Settlement Officer concurs with Maersk on the usefulness of this tariff page: Goodyear has based its calculations on a heavy lift scale intended for use only with regard to “outports.” Port Kelang is a “base port” as defined by the tariff, and, consequently, a different heavy lift scale must apply.

The bill of lading, as indicated by Maersk, was, in fact, partially illegible. That is, that part of the bill of lading which detailed the charges assessed could not be interpreted. However, this detailing of charges was available from the attached invoice addressed to Goodyear by its freight forwarder. These charges are recounted in the Appendix to this decision.

The Settlement Officer nevertheless requested Goodyear's agent to submit a legible bill of lading. This has been done, although the figures supplied appear to have been added at some point subsequent to the completion of the bill of lading. Nevertheless, these figures are the same as those indicated on the forwarder's invoice, and are confirmed by the total of freight charges noted on Goodyear's invoice to consignee. It appears reasonable to conclude that the charges indicated were those actually paid.

Concurrent with the submission of the rated bill of lading, complainant advised the Settlement Officer of its intention to amend its claim.⁴ Goodyear now argues that it was incorrectly assessed a container stuffing charge of \$2.50 per cubic meter, arguing that, “. . . (since) the shipment did not move in a container, this charge should be deleted and the amount of \$68.45 added to our claimed amount.” Maersk, however, challenges this contention, pointing out that “. . . Maersk Line is a fully containerized ocean vessel operator. This shipment was loaded at our container freight station at Port Newark into containers MAEU 2065374 and MAEU 4000813 which you will note in the official Intermodal Equipment Register are a 40 foot dry container and a 40 foot opentop container respectively.” Insofar as this amendment to the com-

³ 46 C.F.R. 502.304(a) Appendix A. No specific violation of the Shipping Act need be cited by the complainant in overcharge cases.

⁴ Amendments of this nature are liberally permitted under the Commission's procedures. Confer *Trane Co. v. South African Marine Corp. (NY)*, 18 F.M.C. 375 (1976).

plaint is concerned, the Settlement Officer finds Goodyear's contention to be without merit.⁵

Goodyear's original claim, on the other hand, would appear to be valid. Tariff rules 1(B) and 4 indicate clearly that heavy lift charges must be applied to each piece individually. The proper heavy lift charges as derived from the "base port" scale have been calculated in the Appendix to this decision.

Maersk's failure to properly apply heavy lift charges resulted from complainant's failure to indicate on the bill of lading the weight of each individual package, as required by Tariff rule 4. However, shipper's lack of care does not constitute an adequate defense in cases of this nature, and Goodyear is entitled to reparation.⁶ In the same manner, shipper's lack of care also contributed to what is, in fact, an erroneous calculation of the basic freight charges on this shipment.

Tariff rule 1(B) requires: "Rates to be assessed per ton of 1000 Kg. (2204.62 lbs.) or 1 cubic meter (35.314 cft.) whichever creates the greater revenue." The Port Kelang Project Rate at the time of shipment was \$128.00 per cubic meter or \$159.00 per kilo ton. Inasmuch as Goodyear's cargo weighed 28.105 kilo tons,⁷ and measured only 27.383 cubic meters,⁸ the use of measurement as the rating basis is a clear violation of rule 1(B).⁹

Furthermore, the error was compounded by this incorrect application of the basic freight rate to Goodyear's shipment taken as a whole. There is no question that each of the four boxes should have been rated independently.¹⁰ Although the shipment was transported by container, it was handled as a "pier-to-pier" (CFS/CFS) movement, packed by the carrier for its convenience,¹¹ and properly rated as breakbulk cargo. This being the case, each of the four boxes should have been rated separately.¹²

As it happens, three of the four boxes concerned should have been rated on a weight basis, while the fourth is measurement cargo. This

⁵ In point of fact, the charge in dispute is not a "container stuffing charge," but, rather, a CFS delivery charge, applicable at the "base port" of Port Kelang. See rule 28(B)(2)(b)(ii)(2). Container stuffing charges are applicable only when such service is requested by the shipper. See rule 28(B)(2)(b)(i).

⁶ For example, confer *United States of America v. Farrell Lines, Inc.*, 16 F.M.C. 42, 48 (1972).

⁷ 61,961 pounds ÷ 2,204.62 = 28.105 kilo tons.

⁸ 967 cubic feet ÷ 35.314 = 27.383 cubic meters.

⁹ 28.105 x \$159.00W = \$4,468.70

27.383 x \$128.00M = \$3,505.02

¹⁰ The project rates (original page 233) are provided for "packages or pieces."

¹¹ If the container had been utilized at the shipper's request, a CFS receiving charge of \$4.50 per revenue ton would apply. See rule 28(B)(2)(b)(i).

¹² The same point applies to the heavy lift charges. If the shipment had been transported by a "house-to-house" (CY/CY) movement, heavy lift charges would not apply. See rule 28(B)(3). Cargo containerized for the convenience of the vessel is covered by rule 28(B)(14), which provides that such cargo is to be treated as breakbulk cargo, and that CFS delivery charges must apply.

has been determined by an analysis of the weights and measurements provided on a invoice submitted by Goodyear. The results of this rerating are included in the calculations found in the Appendix.

One final error was made in the rating of this shipment. On March 23, 1979, a currency adjustment surcharge of 10 percent, applicable to base ports only (including Port Kelang), should have been assessed on Goodyear's shipment.¹³ The failure to apply this charge has been corrected in the Appendix calculations.

Reference to those calculations will indicate that the overcharge resulting from misapplication of heavy lift charges is more than offset by the total of the undercharges deriving from the other errors discussed above. The net undercharge amounts to \$634.96, and Goodyear is ordered to submit that sum to Maersk. In addition, it is the opinion of the Settlement Officer that interest should be awarded. The Commission has determined that interest is not to be viewed as a penalty, but, rather, as compensation for the use of the money involved during the period covered by the interest. In accordance with the present practice of the Commission, Maersk is awarded 11.4 percent interest per annum from March 1979. The interest figure of 11.4 percent is based on the average of the monthly rates on U.S. Treasury bills as quoted in the secondary market from March 1979, to May 1981. So ordered.

(S) JOSEPH T. FARRELL
Settlement Officer

¹³ Rule 10.

APPENDIX

Freight Charges as Assessed by Maersk Lines:

967 ¹ cubic feet at \$128.00 per cubic meter:	\$3,505.06
Heavy Lift Charges, 61,961 lbs. at \$69.00 per 2,204.62 lbs.:	1,939.25
CFS Delivery Charge, 967 cft. at \$2.50 per cubic meter:	<u>68.45</u>
Total Charges:	\$5,512.71

Correct Assessment - four boxes rated separately:

Box #1: 10.433 kilo tons at \$159.00 per kilo ton:	\$1,658.85
Heavy Lift Charges at \$38.25 per kilo ton:	399.06
Box #2: 9.741 cubic meters at \$128.00 per cubic meter:	1,246.85
Heavy Lift Charges (6.350 kilos) at \$25.25 per kilo ton:	160.34
Box #3: 5.579 kilo tons at \$159.00 per kilo ton:	887.06
Heavy Lift Charges at \$22.25 per kilo ton:	124.13
Box #4: 5.743 kilo tons at \$159.00 per kilo ton:	913.14
Heavy Lift Charges at \$22.25 per kilo ton:	<u>127.78</u>
Total:	\$5,517.21
Plus 10 percent Currency Adjustment:	<u>551.72</u>
	\$6,068.93
Plus CFS Delivery Charge ² \$2.50 per revenue ton as freighted. 31.496 rev. tons:	<u>78.74</u>
Total:	\$6,147.67
Less Charges Actually Paid:	<u>-5,512.71</u>
Amount of Undercharge:	\$ 634.96

¹ Rounding of cubic feet is accomplished in accordance with rule 23(ii), which permits dropping fractions under one-half, but requires raising fractions of one-half or larger to the next whole cubic foot.

² CFS Delivery Charge is not subject to the currency adjustment factor. See rule 10.

FEDERAL MARITIME COMMISSION

INFORMAL DOCKET NO. 1092(I)
WHITE CROSS INDUSTRIES, INC.

v.

SEA-LAND SERVICE, INC.

ORDER OF PARTIAL ADOPTION

July 29, 1981

The Commission determined to review the decision of Settlement Officer Donald F. Norris in which he denied the claim of White Cross Industries, Inc. (White Cross) for an alleged freight overcharge by Sea-Land Service, Inc. (Sea-Land) on a shipment of resin from New Orleans to Puerto Limon, Costa Rica, and ordered White Cross, in the event it had not yet done so, to pay with interest Sea-Land's supplemental bill in the amount of \$1008.65 covering an increase in bunker surcharge, which had come into effect on the date of sailing of the vessel.

As recently stated in *Ideal Toy Corp. v. Evergreen Line*, Informal Docket No. 998(I) 23 F.M.C. 1008 (1981), section 22 of the Shipping Act, 1916, (46 U.S.C. 821), confers no jurisdiction on the Commission to order the payment of reparation, in any form, by a shipper or consignee. As a result, the Settlement Officer had no authority to direct White Cross, a shipper, to pay to Sea-Land any amount. Accordingly, this portion of the Settlement Officer's decision must be vacated.

Except as stated above, the Commission finds that the Settlement Officer's findings and conclusion are correct. Sea-Land is therefore directed to take the steps necessary to collect from White Cross unpaid freight charges in the amount of \$1008.65.*

THEREFORE, IT IS ORDERED, That the portion of the Settlement Officer's decision directing White Cross Industries, Inc. to pay to Sea-Land Service, Inc. the amount of \$1008.65 plus interest is reversed and vacated;

* The doubt raised by the Settlement Officer on whether White Cross has already paid the supplemental bill is dispelled by the reference in Sea-Land's letter of July 10, 1980 to "Unpaid Ocean Freight - \$1008.65."

IT IS FURTHER ORDERED, That in all other respects, the decision of the Settlement Officer is adopted and made a part hereof.

By the Commission.**

(S) FRANCIS C. HURNEY
Secretary

Commissioner Richard J. Daschbach's separate opinion.

I am not participating because I do not believe that the Commission should review the decisions of Settlement Officers in informal docket proceedings. Under Subpart S of the Commission's Rules of Practice and Procedure (46 C.F.R. 502.301), parties consent to waive the rights and obligations associated with normal adjudicatory proceedings for the express purpose of receiving prompt consideration of a small claim. Commission review precludes the inexpensive and expeditious handling of small claims which is the foundation of the informal docket process. The Settlement Officer's decisions in informal dockets do not have precedential value. Commission review therefore imposes unnecessary expense and delay in an arbitration process designed to settle minor commercial disputes in a prompt and responsive manner.

** Commissioner Daschbach's separate opinion is attached.

FEDERAL MARITIME COMMISSION

INFORMAL DOCKET NO. 1092(I)
WHITE CROSS INDUSTRIES, INC.

v.

SEA-LAND SERVICE, INC.

DECISION OF DONALD F. NORRIS, SETTLEMENT
OFFICER ¹

Partially Adopted July 29, 1981

Reparation Denied

By its complaint filed with the Commission during May 15, 1981, the White Cross Industries, Inc. (White Cross) appears to claim \$1,008.65 of Sea-Land Service, Inc. (Sea-Land), this amount representing an alleged overcharge ² arising from a White Cross shipment of resin transported by Sea-Land from New Orleans to Puerto Limon, Costa Rica pursuant to the latter's received for shipment bill of lading dated August 4, 1979.

The facts of the matter here are not in dispute. White Cross delivered the resin to Sea-Land during August 2, 1979. Subsequently, the cargo was booked for a vessel scheduled to sail from New Orleans during August 4th, upon which date the bill was issued. On August 5th, a scheduled increase in Sea-Land's bunkers surcharge became effective, i.e., the surcharge was increased from \$3.50 to \$6.00 per revenue ton. The cargo is said not to have "sailed" until August 9th, that date representing the day when the Sea-Land vessel which lifted the resin departed New Orleans on its outward passage. White Cross was billed twice by Sea-Land. The first required payment of ocean freight and a bunkers' surcharge at the \$3.50 rate. A second, supplemental, billing called for the payment of an additional \$2.50 per ton of surcharge, or the differential between the two. It is the latter which White Cross protests on the ground, essentially, that the cargo was in Sea-Land's possession prior to the effective date of increase.

In its reply to service, Sea-Land contends correctly that it had no alternative to assess other than it did. Sea-Land's Tariff No. 264, FMC

¹ Both parties having consented to the informal procedure set forth in the Commission's Rules of Practice and Procedure (46 C.F.R. 502.301 et seq.), this decision will become final unless the Commission elects to review it within 30 days of the date of service.

² No specific violation of section 18(b)(3) of the Shipping Act, 1916, was alleged by White Cross as none is required with respect to overcharge claims. See 46 C.F.R. 502.304, Appendix A.

No. 144, which controls here, states specifically that "TARIFF CHANGES - EFFECTIVE DATE. The effective date of rate changes at each loading port will be governed by the date the vessel sails from the port and not by dates of bookings, dock receipts or bills of lading."³ Hence, Sea-Land's vessel would have to have sailed by August 4th for White Cross to prevail here.

It is not clear from the materials before the Settlement Officer whether White Cross has, in fact, paid the supplemental billing. If it has, reparation is denied. If it has not then it is directed to pay Sea-Land \$1,008.65 plus interest at the rate of 11.5 percent per annum, pro rata, from September 1979. So ordered.

Had White Cross prevailed here, Sea-Land would have been ordered to pay White Cross interest at the same rate, not as a penalty in any way but on the theory that Sea-Land would have enjoyed the use of money to which it was not entitled. That would have been consistent with the Commission's present practice. If Sea-Land has not been paid the supplemental billing then it has been denied the use of money to which it was entitled. Fairness, then, dictates that the same principle apply. The 11.5 percent rate reflects the average of the monthly rates quoted in the secondary market for U.S. Treasury notes for its 6 months bills for the period September 1979, through May 1981, the latest month for which such quotations are available. It is considered reasonable in the circumstances.

(S) DONALD F. NORRIS
Settlement Officer

³ 6th Revised page 83, effective February 9, 1979.

FEDERAL MARITIME COMMISSION

TITLE 46 - SHIPPING

CHAPTER IV - FEDERAL MARITIME COMMISSION

SUBCHAPTER B - REGULATIONS AFFECTING

MARITIME CARRIERS AND RELATED ACTIVITIES

[GENERAL ORDER 23, REVISED; DOCKET NO. 81-3]

PART 524 - EXEMPTION OF CERTAIN AGREEMENTS FROM THE REQUIREMENTS OF SECTION 15, SHIPPING ACT, 1916

August 6, 1981

ACTION: Final Rule

SUMMARY: This exempts agreements which provide for joint cargo inspection or self-policing services, or both, from the filing and approval requirements of section 15 of the Shipping Act, 1916 (46 U.S.C. 814). This exemption will not substantially impair effective regulation, result in unjust discrimination, or be detrimental to commerce. It should encourage the use of cargo inspection services which complement self-policing and also strengthen compliance with the provisions of carrier tariffs.

DATE: Effective September 10, 1981

SUPPLEMENTARY INFORMATION:

Section 35 of the Shipping Act, 1916 (46 U.S.C. 833a) allows the Commission to exempt any class of agreements between persons subject to the Act, where it finds that such exemption will not substantially impair effective regulation, be unjustly discriminatory, or be detrimental to commerce. Pursuant to this authority, the Commission has proposed (46 F.R. 5008) to amend 46 C.F.R. 524 (Commission General Order 23) by exempting agreements which provide for joint cargo inspection or self-policing services, or both, from the filing and approval requirements of section 15 of the Act.

Comments on this proposal have been received from: (1) the U.S.-Flag Far East Discussion Agreement, (2) several North European Conferences (NEC), (3) the Inter-American Freight Conference (IAFC), (4) Sea-Land Service, Inc., (5) three Pacific conferences - the Pacific Westbound Conference, the Pacific-Straits Conference, and the Pacific/Indonesian Conference, and (6) a group of 12 other conferences and rate agreements (Group of 12).

The *Pacific Conferences and the Group of 12* support the proposed rule without reservation.* NEC and the IAFIC support the proposed rule in principle but suggest certain revisions to clarify the application of the exemption. Both would expand the proposed definition of joint cargo inspection or self-policing agreement to include a broader range of activities associated with self-policing and cargo inspection services. In addition, IAFIC recommends that agreements of this type which are filed for approval be handled under delegated authority and a timetable for prompt approval be established.

While Sea-Land believes that joint self-policing/cargo inspection agreements have minimal impact, it does not support their exemption. Sea-Land urges that they continue to be filed, but that they be approved upon filing as presumptively approvable. Sea-Land also suggests that the rule be amended to specifically include within its scope agreements between independent carriers or between an independent carrier or carriers on the one hand and the members of conferences or rate agreements, on the other hand.

The U.S.-Flag Far East Discussion Agreement does not support the proposed rule. It believes that the rule would subject it to unreasonable risks of antitrust exposure because the filing option provided would rarely be exercised under the agreements to which the U.S.-flag carriers are party. This result is anticipated because the U.S.-flag carriers in the several U.S./Far East conferences are minority members, and the majority, foreign-flag members may not be that concerned about the potential application of U.S. antitrust laws and thus would not vote to file the agreements for the optional approval provided. The Commission is, therefore, urged to continue to require the filing of such agreements and adopt a simplified processing procedure so that they can be handled under delegated authority or approved by notation.

After having thoroughly reviewed the comments received, the Commission continues to believe that full section 15 regulation of these agreements serves no substantive purpose and that the proposed exemption will not significantly affect the overall design of regulation contemplated by the Shipping Act, 1916.

The comments submitted by Sea-Land and the U.S.-Flag Far East Discussion Agreement do not convince us that there is a regulatory need for continued Commission approval for all such arrangements. As mentioned before, filing of such agreements for approval will remain optional under the current rule to which this exemption will be added (46 C.F.R. 524.7). Moreover, it is unlikely that coordinated activity under such agreements will result in violations of the antitrust laws.

* The group of 12 does suggest that the rule be amended to clearly state that optional approval is available. This is unnecessary, because the rule to which this exemption would be added already provides for optional section 15 approval for exempted agreements (46 C.F.R. 524.7).

However, if problems arise because of the filing option, then this matter should be brought to the Commission's attention for such further action as may be necessary or warranted.

Some changes in the proposed rule are warranted, however. The exemption has been expanded to include carrier associations operating under section 15 agreements which are neither conferences nor other ratemaking bodies, and arrangements between individual carriers or an individual carrier and a carrier association. The anticompetitive effect of such agreements is equally minimal whether the signatory is an independent carrier or a member of an association of carriers approved under section 15. The final rule also clarifies the type of cargo inspection and self-policing activities which will warrant an exemption.

Pursuant to the Regulatory Flexibility Act (5 U.S.C. 601 *et seq.*), the Commission certifies that the proposed rule will not, if adopted, have a significant economic impact on a substantial number of small entities. The proposed exemption will not impose any reporting or record keeping requirements which might result in a compliance or reporting burden on small entities. The exemption will primarily benefit carriers. The shipping public, some of whom undoubtedly are small entities may enjoy a secondary benefit from this exemption but it is not foreseen that this benefit will amount to a "significant economic impact," within the meaning of 5 U.S.C. 605(b).

THEREFORE, pursuant to 5 U.S.C. 553 and sections 15, 35 and 43 of the Shipping Act, 1916 (46 U.S.C. 814, 833a and 841a), 46 C.F.R. 524 is amended by adding a new paragraph (c) to section 524.2, as follows:

- (c) A joint policing agreement is an agreement between or among:
- (1) two or more individual common carriers by water,
 - (2) two or more associations of common carriers by water each operating pursuant to an approved section 15 agreement, or
 - (3) one or more individual common carriers by water and one or more such associations;

which provides that its parties may discuss and agree upon any of the following activities concerning cargo inspection and/or self-policing services: (a) negotiations for and employment of such services, (b) establishment of rules and procedures relating thereto (including the collection of delinquent freight and other tariff charges), (c) allocation of the costs of such services, and (d) the administration and management of such arrangements.

By the Commission.

(S) FRANCIS C. HURNEY
Secretary

FEDERAL MARITIME COMMISSION

DOCKET NO. 80-69

ARCHIE PELTZMAN

v.

AMERICAN MARITIME ASSOCIATION, ET AL.

ORDER ADOPTING DISMISSAL OF COMPLAINT

August 12, 1981

This proceeding was initiated as a result of a Complaint filed by Archie Peltzman against the American Maritime Association (AMA), the Pacific Maritime Association (PMA), and the individual members of these Associations who are common carriers by water or "other persons subject to the Act" within the meaning of section 1, Shipping Act, 1916 (46 U.S.C. 801) (the Act).¹ Also named in the Complaint are several unions as well as a number of independent shipping companies. In all, the Complaint names some 185 entities alleged to have violated sections 15, 16 and 17 of the Act (46 U.S.C. 814, 815, 816), as well as the antitrust laws and numerous labor statutes. These violations are said to have resulted from the "union security clauses" of certain unspecified collective bargaining agreements which were allegedly neither filed with, nor approved by, the Commission and which allegedly deprived Complainant of employment as a radio operator on Respondents' vessels (Complaint, paragraphs 13, 14, 16, 17 and 21). Complainant requests that the Commission declare the agreements unlawful and seeks reparation under the Act or treble damages under the antitrust laws. Complainant also urges the Commission to investigate the hiring hall and maritime training facilities that are subsidized by the United States Maritime Administration.

This proceeding is now before the Commission upon Petition for Reconsideration filed by Complainant to the ruling of Chief Administrative Law Judge John E. Cogrove dismissing the Complaint.² Replies to the Petition have been filed by or on behalf of most of the Respondents in the proceeding.

¹ This proceeding was initiated prior to the effective date of the Maritime Labor Agreements Act of 1980, P.L. 96-325, 94 Stat. 1021, which modified the Commission's jurisdiction over activities flowing from collective bargaining agreements.

² Mr. Peltzman is appearing *pro se*. His Petition, though captioned as one for "reconsideration," is being treated as an appeal pursuant to Rule 227(b) of the Commission's Rules of Practice and Procedure (46 C.F.R. 502.227(b)). This Rule permits a party to seek Commission review of an administrative law judge's grant of a motion to dismiss a proceeding in whole or in part.

DISCUSSION

In his Order dismissing the Complaint, the Presiding Officer concluded that Complainant had failed to state a cause of action upon which relief could be granted and that, in any event, the Complaint is barred by the two-year statute of limitations in section 22 of the Act (46 U.S.C. 821). The Presiding Officer first found that the agreements complained of, at least as they extend "to provisions which establish union membership as a condition precedent to employment as a radio operator in the U.S. Merchant Marine," are labor-exempt under the criteria established in *United Stevedoring Corporation v. Boston Shipping Association*, 16 F.M.C. 7 (1972) (*BSA*), and "thus are immune from challenge under the Shipping Act" (Order at 11 & 14).³

Further, the Presiding Officer determined that section 16 of the Act is not intended to address the Complainant's allegation regarding "unlawful and discriminatory pre-hire exclusive hiring hall arrangements, and 'union' membership requirement in the agreements which is placed on seamen who wish to enter the service of shipping companies" (Order at 4 and 16; Complaint paragraph 17). The Presiding Officer explained that although section 16 is broadly worded, it is "clearly directed to the obligations of common carriers and other persons subject to the Act to users of their services, *i.e.* the shipping public" rather than to an employee's grievance against an employer and the union. He also noted that it would be "absurd" to recognize a "labor exemption" under *BSA* to reconcile conflicting labor and shipping policies on the one hand and to undermine that exemption by taking jurisdiction under section 16 - "a section which was not intended to deal with offenses alleged" (Order at 16) on the other.

Section 17 of the Act was likewise found to be inapplicable to the charges advanced in the Complaint. The Presiding Officer ruled that the regulations and practices which section 17 requires to be reasonable relate to receiving and handling property and not to the terms and conditions of a radio officer's employment by a common carrier by water (Order at 17).

In concluding that the Complaint is, in any event, barred by the two-year statute of limitations, the Presiding Officer relied on the affidavit of C. S. Larsen, Vice President, Marine Division, Central Gulf Lines, and various decisions and orders of the National Labor Relations Board, the New York State courts and Federal Courts. The Presiding Officer found that Mr. Peltzman's cause of action, if any, arose from his "discharge from employment" in May of 1971 when Central Gulf

³ It was unnecessary for the Presiding Officer to have considered other provisions of the collective bargaining agreements because they were not put in issue. Accordingly, the Commission will not adopt that portion of the Order which implies that the Agreements are exempt in their entirety (see Discussion, *infra*).

terminated his employment because of a refusal to pay union initiation fees (Order at 17).

Complainant appeals from the Presiding Officer's dismissal on essentially five grounds:

- (1) the Presiding Officer applied an erroneous standard in considering the alleged violations of the Shipping Act;
- (2) the Presiding Officer committed procedural errors;
- (3) the Presiding Officer committed factual errors;
- (4) the Presiding Officer failed to consider all of the Respondents' pleadings and arguments; and
- (5) the Presiding Officer erred in finding that the Complaint is time-barred.

The Complainant argues that the "union security" provisions of the agreements complained of are illegal restraints of trade and are therefore contrary to the public interest and must be investigated by the Commission. Complainant maintains that the purpose of the Shipping Act, 1916, and related statutes is not only to assure a strong merchant marine but also to protect merchant seamen. He further submits that the Commission may not approve an agreement under the public interest standard of section 15 if it violates either labor statutes or the antitrust laws.

Complainant also argues that the Presiding Officer erred in failing to convene a prehearing conference or any hearings in this proceeding, in dismissing the Complaint prior to the receipt of all the Respondents' answers thereto, and in not specifically considering and addressing all of his pleadings and arguments.

Mr. Peltzman further contends that the Presiding Officer's finding that the Larsen affidavit went unchallenged is erroneous. This affidavit was allegedly rebutted in Complainant's December 5, 1980 Reply to the Motions to Dismiss. The Presiding Officer also allegedly erred in stating that Complainant had cited *Volkswagenwerk Aktiengesellschaft v. F.M.C.*, 390 U.S. 261 (1968), as an indication that Complainant was cognizant of the Commission's jurisdiction over matters arising out of collective bargaining agreements. Finally, Mr. Peltzman contends that his Complaint is not time-barred because, although he was discharged in 1971, the "illegal closed shop and restrictive hiring hall practices are still continuing."⁴ (Petition at 9).

⁴ The provisions or agreements at issue here have been variously referred to by the parties as "closed shop" or "union security" provisions. The various tribunals where Mr. Peltzman has sought relief have characterized the provisions complained of as "union security" provisions (see for example *Peltzman v. Central Gulf Lines, Inc.*, 86 L.R.R.M. 2127 (1974) and footnote 7, *infra*). They are so referred to in this Order.

The several Respondents replying to Complainant's appeal all urge the Commission to deny the appeal and to affirm the Presiding Officer's dismissal.

Complainant's appeal presents the Commission with no reason for setting aside the Presiding Officer's ruling. The Presiding Officer's ultimate conclusions are well-reasoned and are supportable procedurally and in law and fact. The Order of Dismissal is therefore adopted by the Commission, subject to the modifications and clarifications discussed below. The Commission shall, however, first dispose of certain procedural challenges.

Rule 64 of the Commission's Rules of Practice and Procedure, 46 C.F.R. 502.64, provides that answers to complaints shall be filed within 20 days of the service of the complaint, *unless a motion to dismiss the complaint is filed*. This Rule further states that the answer to the complaint need not be filed until such motion has been denied. Complainant did not request relief as provided for in Rule 64, has not demonstrated how he was harmed by the failure of any Respondent to timely answer his Complaint, nor has the Commission been able to perceive any harm accruing from failure by any Respondent to timely answer Mr. Peltzman's Complaint.⁵ The Commission therefore finds that if any such failure existed, it constituted harmless error, particularly in light of the Commission's ultimate disposition of the Complaint.

Similarly, Complainant has failed to establish how he was prejudiced by the absence of a pre-hearing conference or evidentiary hearings. The Commission Rules provide the Presiding Officer broad discretion in structuring the proceeding (See Rule 94, 46 C.F.R. 502.94). The Commission cannot find that the Presiding Officer abused that discretion. The disposition of this proceeding, on the basis of the Motions filed, turned on questions of law, thus obviating any need for evidentiary hearing procedures.

Finally, it is a well-settled principle that administrative decisions need not recite or respond to each and every argument or finding propounded by a party to a proceeding.⁶ The Presiding Officer's ruling in this proceeding addresses all the material matters raised by the pleadings.⁷

⁵ The one Respondent alleged not to have filed an answer, the Seafarers International Union, filed its answer on November 24, 1980.

⁶ See *Mediterranean Pools Investigation*, 9 F.M.C. 264, 267 (1966), citing *NLRB v. State Center Warehouse and Cold Storage Company*, 193 F.2d 156 (9th Cir. 1951); and *NLRB v. Sharpless Chemicals, Inc.*, 209 F.2d 645 (6th Cir. 1954).

⁷ The facts relied upon by the Presiding Officer are contained in the various decisions and orders of the National Labor Relations Board, and the Federal and New York State courts, as well as Mr. Larsen's affidavit. Commission Rule 226, 46 C.F.R. 502.226, permits the taking of official notice of these decisions, thus mooting any challenges to the Presiding Officer's consideration of Mr. Larsen's affidavit. In any event, the matters allegedly rebutted by Mr. Peltzman's December 5, 1980 Reply were not relied upon nor pertinent to the Presiding Officer's basis for dismissal. Similarly, the Commission per-

Continued

The arguments that Complainant submits were not considered by the Presiding Officer relate primarily to the merits of his Complaint rather than the gravamen of the Motions to Dismiss, *i.e.*, the lack of Commission subject matter jurisdiction and the failure to state a claim upon which relief can be granted.

It is the absence of subject matter jurisdiction and the failure to state a claim upon which relief can be granted which mandates the dismissal of the Complaint. The essence of the Complaint is that certain collective bargaining agreements or their provisions require membership in the union as a condition to employment on Respondent's vessels. (Order at 11). These "union security" agreements or provisions are at the heart of the Complaint. Despite sweeping statements concerning the unlawfulness of the collective bargaining agreements in their entirety, the focus of the Complaint is:

. . . directed *solely* to the unlawful and discriminatory pre-hire exclusive hiring hall arrangements . . . placed on seamen who wish to enter the service of shipping companies . . . [Emphasis supplied] (Complaint, paragraph 17).

Complainant's grievance therefore addresses pure employer-employee/union matters which are not cognizable under the Shipping Act.⁸ See *New York Shipping Association, Inc. v. Federal Maritime Commission*, 495 F.2d 1215, 1220 (2d Cir.), *cert. den.* 419 U.S. 964 (1974). Cf. *Federal Maritime Commission v. Pacific Maritime Association (PMA)*, 435 U.S. 40 (1978).⁹

This agency's jurisdiction attaches to the provision of common carrier services in the domestic offshore and foreign ocean trades of the United States.¹⁰ Within the context of this proceeding, it is concerned with the regulation of *common carriers* subject to its jurisdiction, and not the individual seamen employed by those carriers.¹¹ The transpor-

ceives no harm in the Presiding Officer's misreference to *Volkswagenwerk, supra*, because he properly noted the proposition relied on in a footnote (Order at 11). Moreover, it is irrelevant to the matter at issue whether Complainant was in fact previously aware of the Commission's jurisdiction over collective bargaining agreements (*Id.*).

⁸ Such matters appear to fall within the province of the National Labor Relations Act.

⁹ In *PMA*, the Supreme Court recognized that collective bargaining agreements could be subject to section 15 of the Shipping Act and found such an agreement so subject when it imposed terms relating to employer competition in providing transportation related services upon employers not members of a multi-employer bargaining unit.

¹⁰ "The F.M.C. has no concern with so much of [a collective bargaining agreement] as provides what wages and other benefits shall be paid to the longshoremen, grievance procedures and similar matters." *New York Shipping Association, supra*, at 1220.

¹¹ This proceeding presents a factual situation far removed from the type of transportation practice growing out of collective bargaining agreements whereby carriers refuse to tender containers to certain classes of shippers or tender them only subject to additional charges, or from situations involving the imposition of charges by common carriers against the users of their transportation services to fund longshoremen's benefits, the usual situations in which our jurisdiction has come into play. See *e.g. Volkswagenwerk v. F.M.C.*, 390 U.S. 261 (1968); *New York Shipping Association, Inc. v. Federal Maritime*

Continued

tation activities of such carriers present Shipping Act considerations; their employment relationships, standing alone, do not.¹² It follows, therefore, that the Complaint does not allege matters which, if true, would establish a violation of the Shipping Act, 1916. The Complaint must accordingly be dismissed as a matter of law.

The language of sections 16 and 17, even if broadly construed, could not be interpreted to apply to Complainant's grievance. The Commission will therefore adopt the Presiding Officer's disposition of these allegations with the following clarification. After concluding that the Complaint does not state a cause of action under section 16, the Presiding Officer noted that:

It would be patently absurd to, on the one hand, create a labor exemption to reconcile the conflicting labor and shipping policies and on the other nullify the reconciliation through an assumption of jurisdiction under section 16 First - a section which was not intended to deal with the offenses alleged. (Order at 16).

Notwithstanding the last modifying phrase, this statement could suggest that once a particular agreement is determined to be "labor exempt" from the filing and approval requirements of section 15, the activities contemplated by the agreement are also immune from other sections of the Shipping Act, 1916. This result is inconsistent not only with the *BSA* decision relied on by the Presiding Officer, but with court decisions indicating that action which is "labor exempt" from the reach of section 15 may nevertheless be subject to section 16 of the Act. *See, e.g., Pacific Maritime Ass'n v. F.M.C.*, 543 F.2d 395, 410, 411, fn. 39

Commission, 495 F.2d 1215 (2nd Cir. 1974), *cert. den.*, 419 U.S. 964 (1974); *Transamerican Trailer Transport, Inc. v. F.M.C.*, 492 F.2d 617 (D.C. Cir. 1974); *New York Shipping Ass'n v. F.M.C.*, 571 F.2d 1231 (D.C. Cir. 1978); *New York Shipping Ass'n v. F.M.C.*, 628 F.2d 253 (D.C. Cir. 1980); *United States v. Sea-Land Service, Inc.*, 424 F.Supp. 1008 (D.N.J. 1977), *appeal dismissed*, 577 F.2d 730 (3rd Cir. 1978) (table), *cert. denied*, 439 U.S. 972 (1979); *South Atlantic and Caribbean Line, Inc.*, 12 F.M.C. 237 (1969); Docket Nos. 73-17, *Sea-Land Service, Inc. and Gulf Puerto Rico Line, Inc. - Proposed Rules on Containers and 74-40, Puerto Rico Maritime Shipping Authority Proposed ILA Rules on Containers 20 F.M.C. 788* (1978), pending appeal *sub nom. CONASA and NYSA v. F.M.C. and USA*, D.C. Cir. No. 78-1776.

¹² In *NAACP v. Federal Power Commission*, 425 U.S. 662 (1976), the Supreme Court ruled on the applicability of the public interest standard of the Federal Power Act, 41 Stat. 1063, and the Natural Gas Act, 52 Stat. 821, to employment practices of the regulated industry. In rejecting the contention that the public interest criterion authorized the Federal Power Commission to "concern itself with discriminatory employment practices on the part of the companies it regulates," the Court explained:

This Court's cases have consistently held that the use of the words "public interest" in a regulatory statute is not a broad license to promote the general welfare. Rather, the words take meaning from the purpose of the regulatory legislation.

For example, in the case of the Interstate Commerce Commission . . . the term "public interest" . . . is not a concept without ascertainable criteria but has a direct relation to the adequacy of transportation service. . . . (at 669, citations omitted).

The Court further stated:

[I]t could hardly be supposed that in directing the Federal Power Commission to be guided by the "public interest" Congress thereby instructed it to take original jurisdiction over the processing of charges of unfair labor practices on the part of its regulatees. (at 671).

(D.C. Cir. 1976), *reversed on other grounds sub nom. F.M.C. v. Pacific Maritime Ass'n*, 435 U.S. 40 (1978); *F.M.C. v. Pacific Maritime Ass'n*, 435 U.S., *supra*, at 68, 74-75, 77 (dissent of Justice Powell). Accordingly, the Commission will not adopt the sentence quoted above from page 16 of the Order.

There is one final matter that warrants clarification. The Presiding Officer concluded that the Complaint is barred by the two-year statute of limitations in section 22 of the Act. The limitation in section 22, however, applies only to claims for reparation and does not act as a bar to requests for other relief. This fact is not significant here, however, because Complainant has not otherwise stated a claim upon which relief can be granted.

THEREFORE, IT IS ORDERED, That Complainant's Petition for Reconsideration is denied.

IT IS FURTHER ORDERED, That the March 13, 1981 Order of Dismissal in this proceeding is adopted by the Commission as modified and clarified above.

By the Commission.*

(S) FRANCIS C. HURNEY
Secretary

* Chairman Green did not participate.

FEDERAL MARITIME COMMISSION

DOCKET NO. 80-69

ARCHIE PELTZMAN

v.

AMERICAN MARITIME ASSOCIATION, ET AL.

DISMISSAL OF COMPLAINT

Adopted August 12, 1981

Complainant, Archie Peltzman, a "Marine Radio Officer," charges some 185 entities with depriving him of employment on certain vessels through "monopolistic and illegal exclusive preferential hiring hall bargaining agreements negotiated by the American Maritime Association, and the Pacific Maritime Association." Some of the respondents are named in the body of the complaint while the remainder are designated in four appendices to the complaint. Those named in the complaint appear to be the principal respondents and they are:

The American Maritime Association (AMA) and the Pacific Maritime Association (PMA) which are "the employers collective bargaining representatives, negotiating on behalf of the employers with the American Radio Association, and the Radio Officers Union and with other seamen's unions in the maritime industry for wages, pensions, and other benefits to be paid seamen employed on the vessels listed in Annex A, B, C" to the complaint.

The American Radio Association (ARA) and the Radio Officers Union (ROU) are both unions, which together represent "over ninety percent of the Marine Radio Officers in the maritime industry thereby controlling the entrance and continuity of employment in the trade by the restrictive hiring hall agreements negotiated with AMA and PMA." According to Mr. Peltzman, all "Radio Officers are hired through union hiring halls and continuity of employment is controlled by the restrictive 'closed shop' agreements with AMA and PMA."

The "American Federation of Labor-CIO (AFL-CIO) which is an association which has unions in the maritime field. . . ."

The remaining respondents are according to Mr. Peltzman "common carriers by water" subject to the Shipping Act "which have bargaining agreements with the unions and associations already named or with others named in appendix D to the complaint."

Mr. Peltzman states that the case "arises under section 15 of the Shipping Act, 1916, as amended" and recites the events leading up to the filing of the complaint as follows: ¹

From 1948 to 1977 AMA and PMA did not file with the Commission the agreements negotiated by ARA and ROU, and did not file the agreements negotiated with the other maritime unions affiliated with the American Federation of Labor-C.I.O.

In 1978 PMA filed an agreement with ARA which the Commission on August 18, 1978, granted a temporary exemption, which the complainant by telegram on November 30, 1978, and later by a letter giving reasons for such protest. PMA sought either approval pursuant to section 15 of the Act or exemption therefrom.

AMA and PMA control and determine the amount to be assessed to each shipping company for the various funds of the unions, for the benefit of the individual shipping company employees as provided for under the collective bargaining agreement with the unions in the maritime industry.

Pursuant to the terms of the bargaining agreement relating to exclusive restrictive hiring referral practices, and tenure of employment for "union members" only, the complainant and other seamen similarly situated have been subjected to prejudice and disadvantage in violation of Section 16 of the Act, (B) constituted unjust and unreasonable regulations and practices in violation of section 17 of the Act, and (C) cause the agreement to be unjustly discriminatory and unfair as between "members" of the unions and "permit card members," all to the detriment of the commerce of the United States, and to be contrary to the public interest in violation of section 15 of the Act, and to the public policy of the Government as expressed in Taft-Hartley Act, Landrum-Griffin Act, and the Norris-Laguardia Act. Similarly the statutes enacted for the protection of seamen in Title 46 have been nullified by the bargaining agreement.

This complaint is not directed to the amounts of wages or benefits which are agreed to be paid to seamen under the agreement. This complaint is directed solely to the unlawful and discriminatory pre-hire exclusive hiring hall agreements, and "union" membership requirement in the agreement which is placed on seamen who wish to enter the service of shipping companies, and who wish to retain those jobs without being forced to "join" a union or be discharged from employment if they do not "join" a union which has an exclusive preferential hiring hall agreement, commonly called a pre-hire, or closed

¹ The numbers preceding the paragraphs in the complaint have been omitted. No other editorial changes have been made.

shop agreement, requiring membership as a condition of employment, or referral by a union as a condition of employment.

AMA and PMA are controlled by the shipping companies listed in Annex A, B, C. When raises and other benefits are negotiated the Maritime Administration pays the shipping companies a subsidy to cover these raises in pay and other benefits. This is done by the Government in order to strengthen and keep the Merchant Marine ready for any emergency, and to provide this country with commercial carriers to compete in world trade with foreign vessels, and to have a sufficient supply of seamen to man those vessels.

AMA and PMA and some independent shipping companies have caused the seamen who are not "union" members to be deprived of the benefits negotiated on their behalf, and thereby treated those seamen discriminatorily by discharging "non-union" employees, and offering only temporary employment to "non-union" employees.

Seamen employed by the bargaining agreement are employed on an industry wide basis, and the benefits of the agreement in respect to entry in the trade, continuity of employment, health, welfare, vacation, and pension benefits are restricted to "union members" to the detriment of the complainant and those similarly situated who are not "union members."

By way of illustration complainant was discharged from his employment as a Radio Officer on a Central Gulf Lines vessel, because of a lack of "clearance" from the American Radio Association, thereby violating not only his "permanent" assignment to the vessel but depriving him of health, welfare, vacation and pension benefits that he had accumulated in three and one half years of employment in the trade.

Many Captains, Mates, and Radio Officers of the American Export Lines were discharged because non-membership in the unions that Farrell Lines had a bargaining agreement with when Farrell Lines bought the American Export Line vessels.

Radio Officers of the Prudential Steamship Company lost their jobs when Farrell Lines bought those ships and required those American Radio Association members to join the Radio Officers Union or be discharged.

Unlicensed seamen on National Maritime Union and Seafarer's Union contract ships have been discharged and refused referral from the exclusive preferential hiring halls of these unions. Likewise seamen have been prevented from entering the trade because of the closed shop, pre-hire agreements in the maritime industry.

Respondents and the ARA and ROU unions have received subsidy payments from the Maritime Administration and have

been unjustly enriched to the detriment of complainant and other seamen similarly situated in violation of the Shipping Act and seamen's statutes protecting seamen in their employment and entrance into the trade.

On the basis of the foregoing, Mr. Peltzman prays that the Commission (1) "declare that the bargaining agreements which were not filed until 1978 were illegal and could not be enforced against complainant and other seamen similarly situated before the agreement was filed and approved," (2) award reparations "retroactive from the date of discharge of complainant from the Central Gulf Lines vessel to the present, and continuing until rehired by Central Gulf Lines or triple damages because of the violation of the antitrust laws relating to monopoly in employment, . . ." and (3) determine "that insofar as the agreements call for an exclusive pre-hire preferential hiring hall referral system," and "union membership" as a condition of employment, the agreements, unless modified are unlawful and may not be approved. Finally Mr. Peltzman prays "that the Commission investigate the illegal hiring hall and training facilities in the maritime industry which are subsidized by the Maritime Administration, and order that the agreements be modified so as to conform to the requirements of sections 15, 16 and 17 of the Act."

Before dealing with the merits of the various motions now before me, a summary of what one respondent has called Mr. Peltzman's "legal odyssey" is necessary to any understanding of the complaint in this case. The facts set forth below are taken from an unchallenged affidavit of Mr. C. S. Larsen, Vice President, Marine Division, Central Gulf Lines, and various decisions and orders of the National Labor Relations Board, the New York State courts and Federal courts. Official notice is taken of those decisions and orders pursuant to Rule 226 of the Commission's Rules of Practice and Procedure. The affidavit, orders and decisions can be found in the Appendix to Central Gulf's Motion to Dismiss Complaint.

Mr. Peltzman was first employed by Central Gulf in May 1970 as a radio operator on the *SS Green Ridge* and completed three voyages aboard the vessel. Then and since, Central Gulf employed radio operators on its vessels under agreements with the American Radio Association, a union of radio operators.² All of these agreements contained a "union security clause" which provides:

(b) The Company agrees, as a condition of employment, that all employees in the bargaining unit shall become and remain members of the Union thirty (30) days after date of hiring.

² The current agreement between Central Gulf and the Association became effective June 16, 1978, and expires June 15, 1981. There have been and there are now no other agreements between Central Gulf and anyone else concerning the employment of radio operators.

In May 1971, the Association advised Central Gulf that Mr. Peltzman had not paid his union initiation fees and on May 28, 1971, Central Gulf told Mr. Peltzman that because of its agreement with the Association, he would "not be able to rejoin the vessel without prior clearance from the union." In September of 1971, Mr. Peltzman filed charges with the National Labor Relations Board (NLRB) alleging that the union's refusal to clear him for employment on a central Gulf vessel and Central Gulf's subsequent refusal to employ him were unfair labor practices in violation of the National Labor Relations Act. He also charged the union with violating the National Labor Relations Act because of the Union's refusal to enroll him in "the industry school," which refusal was allegedly based solely on the fact that Mr. Peltzman was not a union member.

On October 26, 1971, the NLRB's Region 2 found Mr. Peltzman's charges to be without merit saying:

The evidence does not tend to establish that the . . . Union violated the National Labor Relations Act. The evidence establishes that pursuant to a valid Union security agreement you were obligated to pay an initiation fee to the Union which you refused to do after notification by the Union that such fees were due. Under such circumstances the refusal by the Union to refer you to your former permanent position aboard the *S.S. Green Ridge* was permissible.

Insofar as the charge alleges that you were not enrolled in the industry school because of your lack of membership in the Union, the evidence does not support such claims, inasmuch as you failed to qualify for admission to the course for which you sought enrollment and admission to the school is not limited to Union members. (Central Gulf Appendix, page 8.)

The findings of Region 2 were confirmed by the NLRB's General Counsel and Mr. Peltzman's appeals from those decisions were unsuccessful. (*Peltzman v. NLRB*, 2d Cir., Dkt. No. 70-1091, unreported orders of dismissal and rehearing contained in Central Gulf Appendix pages 15 and 16; *certiorari denied*, 409 U.S. 887; *rehearing denied*, 409 U.S. 1050.)

It appears that at the same time Mr. Peltzman was seeking relief from the NLRB, he was pursuing other remedies in the courts of New York State where he sought to enjoin the union and collect damages for the termination of his employment on Central Gulf vessels. These actions were dismissed because the subject matter was within the exclusive jurisdiction of the NLRB. *Peltzman v. American Radio Association*, 69 Misc. 2d 17, 327 N.Y. Supp. 2d 505 (1971); *affirmed*, 40 A.D. 2d 631 (N.Y. Supp. Ct. App. Division 1971), 335 N.Y. Supp. 2d 998 (1971); *certiorari denied*, 411 U.S. 916; *rehearing denied*, 411 U.S. 977 (1973).

Having been turned down by the NLRB and the New York courts, Mr. Peltzman then filed suit against Central Gulf in the United States

District Court for the Southern District of New York but again the result was the same with the Supreme Court denying rehearing in 1976.³ The gravamen of Mr. Peltzman's action in the District Court was described by the Court of Appeals as consisting of ". . . a myriad of claims . . . based on maritime law, the New York and federal constitutions, the antitrust laws, and the collective bargaining agreement. . . ." The Court disposed of the claims saying:

Most of Peltzman's arguments can be dealt with summarily. Nothing in maritime law renders illegal a discharge that is authorized under a legitimate union security clause. There is no colorable basis for an antitrust claim. The security clause here is not subject to attack under the federal or New York constitutions . . . And any claim that the company committed an unfair labor practice in discharging him would plainly be subject to the exclusive jurisdiction of the NLRB.

The record does not disclose what other actions, if any, Mr. Peltzman might have taken during the period from 1976 when the Supreme Court last denied rehearing to October of last year when he filed this complaint with the Commission. Motions to dismiss Mr. Peltzman's complaint have been filed by or on behalf of virtually every respondent in the case. The arguments for dismissal run from the complaint being barred through lack of jurisdiction over some of the respondents to failure to state a cause of action.

Before getting to the merits of the various substantive grounds for dismissal a word or two should be said about a procedural ground which has been argued by a number of respondents, i.e. that the complaint fails to meet the requirements of Rule 62 of the Commission's Rules of Practice and Procedure. That rule requires that complaints contain, (1) a concise statement of the cause of action, (2) a request for relief or other affirmative action sought, and (3) identification of ports of origin and destination and other particulars of shipments when reparations are sought. The main thrust of the procedural argument is that the complaint utterly fails to concisely state the cause of action—the complaint is so confusingly drafted that respondents are virtually reduced to divination to find what violations they are charged with.

Mr. Peltzman, who is appearing without counsel, has, it must be admitted, been somewhat less than lucid in stating his grievance. However, the various motions to dismiss demonstrate that the respondents have little doubt as to the precise nature of Mr Peltzman's charges.

³ *Peltzman v. Central Gulf Lines, Inc.*, 86 L.R.R.M. 2127, not officially reported; *affirmed in part and remanded for a single fact determination*, 497 F.2d 332 (2d Cir. 1974) *decision on remand*, 88 L.R.R.M. 2924, not officially reported; *affirmed*, 523 F.2d 96 (2d Cir. 1975), *certiorari denied*, 423 U.S. 1974 (1976); *rehearing denied*, 424 U.S. 979 (1976). These decisions can be found in the Central Gulf Appendix pages 17-26.

Moreover, were the complaint defective for its lack of clarity, the appropriate remedy would not be dismissal but leave to amend.

Two statements in the complaint provide the key to the nature of Mr. Peltzman's grievance. First Mr. Peltzman describes himself as a "Marine Radio Officer . . . who has been deprived of employment on [certain] vessels . . . due to the monopolistic and illegal exclusive preferential hiring hall bargaining agreements negotiated by the American Maritime Association, and the Pacific Maritime Assn. with the American Radio Association, and the Radio Officers Union." And later in the complaint Mr. Peltzman states, "This complaint is directed solely to the unlawful and discriminatory pre-hire exclusive hiring hall arrangements, and union membership requirement in the agreement which is placed on seamen who wish to enter the service of shipping companies, and who wish to retain those jobs without being forced to join a union or be discharged from employment if they do not join a union which has an exclusive preferential hiring hall agreement, commonly called a prehire or closed shop agreement. . . ."

From this it is clear that the real grievance of Mr. Peltzman is the requirement that he join a union before he can be employed as a radio officer on the vessels of those shipping companies which have union contracts containing closed shop or union security clauses. It is equally clear that Mr. Peltzman feels that the Commission's jurisdiction over this grievance is to be found in section 15 of the Shipping Act.⁴ Mr. Peltzman is also aware that since 1968, the Commission has exercised jurisdiction, albeit expressly limited, over some provisions of collective bargaining agreements for in a reply to the motions to dismiss he cites *Volkswagenwerk Aktiengesellschaft v. F.M.C.*, 390 U.S. 261 (1968).⁵ Thus the question becomes does or can whatever jurisdiction the Commission has or had over labor-management agreements extend to provisions which establish union membership as a condition precedent to employment as a radio officer in the U. S. Merchant Marine. While it is unnecessary to review the complete history of the Commission's involvement in labor agreements, some consideration of the leading cases is necessary to show just why Mr. Peltzman's complaint is without the Commission's jurisdiction.

In 1965 the Commission issued its decision in *Volkswagenwerk Aktiengesellschaft v. Marine Terminals*, 9 F.M.C. 77. Volkswagen's complaint in that case charged that the agreement between members of the Pacific Maritime Association (PMA) establishing the method of assessing cargoes for contributions to pay their obligations under an agreement with

⁴ In paragraph 9 of his complaint Mr. Peltzman states, "This proceeding arises under Section 15 of the Shipping Act, 1916, as amended, 46 USC Sec. 814."

⁵ Mr. Peltzman cites *Volkswagen*, *supra*, solely for the proposition "that the public interest is violated by this type of agreement," i.e. closed shop.

the International Longshoremen's and Warehousemen's Union (ILWU) violated section 15 of the Shipping Act.⁶

In 1960 the ILWU agreed to the introduction of labor saving devices and the elimination of certain restrictive work practices. In return the PMA agreed to create a \$29,000,000 "Mechanization and Modernization Fund" to be used to mitigate the impact upon employees of technological unemployment. The agreement specifically reserved to the PMA alone the right to determine how to raise the Fund from its members. PMA decided to raise the money for the fund by an assessment on each revenue ton of cargo handled.

Volkswagen in its action before the Commission charged that the method of allocating the assessment was discriminatory as applied to its automobiles and that the agreement itself was unenforceable because it had not been filed with or approved by the Commission under section 15 of the Shipping Act. The Commission dismissed the complaint concluding it was not the kind that required filing under section 15. The Court of Appeals affirmed the Commission and the case then went to the Supreme Court. The Supreme Court reversed the Commission finding that the agreement did fall within the ambit of section 15 and after reaching their conclusion the Court went on to say:

It is to be emphasized that the only agreement involved in this case is the one among members of the Association [PMA] allocating the impact of the Mech Fund levy. We are not concerned here with the agreement creating the Association or with the collective bargaining agreement between the Association and the ILWU. No claim has been made in this case that either of those agreements was subject to the filing requirements of section 15. Those agreements reflecting the national labor policy of free collective bargaining by representatives of the parties own unfettered choice, fall in an area of concern to the National Labor Relations Board, and nothing we have said in this opinion is to be understood as questioning their continuing validity. But in negotiation with the ILWU, the Association insisted that its members were to have the exclusive right to determine how the Mech Fund was to be assessed, and a clause to that effect was included in the collective bargaining agreement. That assessment arrangement affecting only relationships among Association members and their customers, is all that there is before us in this case.

Several points are clear from the Court's decision: (1) the agreement in question was between persons subject to the Act, (2) the agreement has

⁶ PMA is an employer organization of some 120 principal common carriers by water, stevedoring contractors and marine terminal operators representing the Pacific Coast shipping industry. The primary function of PMA is to negotiate and administer collective bargaining agreements with unions representing its member's employees of which the ILWU is one.

a direct impact upon persons protected by the Act, i.e. shippers, and (3) the agreement was not a collective bargaining agreement reflecting the national labor policy which is the exclusive concern of the NLRB. The Supreme Court's decision in Volkswagen faced the Commission with the problem of "reconciling or accommodating Shipping Act policies with labor act policies." The Commission dealt with the problem in *United Stevedoring Corp. v. Boston Shipping Assoc.*, 16 F.M.C. 7 (1972). In that case, the Commission decided to apply the so-called "labor exemption" to certain agreements which might otherwise fall under section 15.

The labor exemption was created as a means of accommodating the national policies embodied in the antitrust laws and the labor laws. The labor exemption rendered "pure" collective bargaining agreements immune from attack under the antitrust laws. The Commission found the analogy to a labor exemption from the shipping laws "obvious," and after a review of the leading cases on the labor exemption from the antitrust laws, the Commission developed the following criteria to be used in granting "labor related" agreements a labor exemption from the "shipping laws":

1. The collective bargaining agreement which gives rise to the activity in question must be in good faith. Other expressions used to characterize this element are "arms-length" or "eyeball to eyeball."

2. The matter is a mandatory subject of bargaining, e.g. wages, hours or working conditions. The matter must be a proper subject of union concern, i.e., it is intimately related or primarily and commonly associated with a bona fide labor purpose.

3. The result of the collective bargaining does not impose terms on entities outside of the collective bargaining group.

4. The union is not acting at the behest of or in combination with nonlabor groups, i.e., there is no conspiracy with management. (16 F.M.C. 13).

Application of these criteria to the agreements Mr. Peltzman says violate the Shipping Act clearly demonstrates that the agreements come under the labor exemption and thus are immune from challenge under the Shipping Act.⁷

First, there is no allegation that the agreements were not the product of "arms length" or "eyeball to eyeball" bargaining.

Second, the challenged provisions are mandatory bargaining subjects. *NLRB v. General Motors*, 373 U.S. 734 (1963); *Onieta Knitting Mills v.*

⁷ Mr. Peltzman refers to only two agreements with anything approaching specificity—"From 1948 to 1977 AMA and PMA did not file with the Commission the agreements negotiated by ARA and ROU. . . ." There are a number of unclear references to other "agreements."

NLRB, 375 F.2d 385 (4th Cir. 1967). "Closed shop" or union security clauses are proper union concerns and are primarily and commonly associated with a bona fide labor purpose.

Third, the result of the challenged clause in the collective bargaining agreements does not impose terms on entities outside the bargaining group which are protected by or subject to the provisions of the Shipping Act.

Fourth, there is no allegation that the unions were or are acting at the behest or in combination with nonlabor groups, i.e. there is no conspiracy with management. Even if a conspiracy were alleged it would of necessity deal with matters which are the exclusive concern of the NLRB and beyond the jurisdiction of the Federal Maritime Commission.

Thus, since at least 1972, the allegedly unlawful agreements have or would if challenged, been exempt from and therefore immune to any attack under section 15 of the Shipping Act, 1916. In other words, since at least 1972, the labor exemption has applied to agreements of the kind challenged by Mr. Peltzman and the Commission since then has lacked jurisdiction over the subject matter of those agreements.

Mr. Peltzman also alleges that the agreements violate section 16 and 17 of the Act.⁸ Section 16 First provides:

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

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. (46 U.S.C. 815).

Though broadly worded, section 16 is clearly directed to the obligations of common carriers and other persons subject to the act to users of their services, i.e., the shipping public. See e.g. *Armstrong Cork Co. v. American Hawaiian SS Co.*, 1 U.S.M.C. 719 (1938); *Huber Mfg. Co. v. N.V. Stoomvaart "Nederland,"* 4 F.M.B. 343, 347 (1953); *Afghan-American Trading Co. v. Isbrandtsen Co.*, 3 F.M.B. 622, 623 (1951); *Port of New York Authority v. AB Svenska*, 4 F.M.B. 202, 205 (1953); and *Pittston Stevedoring Corp. v. New Haven Terminal Inc.*, 13 F.M.C. 33, 35 (1969). Mr. Peltzman's charge is that he has been subjected to "prejudice and disadvantage in violation of section 16" because of "the terms of the bargaining agreement relating to exclusive restrictive hiring referral practices, and tenure of employment for 'union members'

⁸ It must be assumed that Mr. Peltzman is relying on section 16 First since no other section is even remotely applicable to the complaint.

only. . . ." It would be patently absurd to, on the one hand, create a labor exemption to reconcile the conflicting labor and shipping policies and on the other nullify the reconciliation through an assumption of jurisdiction under section 16 First—a section which was not intended to deal with offenses alleged.

Mr. Peltzman alleges that closed shop or union security clauses in bargaining agreements "constitute unjust and unreasonable regulations and practices in violation of Section 17 of the Act, and cause the agreement to be unjustly discriminatory as between 'members' of the union and 'permit card members'. . . ." A simple reading of the language of section 17 shows that it has no applicability to the grievances of Mr. Peltzman.

The regulations and practices which section 17 requires to be just and reasonable are those "relating to or connected with the receiving, handling, storing or delivery of property." They clearly do not apply to the terms and conditions under which a common carrier will employ a "radio officer." The unjust discrimination forbidden by section 17 is discrimination in rates between shippers and ports. Again a condition not even remotely concerned with the employment of radio officers.

Finally, the complaint is time-barred by the two-year period of limitation in section 22 of the Act. The single allegation of harm is contained in paragraph 21 of the complaint where Mr. Peltzman says:

. . . complainant was discharged from his employment as a Radio Officer on a Central Gulf Line vessel, because of lack of "clearance" from the American Radio Association, thereby violating not only his "permanent" assignment to the vessel but depriving him of health, welfare, vacation and pension benefits that he accumulated in his three and one half years of employment in the trade.

The record demonstrates that the discharge Mr. Peltzman is referring to took place in 1971.⁹ Mr. Peltzman's cause of action, if he had one, arose with his "discharge from employment" in May of 1971 when Central Gulf terminated his employment because of Peltzman's refusal to pay his union initiation fees. Additionally in a letter reply to some of the motions to dismiss Mr. Peltzman argued that the motions "do not reach the thrust or substantive allegations in the complaint" which allege in essence:

1. Illegal bargaining agreements not filed by the defendants in violation of the Shipping Act from 1948 to 1977.

Again this alleged violation is time-barred by section 22 of the Act.

⁹ See affidavit of C. S. Larsen and the decisions in *Peltzman v. Central Gulf Lines Inc.*, 497 F.2d 332 (CA2, 1974); *Peltzman v. NLRB*, 409 U.S. 877, *reh. denied*, 409 U.S. 1050; *Peltzman v. American Radio Assoc.*, 327 N.Y. Supp. 2d 505 (1971), *affirmed*, 40 A.D. 2d 631 (N.Y. Sup. Ct. App. Div. 1971); 335 N.Y. Supp. 2d 998 (1971) (App 35); *cert. denied*, 441 U.S. 916 (1973), *reh. den.*, 411 U.S. 977 (1973).

The complaint of Mr. Archie Peltzman fails to state a cause of action upon which relief can be granted and is time barred. The complaint is dismissed.

(S) JOHN E. COGRAVE
Administrative Law Judge

FEDERAL MARITIME COMMISSION

DOCKET NO. 80-21
INDEPENDENT OCEAN FREIGHT FORWARDER
LICENSE NO. 1778;
CRESCENT NAVIGATION, INC.

ORDER ADOPTING INITIAL DECISION

August 13, 1981

This proceeding was instituted by Order of Investigation and Hearing served April 11, 1980 to determine whether Crescent Navigation, Inc. (Crescent) violated section 16, Initial Paragraph, of the Shipping Act, 1916 (46 U.S.C. 815), and sections 510.23(c), 510.23(d), 510.23(h) and 510.24(a) of the Commission's General Order 4¹ on certain shipments

¹ Section 16, Initial Paragraph provides:

That it shall be unlawful for any shipper, consignor, consignee, forwarder, broker, or other person, or any officer, agent, or employee thereof, knowingly and wilfully, directly or indirectly, by means of false billing, false classification, false weighing, false report of weight, or by any other unjust or unfair device or means to obtain or attempt to obtain transportation by water for property at less than the rates or charges which would otherwise be applicable.

On May 1, 1981 the Commission's General Order 4 was substantially revised and reissued. (46 FR 24565). All references to General Order 4 herein reflect the numbering and wording of the regulations prior to revision.

Section 510.23(c), General Order 4 (46 C.F.R. 510.23(c)) provided:

A licensee who has reason to believe that a principal has not, with respect to a shipment to be handled by such licensee, complied with the law of the United States or any State, commonwealth or territory thereof, or has made any error or misrepresentation in, or omission from, any export declaration, bill of lading, affidavit, or other paper which the principal executes in connection with such shipment, shall advise his principal promptly of the suspected noncompliance, error, misrepresentation or omission, and shall decline to participate in such transaction involving such document until the matter is clarified.

Section 510.23(d) of General Order 4 (46 C.F.R. 510.23(d)) provided:

Every licensee shall exercise due diligence to ascertain the correctness of any information which he imparts to a principal with reference to any forwarding transaction; and no licensee shall knowingly impart to a principal or oceangoing common carrier false information relative to any such transaction.

Section 510.23(h) of General Order 4 (46 C.F.R. 510.23(h)) provided:

No licensee shall file or assist in the filing of any claim, affidavit, letter of indemnity, or other paper or document, with respect to a shipment handled, or to be handled, by such licensee, which he has reason to believe is false or fraudulent.

Section 510.24(a) of General Order 4 (46 C.F.R. 510.24(a)) provided:

No oceangoing common carrier shall pay to a licensee, and no licensee shall charge or receive from any such carrier, either directly or indirectly, any compensation or payment of any kind whatsoever, whether called "brokerage", "commission", "fee", or by any other name, in connection with any cargo or shipment unless the name of the actual shipper is disclosed on the shipper identification line appearing above the cargo description data of the ocean bill of lading, and, if the forwarder's name also appears on said shipper identification line, it appears after the name of the actual shipper.

for which Crescent prepared bills of lading and which: (1) were misrated due to a misstatement of measurement; or (2) did not state the name of the actual shipper. The Commission's Order also put at issue whether, as a result of such activity, Crescent's freight forwarder license should be revoked or suspended pursuant to section 44(d) of the Shipping Act, 1916 (46 U.S.C. 841b(d)) and section 510.9(e) of General Order 4.² Administrative Law Judge Paul J. Fitzpatrick issued an Initial Decision finding no violations of section 16, Initial Paragraph or section 510.23(c) of General Order 4 but assessing a \$10,000 penalty on the basis of violations of sections 510.23(a), 510.23(h) and 510.24(d). The Presiding Officer held, however, that the nature of the violations found did not warrant suspension or revocation of Crescent's freight forwarder license. Crescent has filed Exceptions to the Initial Decision and the Commission's Bureau of Investigation and Enforcement (BIE) has filed a Reply to those Exceptions.

THE INITIAL DECISION

The Presiding Officer concluded that Crescent's handling of eight shipments, which were misrated based on a misstatement of measurement, did not violate the Shipping Act or General Order No. 4. He found that the misstatement of measurement on the shipments of identical excavators exported by FMC Corporation to Turkey, between May of 1977 and August of 1977, was the result of the shipper's failure to provide Crescent with packing lists reflecting the equipment's proper measurements, including the measurements of a gantry assembly attached to each excavator. The Presiding Officer determined that Crescent prepared the bills of lading for the shipments from information appearing on the packing lists and had no knowledge of the misstatements until so advised by one of the carriers transporting the shipments. It was also noted that Crescent took immediate corrective action after learning of the error.

The Presiding Officer, therefore, concluded that the evidence failed to establish that Crescent "knowingly and wilfully" caused the cargo to be misrated. Although certain deficiencies in Crescent's handling of the shipments were noted, these failures were found to fall short of a

² Section 44(d) provides:

Licenses shall be effective from the date specified therein, and shall remain in effect until suspended or terminated as herein provided. Any such license may, upon application of the holder thereof, in the discretion of the Commission, be amended or revoked, in whole or in part, or may upon complaint, or on the Commission's own initiative, after notice and hearing, be suspended or revoked for willful failure to comply with any provision of this Act, or with any lawful order, rule, or regulation of the Commission promulgated thereunder.

Section 510.9(e) of General Order 4 (46 C.F.R. 510.9(e)) provided:

A license may be revoked, suspended, or modified after notice and hearing for any of the following reasons: . . . (e) Such conduct as the Commission shall find renders the licensee unfit or unable to carry on the business of forwarding.

violation of section 16. Similarly, it was found that none of the provisions of General Order 4 were violated by Crescent's handling of these eight shipments, again because of a failure to prove *scienter*.

The Presiding Officer did find that Crescent violated section 510.23(d) of General Order No. 4 on 27 occasions in its handling of 33 shipments between July 9, 1976 and June 16, 1978 by receiving compensation for bills of lading it prepared which did not name the actual shipper.³ He found that when these bills of lading were prepared, naming Far Eastern Forwarding Company (Far Eastern) as the shipper, Crescent knew or should have known that the actual shipper was New World Research Corporation (New World). The Presiding Officer held that this enabled New World to avoid its obligations under a dual rate contract with the Far East Conference on shipments to Taiwan. As a result, the Presiding Officer found that Crescent had violated section 510.23(h) on 29 of the 33 occasions by assisting in filing documents which it knew or should have known were false or fraudulent and had violated section 510.23(d) on all 33 occasions by knowingly imparting to a carrier false information regarding shipments it had handled.

In finding that Crescent knew or should have known that Far Eastern was an instrumentality of New World and that New World and not Far Eastern was the actual shipper in these transactions the Presiding Officer relied upon the following evidence: (a) New World paid the freight charges for Far Eastern; (b) correspondence and shipping documents received by Crescent from third parties concerning Far Eastern shipments referred to New World as the shipper; (c) Far Eastern and New World had the same office address and telephone number; (d) shipping instructions for Far Eastern were received on New World letterhead, (e) freight charges for Far Eastern shipments were invoiced to New World; (f) Crescent's files for New World contained Far Eastern bills of lading; (g) some of New World's bills of lading had Far Eastern written in the margin and (h) the president of Far Eastern, Mr. Peter Pai, testified that he had told the president of Crescent, Mr. Robert Arciero, that Far Eastern was established to ship New World shipments on nonconference vessels. The Presiding Officer found that the use of this device saved New World approximately \$8,000 in freight charges.

For the violations found, the Presiding Officer assessed a civil penalty of \$10,000, noting that a total of 89 violations had been proven for which a maximum potential civil penalty of \$89,000 could be assessed. The violations were not found to be of such a nature, however, to warrant suspension or revocation of Crescent's license.

³ The Presiding Officer found that Crescent did not receive compensation for six of the 33 shipments, and therefore could not have violated section 510.23(d) on those occasions.

POSITION OF THE PARTIES

In Exceptions to the Initial Decision, Crescent submits that the \$10,000 civil penalty assessed by the Presiding Officer is excessive and is based upon an erroneous finding that Crescent knew or should have known that the shipments of Far Eastern were actually those of New World.

Crescent alleges that there is no evidence of record supporting a conspiracy between it and New World and that this case is the first time that a forwarder has been held to be responsible for the actions of the shippers it serves. Crescent contends that its president came into contact with the two shippers through two different individuals and that the interaction between the two firms evolved gradually over an extended period of time. This is allegedly supported by the fact that two different rates of compensation were negotiated for the two entities.

Crescent also argues that there is insufficient evidence upon which the Presiding Officer could find that it knew or should have known of the identity of interests between Far Eastern and New World. Moreover, it is pointed out that the consignees of Far Eastern were government agencies of Taiwan and required the use of its national-flag vessels.

Alternatively, Crescent argues that, even assuming a violation of the Commission's regulations has been shown, such violation is one of "omission" and not of "commission", and that there are significant facts in mitigation presented on the record, to wit: (a) the alleged violations only indicate negligence on the part of Crescent; (b) no harm to shippers or the public has been shown; (c) the allegedly violative practice was discontinued by 1978; (d) the president of Crescent has a history of 15 years of forwarding without any violations and (e) Crescent fully cooperated in the Commission's investigation. Crescent alleges that the instant situation is less serious than one involving forwarding without a license and accordingly, the penalty of \$10,000 is unjustified and punitive.

In its Reply to Exceptions, BIE alleges that the preponderance of evidence shows that Crescent knew or should have known that Far Eastern was in fact an instrumentality of New World and, accordingly, violated General Order No. 4 by preparing documents which did not reflect the actual shipper. BIE cites basically the same evidence relied upon by the Presiding Officer in support of his finding and requests the Commission to uphold the Initial Decision.

BIE does not believe that the Presiding Officer's findings are undermined by Crescent's allegation that its contact with Far Eastern and New World was made with two different individuals because New World is a large entity and would logically have separate personnel on different shipments. Similarly, it is argued that the record does not

support the allegation that the consignee directed which carriers were to be used.

BIE supports the \$10,000 penalty assessed against Crescent. First, it states that Crescent committed 89 separate violations of General Order 4 and could have been assessed an \$89,000 penalty. Furthermore, BIE submits that the Commission's regulations are intended to require the utmost integrity by forwarders and mandate careful scrutiny of a forwarder's business relations due to the intermediary role that forwarders perform in transferring large sums of money between shippers and carriers. BIE concludes that Crescent has failed to meet the responsibilities of a forwarder.

DISCUSSION

Having reviewed the Initial Decision, Exceptions and Replies to Exceptions in light of the evidence of record in this proceeding, the Commission has determined that the Presiding Officer's decision is correct both in law and in fact. That decision is therefore adopted by the Commission with the clarification discussed below.

Much of the disagreement between the parties to the proceeding concentrated on whether Far Eastern and New World were separate corporations. There is conflicting evidence of record on this issue. The Presiding Officer did not resolve whether Far Eastern has a separate corporate existence from New World, nor does the Commission believe it was necessary for him to do so. The critical determination that must be made here is whether Crescent knew or should have known that New World and not Far Eastern was the actual shipper. The Presiding Officer found that it did and the Commission agrees.

Although a separate fee for shipments under the name of Far Eastern was negotiated, New World was viewed by all parties to the forwarding transactions as the entity which ultimately bore the responsibility for the essential elements of those transactions. Of particular significance is the fact that shipper instructions were received on New World's letterhead and that New World was invoiced for the shipments in question and paid the freight charges on those shipments. Moreover, correspondence and shipping documents received by Crescent from third parties refer to New World as the shipper. The only involvement of Far Eastern appears to be the use of its name on the bills of lading for shipments moving to Taiwan. Accordingly, there is sufficient evidence to conclude that the actual shipper was New World and that Crescent knew or should have known this fact.

Once it has been determined that Crescent knew or should have known that New World was the actual shipper in these transactions, the violations of 46 C.F.R. 510.23(h) and 510.23(d) have been established. The misrepresentation of the shipper on the bills of lading was false information which Crescent imparted to the carriers which ulti-

mately transported the shipments. This constituted a clear violation of section 510.23(d). Similarly, the false information appeared on export declarations signed and certified by Crescent as true and accurate and filed with the United States Customs Service in violation of section 510.23(h).

The amount of the civil penalty assessed by the Presiding Officer is not unreasonable. The number of violations found to have been committed by Crescent exposes it to a potential penalty of \$89,000. The "omission" rather than "commission" argument of Crescent is without merit. The Commission's regulations impose duties and obligations on Crescent, and its passive failure to conform with the requirements of law is as serious a matter as affirmative actions in violation of the law. Crescent has not argued financial hardship and the volume of their business would indicate that a \$10,000 penalty would not impose an undue burden on the firm.

THEREFORE, IT IS ORDERED, That the Exceptions of Crescent Navigation, Inc., are denied; and,

IT IS FURTHER ORDERED, That the Initial Decision served in this proceeding on April 14, 1981, is adopted and made a part hereof;

IT IS FURTHER ORDERED, That the Respondent, Crescent Navigation Inc., shall contact the Office of Hearing Counsel within 20 days of service of this Order to discuss the form and manner of payment of the civil penalty imposed by this decision; and

FINALLY, IT IS ORDERED, That this proceeding is discontinued.

By the Commission.

(S) FRANCIS C. HURNEY
Secretary

FEDERAL MARITIME COMMISSION

DOCKET NO. 80-21

INDEPENDENT OCEAN FREIGHT FORWARDER

LICENSE NO. 1778;

CRESCENT NAVIGATION, INC.

Respondent found to have violated provisions of the Commission's General Order 4 (46 C.F.R. Part 510), which regulates the conduct of independent ocean freight forwarders. Civil penalty assessed.

Carlos Rodriguez for respondent.

Polly Haight Frawley, Aaron W. Reese, Paul J. Kaller, and John Robert Ewers for the Commission's Bureau of Investigation and Enforcement.

INITIAL DECISION ¹ OF PAUL J. FITZPATRICK, ADMINISTRATIVE LAW JUDGE

Adopted August 13, 1981

This investigation was instituted by the Commission's Order of Investigation and Hearing (Order) served April 11, 1980. Basically, two dissimilar forwarding activities by Crescent Navigation, Inc. (respondent or Crescent), of 30 Vesey Street, New York, N.Y., are placed under investigation. The Order states that Crescent, an independent ocean freight forwarder operating pursuant to FMC License No. 1778 (effective April 20, 1976), may have violated section 16, Initial Paragraph, of the Shipping Act, 1916 (46 U.S.C. 815) (the Act), and provisions of the Commission's General Order 4. The seven issues posed in the Order embrace the claimed violations and seek determination as to (1) whether civil penalties should be assessed, and (2) whether Crescent's license should be revoked or suspended.² The Bureau of Hearing Counsel,

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

² The Order lists the following as the issues to be determined:

1. Whether Crescent has violated section 16, Initial Paragraph of the Shipping Act, 1916, by knowingly and wilfully, directly or indirectly, by means of false billing, false classification, false weighing, false report of weight, or by any other unjust or unfair device or means obtained or attempted to obtain transportation by water for property at less than the rate or charges which would otherwise be applicable;
2. Whether Crescent has violated section 510.23(c) of General Order 4, by participating in a forwarding transaction involving an export declaration, bill of lading, affidavit or other paper executed by its principal in connection with a shipment handled by Crescent, in which Crescent had reason to believe the principal made an error or misrepresentation or omission;

Continued

now the Bureau of Investigation and Enforcement (Bureau), presented six witnesses and Crescent one at the hearing held in New York City on October 1-2, 1980. Briefs were filed by the parties.

In evaluating Crescent's conduct relating to discrepancies between cargo measurements on bills of lading and measurements appearing on packing lists (Issues 1-4), the Bureau concludes that "The evidence developed in the record of this proceeding shows that Crescent's involvement in these eight shipments did not violate the Shipping Act, 1916, or General Order 4." The other type of conduct under investigation, involving instances where the actual shipper's name did not appear on the bills of lading, the Bureau submits that: (1) the record demonstrates a violation of certain provisions of General Order 4; (2) Crescent should be assessed civil penalties in the amount of \$10,000; and (3) the facts do not warrant suspension or revocation of its license. Respondent concludes that the Bureau "fairly evaluated the record and the law on the issues related to the [discrepancies in the cargo measurement] shipments" but disagrees that the record reflects any other violations or supports an assessment of civil penalties. The two types of possible violations will be treated separately.

(1) ALLEGATIONS OF MISMEASUREMENT

As noted above, the Bureau concludes that Crescent's involvement in the allegations of mismeasurement in eight shipments did not violate the Shipping Act, 1916, or General Order 4. A review of the proposed findings of fact submitted by the parties reveals that the findings proposed by the Bureau, by and large, are uncontested and set forth a

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3. Whether Crescent has violated section 510.23(d) of General Order 4, by not exercising due diligence to ascertain the correctness of any information which it imparts to a principal and by knowingly imparting to an oceangoing common carrier false information relative to a forwarding transaction;
 4. Whether Crescent has violated section 510.23(h) of General Order 4, by filing or assisting in the filing of any paper or document with respect to a shipment handled by Crescent which it had reason to believe was false or fraudulent;
 5. Whether Crescent has violated section 510.24(a) of General Order 4, by charging or receiving from an oceangoing common carrier any compensation or payment of any kind whatsoever in connection with any cargo or shipment for which the name of the actual shipper was not disclosed on the shipper identification line of the ocean bill of lading;
 6. Whether Crescent should be assessed civil penalties pursuant to section 32 of the Shipping Act, 1916, if it is found to have violated section 16, Initial Paragraph, of the Shipping Act, 1916, and/or provisions of General Order 4, and, if so, the amount of such penalties which should be imposed taking into consideration factors in possible mitigation of such a penalty;
 7. Whether Crescent's independent ocean freight forwarder license should be revoked or suspended pursuant to:
 - a. section 44(d), Shipping Act, 1916, for willful violations of the Shipping Act, 1916, the Commission's Orders, Rules or Regulations, or both;
 - b. section 510.9(e) of General Order 4 for conduct which renders the licensee unfit to carry on the business of forwarding.

convincing basis for the conclusions to be drawn. Accordingly, they will be adopted here with some slight modifications.

(A) FINDINGS OF FACT

1. Mr. Robert Arciero, the President of Crescent, formed his company in April 1976. As to activities under consideration here, Crescent performed freight forwarding services on eight shipments between May 1977 and August 1977. The exporter, FMC Corporation, was the same in each instance as was the consignee in Turkey. Shipments one, two and seven were transported by Turkish Cargo Lines and the remainder by Prudential Lines, Inc. (Prudential). (Ex. 1, Attachments 1-8.)

2. The cargo was the identical type of excavator, Model HC78B, although a variance existed in the number of excavators in the shipments. The excavators were subject to standardized packing. (Ex. 1, Attachments 1-8, and Tr. 110.)

3. The freight rate for the eight shipments was \$95.00 for weight (2240 pounds) or measurement (40 cubic feet). (Tr. 84.)³

4. The dimensions of piece #1 of the excavator exported were 108 inches wide, 314 inches long and 149 inches high, or 2924 cubic feet. (Ex. 7, Tr. 124, 129-30.)

5. The bills of lading were rated on the basis of machines for which the dimensions of piece #1 were 108 inches wide, 314 inches long and 139 inches high or 2728 cubic feet. (Ex. 1, Attachments 1-8, Tr. 49-50.)

6. Mr. Yilmaz Cetin, Vice-President of Crescent during this period, was responsible for performing freight forwarding services for the shipments.

7. Mr. Cetin testified that he always sent a copy of the packing list which had been supplied by FMC Corporation to the steamship company. Because the packing lists were similar, he sent only one copy to the carrier and that copy was the first packing list in the "export reference" box on the bill of lading. (Tr. 119, 131, 142.)

³ Respondent disagrees that there is an acceptable basis for Nos. 3 and 5. The claim is made that such data should be obtained only from the appropriate tariff. The objections raised fall into two areas: (1) that respondent withdrew its earlier discovery request (seeking the tariff pages) on the basis of the Bureau's representation; and (2) that respondent had a right to verify the accuracy of the oral testimony relating to tariff rates under the best evidence rule and the Commission's Rules of Practice and Procedure. A fair reading of the Bureau's representations made at the time of the prehearing conference (May 20, 1980, Tr. 1823) reflects that the tariff pages for each shipment would not be produced as evidence by the Bureau because of an understandable inability to determine the rate at that time. The discussion related to tariff pages only. Furthermore, neither the applicable tariff rate nor the application of the proper tariff rate should be considered essential to the overall determination here since the issues relate to the alleged misdescription of cargo measurements. The witness who addressed the topic of rates was particularly qualified to testify concerning the applicable tariff rate and certainly more so than Commission personnel who would lack the information concerning the movement of cargo under a project rate. Certainly, respondent had the opportunity to request permission to file a late-filed exhibit reflecting the applicable tariff rate in the event the testimony of this witness was inaccurate. It did not pursue that avenue of evidentiary relief.

8. The packing lists for the first four shipments listed the height of piece #1 as 139 inches and those for the last three shipments as 149 inches. The list for the fifth shipment provided both heights. (Ex. 1.)

9. The first packing list listed in the "export reference" box on the fifth bill of lading and reflected the height of piece #1 as 149 inches. (Ex. 1, Attachment 5.)

10. Shipments one, two and seven were rated on the basis of a letter from FMC Corporation to Thule Ship Agency, Inc. (Thule), general agent for Turkish Cargo Lines, which indicated the height of piece #1 to be 139 inches. (Ex. 12, Tr. 88-89.)

11. Thule did not receive packing lists from Crescent for shipments which moved under certain bills of lading. (Ex. 1, Attachments 1, 2 and 7, Tr. 90, 101.) If it had received packing lists, it would have used the weights and measurements supplied to rate the bills of lading. (Tr. 90.)

12. Prudential contacted Crescent when it discovered that the measurements of the cargo being transported under Bill of Lading No. 3 of June 25, 1977 (Ex. 1, Attachment 3), did not conform to the dimensions specified on the packing list. The discovery resulted when the hatch on its lash barge would not close. Crescent informed Prudential not to process the bill of lading until it confirmed the measurements with the shipper. Crescent then confirmed that the packing list contained an error and the actual measurement of piece #1 was 149 and not 139 inches high. Crescent then authorized Prudential to process the bill of lading based upon the correct measurements rather than those specified on the packing list. (Tr. 122-124, 127-28.)

13. According to Mr. Cetin, after the third shipment FMC Corporation authorized Crescent to correct, by hand, packing lists incorrectly reflecting the height of piece #1. He also made the correction on the packing list corresponding to the fourth bill of lading before he sent it to Prudential. (Tr. 129, 131, 161-162.)

14. Thule received a packing list for the shipment moved pursuant to its Bill of Lading No. 1 of September 2, 1977 (Ex. 4) and used a rating on the basis of piece #1 as 149 inches. (Tr. 90.)

15. The reason for the error covering the first five shipments is that the shipper failed to remove a gantry assembly while disassembling the excavator for shipping at its factory. (Ex. 7.)

16. Crescent has not performed any freight forwarding services for the shipper other than these shipments. (Tr. 110.)

17. Crescent, in the usual course of business, would receive from the steamship company a rated copy of a bill of lading which it had prepared within two working days of the vessel's departure. (Tr. 116.)

18. Crescent did not examine the rated copies of the bills of lading received from the steamship companies for shipments three through eight to determine if they were rated in accordance with the actual dimensions of piece #1. (Tr. 116, 135, 137-138.)

19. Crescent did not discuss with Turkish Cargo Lines or Prudential the necessity for these companies to issue freight correctors for the bills of lading. (Tr. 128, 135-6, 139.)

20. Prudential, after being approached by this Commission, issued freight correctors for its bills of lading. (Ex. 1, Attachments 3-6 and 8, Tr. 37-38, 45-48, Ex. 5, 8 and 10.)

21. Thule, also after being approached by the Commission, issued freight correctors for its bills of lading. (Ex. 1, Attachments 1, 2 and 7. Tr. 45-48, Ex. 9 and 11.)

22. FMC Corporation chose Crescent to be the freight forwarder for the shipments. (Ex. 1, Attachments 1-8, Tr. 109, Ex. 13.)

23. Crescent authorized Turkish Cargo Lines to process Bill of Lading No. 7 of May 23, 1977 (Ex. 1, Attachment 1), on the basis of eight units rather than ten units which were listed on the initial bill of lading. (Tr. 114.)

24. Part of the freight forwarding services performed by Crescent for these shipments included preparation of the bills of lading and export declarations and to make a firm booking of the shipments with the steamship companies. (Ex. 1, Tr. 109-110, 115, 118.)

(B) DISCUSSION AND CONCLUSIONS

Since the Bureau concludes, in this instance, that respondent did not violate section 16 of the Act or the applicable provisions of General Order 4, both parties, on brief, arrive at the same conclusion and both essentially utilize the same legal principles as support. The differences lie somewhat in the approach afforded to the facts, the stress placed upon certain areas and the emphasis provided in discussing the legal precedents involved. As a practical matter, it is considered unnecessary to burden this report by articulating the differences since the resulting conclusion reached here is the same as urged by both sides. The important aspect to be borne in mind is that the Bureau, in evaluating the evidence, correctly acknowledges that the evidence fails to reflect that respondent "knowingly and willfully attempted to obtain lower freight rates than would otherwise be applicable."

Briefly, the evidence shows that the eight shipments which moved between May and August 1977 involve the same exporter and consignee. The identical cargo transported (except for the number of pieces involved) was subject to standardized packing and moved under the same freight rate. Shipments identified in the record as one, two and seven were transported by Turkish Cargo Lines and the remainder by Prudential.

Respondent's Vice-President at the time testified that for each shipment the shipper sent Crescent a packing list which he then forwarded to the steamship company. Since the packing lists were similar, only one copy was provided the carrier. The copy sent was the first packing list listed in the "export reference" box on the bill of lading. For the

first two shipments, the packing list listed the height of piece #1 of the excavator as 139 inches. Thule, agent for Turkish Cargo Lines, did not receive copies of the packing lists but rated the bills of lading on the basis of measurements supplied in a letter from the shipper. The letter listed the height of piece #1, an excavator, as 139 inches, and the bills of lading for the first two shipments were rated accordingly. Prudential carried the third shipment and during the course of loading the excavator, because its hatch would not close, discovered that piece #1 was actually 149 inches in height. Prudential notified the respondent of the problem, who in turn contacted the shipper, who stated that piece #1 was actually 149 inches high. Crescent then authorized Prudential to rate the bill of lading on the corrected basis. For some reason, which is not entirely apparent from the record, this was not done.

The packing lists forwarded by the shipper for the fourth shipment still listed piece #1 as 139 inches high. Respondent, pursuant to an authorization from the shipper, sent, by hand, a corrected packing list for this shipment to Prudential indicating that the height of piece #1 was actually 149 inches high. However, the bill of lading for this shipment was rated as 139 inches. The packing lists for the fifth shipment varied, some listing 149 and others 139 inches. The first packing list listed in the "export reference" box on the bill of lading, B77-306, sent to Prudential reflects the height as 149 inches. But, again, the bill of lading was rated on the basis of 139 inches. The packing lists for the remaining three shipments sent by the shipper listed 149 inches, but all three bills of lading were rated on the basis of 139 inches. Turkish Cargo Lines, the carrier for the seventh shipment, rated the bill of lading on the measurements contained in the letter its agent received from the shipper and on the same basis used for the first two bills of lading.

By way of summary, all eight of the bills of lading were rated using the dimensions of piece #1 as 139 inches, although the actual height was 149 inches. Respondent sent a packing list to the steamship company for each shipment and a correct packing list for each of the five shipments after learning of the error on the packing list in connection with the third shipment. The evidence is uncontroverted concerning shipments transported by Prudential. On the other hand, Thule did not have packing lists for the first, second or seventh shipments and rated the cargo on the basis of measurements contained in a letter from the shipper. Thule also received a packing list for a ninth shipment, not at issue, where the bill of lading was correctly rated.

The evidence clearly fails to establish that respondent "knowingly and wilfully" caused the cargo to be rated on the basis of an inaccurate

measurement.⁴ Certainly, none of the usual elements establishing a violation are present. Respondent did not intentionally disregard the statute or act in a fashion that mirrors activities plainly indifferent to its stated requirements. What the evidence does provide is an acceptable explanation of events arising from a shipper's mismeasurement. Once the error was recognized, activity was undertaken to correct the mismeasurement. Very simply, respondent's fee for its services could have increased if the error continued; instead, it took some steps to seek a correction. And while the submission of a packing list for each shipment should have been the appropriate action originally taken by the respondent, that deficiency alone does not equate with a willful practice contemplated by the statute.

The record also establishes that respondent's actions were deficient in other respects. Respondent should have inspected each of the bills of lading to insure that the correct rate was applied. It also should have contacted the two steamship companies with respect to the requirement to issue freight correctors. But again these failures to take appropriate action fall short of the type of conduct necessary to establish a violation within the contemplation of the statute. *Viking Importrade Inc.*, 18 F.M.C. 3, 11 (1973). And the additional considerations beyond the "knowingly and wilfully" language employed in the statute likewise are not established on the record. A review of the activity of respondent fails to show any falsification of documents and clearly no deception, fraud or intentional concealment. Accordingly, it is found that respondent did not violate section 16, Initial Paragraph, of the Act.

Both the Bureau and respondent also agree that the record fails to establish a basis for finding a violation of any provision of the Commission's General Order 4, sections 510.23(c), (d) and (h), (46 C.F.R. 510.23(c), (d) and (h)). Essentially, section 510.23(c) provides that a freight forwarder may not participate in a transaction in which it has reason to believe that its principal made an error, misrepresentation or omission from any export declaration, bill of lading, affidavit or other paper executed by the principal. The only document submitted by the shipper was the packing list containing an error for the first five shipments. Moreover, for the first three shipments, respondent was not aware that the lists contained the error and sent a correct list for the fourth and fifth shipments.

⁴ Section 16, Initial Paragraph, of the Shipping Act, 1916, provides:

That it shall be unlawful for any shipper, consignee, forwarder, broker, or other person or any officer, agent, or employee thereof, *knowingly and wilfully*, directly or indirectly, by means of false billing, false classification, false weighing, false report of weight, or by any other unjust or unfair device or means to obtain or attempt to obtain transportation by water for property at less than the rates or charges which would otherwise be applicable. (Emphasis supplied.)

Section 510.23(d) provides that a freight forwarder "shall exercise due diligence to ascertain the correctness of any information which he imparts to a principal with reference to any forwarding transaction" and that no licensee shall "knowingly impart to a principal or oceangoing common carrier false information" relative to a forwarding transaction. And while respondent provided false information to the carriers for the first three shipments, the record fails to establish that it knowingly did so on any of the shipments.

Finally, section 510.23(h) provides that "No licensee shall file or assist in the filing of any claim, affidavit, letter of indemnity, or other paper or document, with respect to a shipment handled, or to be handled by such licensee, which he has reason to believe is false or fraudulent." Again, there is no evidence that respondent had reason to believe that any of the documents involved in the shipments were false or fraudulent. Accordingly, it is found the respondent did not violate any of the provisions of General Order 4 with respect to the allegations of mismeasurement of the eight shipments under investigation.

(2) ALLEGATIONS INVOLVING FAILURE TO NAME THE ACTUAL SHIPPER ON BILLS OF LADING

(A) FINDINGS OF FACT

25. Crescent performed freight forwarding services for thirty-three shipments between July 9, 1976, and June 16, 1978, where Far Eastern Forwarding Company (Far Eastern) appeared as the shipper on the bills of lading. As part of the services, it prepared the bills of lading and export declarations for these shipments. (Ex. 1.)

26. For eighteen of these shipments, New World Research Corporation (New World Research) or China Trade and Industrial Service also appeared on the shipper line of the bills of lading immediately below "Far Eastern Forwarding Company, c/o." (Ex. 1, Attachments J, L, M, N, O, P, Q, R, S, T, U, V, W, X, EE, FF, GG, HH.)

27. Mr. Robert Arciero, the President of Crescent, first became aware of New World Research as a shipper in the late 1960's while employed by Crescent Transport Co., Inc. (not related to Crescent Navigation, Inc.), an ocean freight forwarder. At this time Far Eastern was unknown to him. On matters concerning New World Research, he dealt with Mr. Sung. (Tr. 251-252.)

28. In the early 1970's Mr. Arciero, while employed by Brag International, an ocean freight forwarder, became familiar with Far Eastern as a shipper. Upon leaving Crescent Transport, Inc., he discontinued forwarding services for New World Research. There was a lapse of a year or two between forwarding shipments for New World Research with Crescent Transport, Inc., and commencing forwarding for Far Eastern at Brag International. On matters concerning Far Eastern, he dealt with Mr. Peter Pai. (Tr. 252, 253.)

29. Before April 1976, Mr. Arciero was employed for two and a half to three years by Aquino Shipping, also an ocean freight forwarder. During this period, both New World Research and Far Eastern utilized his services. Mr. Pai continued to represent Far Eastern and a Mr. Light now dealt with matters concerning New World Research. Both firms followed Mr. Arciero as forwarder when he commenced his own company in April 1976. (Tr. 255.)

30. Forwarding fees of \$35.00 per shipment were negotiated by Mr. Arciero for Far Eastern shipments and fees of \$50.00 per shipment were negotiated by him for New World Research shipments. (Tr. 259.)

31. New World Research shipped primarily to South America, the Philippines and Korea, and these shipments were made on carriers of the Far East Conference using conference rates. (Tr. 215-216, 260.)

32. China Trade and Industrial Service, Inc., and New World Research, its subsidiary, are bound by a Merchant's Freight Agreement with the Far East Conference, effective September 4, 1964. Far Eastern is not a signator of a dual rate contract with that Conference. (Tr. 209, Ex. 19.)

33. Shipments listing Far Eastern as shipper all moved aboard non-conference Chinese flag vessels to China. (Tr. 270-272.) Crescent received compensation for its freight forwarding services for twenty-seven of the thirty-three shipments. (Ex. 1.) Crescent also performed freight forwarding services for New World Research. These shipments moved with carriers of the Far East Conference using Conference rates. (Tr. 215-216, 260.)

34. The only business in which Far Eastern is engaged is in shipping cargo to China, specifically Taiwan. Between July 1976 and June 1978, New World Research only exported cargo to countries other than China. (Tr. 213-14.) The destination of the shipment determined whether the name New World Research or Far Eastern would appear on the bill of lading. (Tr. 216.)

35. New World Research and Far Eastern engaged in the same type of shipping business, but while Far Eastern shipped to China and New World Research shipped to countries other than China, Far Eastern obtained freight rates lower than the applicable conference rates by shipping cargo with non-conference carriers. (Tr. 214.)

36. Mr. Pai stated to Mr. Kane, an investigator with this Commission, on July 30, 1980, that Far Eastern was incorporated in the state of New York in 1958. (Tr. 190.)

37. A letter dated August 22, 1980, from the state of New York to this Commission indicates that its records do not show the following names as New York Corporations: Far Eastern Forwarding Corp., Far Eastern Forwarding Co., Far Eastern Forwarding Company, Inc., Far Eastern Forwarding Corporation. A letter to Far Eastern from the state of New York (Department of Taxation and Finance) dated August 26,

1959, refers to it as a corporation taxable under New York law. Mr. Pai testified that Far Eastern was a separate corporation with a corporate identification number from the Internal Revenue Service. (Ex. 20, 23, Tr. 223-224.)

38. The New York Telephone Company phone book for 1980 lists New World Research and Far Eastern as having the same address and the same phone number. (Ex. 21 and 22.) The two companies operate out of the same office. (Tr. 282.)

39. The records of the rental officer of the World Trade Center, in New York City, do not indicate that Far Eastern occupies a suite occupied by New World Research, the company registered with the building management. (Tr. 190.)

40. Far Eastern does not make a profit. (Tr. 221.) New World Research used its own funds to pay Crescent for the freight forwarding services it performed for Far Eastern. (Tr. 217.)

41. Crescent received instructions for shipments to be shipped by Far Eastern on stationery typed with the letterhead of New World Research and signed with the typed name of New World Research. (Tr. 220-222, Ex. 1, Attachments, A, C, G, K, L, N, S, T, U, V, W, BB, DD, EE, FF, and GG.)

42. Crescent received instructions for shipments to be shipped by Far Eastern on stationary printed with the letterhead of Far Eastern stamped with the letterhead of New World Research and signed with the typed name of New World Research. (Ex. 1, Attachments A, Y, Z and AA.)

43. Most shipping instructions contained the reference "Chinese Vessel" or an Order number prefixed "CTC," which, from experience, Crescent knew was a Far Eastern shipment; "CTC" was a reference to China Trust of China, a consignee for most of the Far Eastern shipments. (Ex. 1, Tr. 271, 212-213.)

44. Crescent invoiced New World Research for the freight forwarding services it performed for Far Eastern. (Tr. 219.)

45. The files of Crescent contained ten letters of credit made out to New World Research for shipments in which Far Eastern appeared as the shipper on the bills of lading. (Ex. 1, Attachments B, C, L, N, O, U, W, AA, BB, and FF.)

46. For fourteen of the shipments for which Far Eastern was listed as the shipper on the bills of lading, the files of Crescent contained documents from suppliers and inland transportation companies which referred to the shipments as those of New World Research. These documents included letters, invoices, inland bills of lading and arrival notices. (Ex. 1, Attachments B, C, D, I, J, L, N, Q, R, U, W, X, AA and FF.)

47. During a compliance check interview in June 1978, Mr. Kane asked Crescent to examine the files for certain shipments which were

denoted in Crescent's reference log as New World Research files. Among the files supplied pursuant to this request were bills of lading which listed Far Eastern as the shipper. (Tr. 180.) For four of these shipments, the files of Crescent included a piece of paper on which New World Research was handwritten along the side. (Ex. 1, Attachments A, C, Y and Z.)

48. The files of Crescent contained five dock receipts, prepared by Crescent, which listed the exporter as New World Research. These receipts corresponded to bills of lading where the shipper was listed as Far Eastern. (Ex. 1, Attachments A, U, BB, CC and HH.)

49. For eight of the shipments where Far Eastern was listed as the shipper on the bills of lading, the files of Crescent contained correspondence from Crescent which referred to the shipments as those of New World Research. (Ex. 1, Attachments B, I, M, U, W, DD, EE and FF.)

50. Mr. Pai told Mr. Arciero throughout the years that Far Eastern was a separate company from New World Research; that it was the actual shipper for the subject shipments; that the firm was used to ship to Taiwan on Chinese vessels; that Taiwan consignees, generally government agencies, requested that shipments be shipped on Chinese vessels; and that Far Eastern was set up strictly to ship cargo to China via non-conference vessels. (Tr. 224-225, 271.)

51. Between July 1976 and June 1978, Crescent was aware that the Far East Conference was a conference which offers dual rate contracts (Tr. 265), and that a dual rate contract usually covers affiliates of the shipper company. (Tr. 264.)

52. Far Eastern has been shipping to Taiwan at least since 1963, a time before New World Research was a signator of a merchant contract with the Far East Conference. (Ex. 19, 25.)

53. Mr. Arciero testified that he was under the impression that Far Eastern was a separate corporation. (Tr. 259.) He testified that Crescent cooperated completely with the FMC investigators on the investigation of both matters subject of this proceeding. (Tr. 257.)

54. During the period in question, July 1976 through August 1978, Crescent handled approximately 500 shipments for New World Research as compared to approximately 34 shipments for Far Eastern. For these shipments, New World Research spent approximately \$647,000 for ocean freight and over \$60,000 for Far Eastern shipments. (Ex. 1, Tr. 261.)

55. Crescent prepared twenty-nine export declarations which listed Far Eastern as the exporter. (Ex. 1, Attachments B, C, E, F, G, H, I, J, K, L, M, N, O, P, Q, R, S, T, U, V, X, Y, AA, BB, CC, DD, EE, GG and HH.)

56. Export declarations are filed with the United States Customs Service, Department of the Treasury. (Tr. 115.) The preparer is re-

quired to sign the export declaration, certifying that the information contained therein is true and correct. (Ex. 1, Attachments B, C, E, F, G, H, I, J, K, L, M, N, O, P, Q, R, S, T, U, V, X, Y, AA, BB, CC, DD, EE, GG and HH.)

57. The following are various documents wherein Far Eastern is referred to as a separate entity by various sources:

- a. Letter from Crescent to Yangming Maine Transport Corporation dated October 27, 1977, refers to "our shipper Far Eastern Forwarding Co., Inc." (Ex. 1, Attachment J.)
- b. Lyons Transport, Inc. arrival notice dated March 30, 1978, refers to the "A/C Far Eastern Fwdg. Co., Inc." (Ex. 1, Attachment T.)
- c. Shipping Order from Soiltest, Inc., dated March 29, 1978, consigns a shipment to Far Eastern Forwarding Company, Inc. (Ex. 1, Attachment T.)
- d. June 2, 1978, letter from Soiltest International, Inc., to Eckert Overseas Agency, Inc., which says: "Please be advised that the above mentioned material is being exported by Far Eastern Forwarding Company, Inc. c/o China Trade & Industrial Service, Inc., not by our firm; we are the supplier." (Ex. 1, Attachment X.)

58. Crescent Navigation, Inc., has not previously been approached by the Commission for questionable practices as a freight forwarder. (Tr. 255.)

(B) DISCUSSION AND CONCLUSIONS

The Bureau argues that respondent here violated provisions of General Order 4; i.e., section 510.24(a) on twenty-seven occasions, section 510.23(d) on thirty-three occasions, and section 510.23(h) on twenty-nine occasions. It recommends the imposition of an assessment of a civil penalty in the amount of \$10,000. On the other hand, it considers that any revocation or suspension of respondent's freight forwarding license based upon these violations would be an unduly harsh penalty. Respondent argues that: (1) there is no substantial evidence to find that Far Eastern was not the actual shipper of shipments to Taiwan, or that it knew or should have known that Far Eastern was not the actual shipper; and (2) the facts neither warrant revocation or suspension of respondent's license nor an assessment of civil penalties. The evidence supports a showing of violations of the General Order and the assessment of a penalty in the amount recommended by the Bureau.

In this instance, respondent provided freight forwarding services for thirty-three shipments moving aboard non-conference vessels where the name of the shipper on the bill of lading was Far Eastern. In all but six of these shipments, it received compensation. The Bureau argues that respondent knew or should have known that Far Eastern was a name used by New World Research when it shipped on non-conference

vessels. Both China Trade & Industrial Service, Inc., and New World Research, a subsidiary, are bound by a Merchant's Freight Agreement to ship with the Far East Conference while Far Eastern is not similarly bound. The Bureau contends that the evidence establishes that Far Eastern is essentially a shell of New World Research, the actual shipper for these thirty-three shipments.

Far Eastern was engaged in the business of shipping cargo to China, specifically Taiwan, and New World Research, in exporting cargo to countries other than China. The destination would determine the name under which the cargo would be shipped. Cargo shipped to China under Far Eastern moved on non-conference vessels, while cargo to countries other than China under New World Research used conference vessels at conference rates. This procedure enabled the obtaining of lower than the conference freight rates on shipments to China and lower rates on shipments moving with the conference because of the dual rate contract.

The practices of New World Research and Far Eastern inexorably demonstrate that, as to these shipments, they operated, in fact, as the same entity. New World Research paid the freight charges and used its own funds in payment of forwarding fees for Far Eastern shipments. Documents of third parties refer to such shipments as those of New World Research. For example, letters of credit, letters from suppliers, and invoices were completed by parties directly involved with the firms at the time of shipment. While some documents specifically referred to Far Eastern, companies also referred to the shipper as New World Research. Specifically, letters of credit for ten of the shipments where Far Eastern appears as the shipper were issued to New World Research. Fourteen of the shipments, suppliers and inland transportation companies referred to New World Research as the shipper of the cargo.

Both companies work out of the same office and have the same telephone number. Far Eastern does not make a profit from its operations. The rental office records indicate New World Research occupies the office space, but those records also fail to reflect that Far Eastern shares the same space. Despite testimony that Far Eastern was incorporated in the State of New York, its Department of State, Corporate Division, has no record reflecting that articles of incorporation were ever filed.

Respondent, on the other hand, raises numerous points in its attempt to offset the apparent commingling of the operations of these "separate entities." From a historical view, it points out that Mr. Arciero formed Crescent in April 1976 and first became aware of New World Research as a shipper in the late 1960's while he was employed by Crescent Transport Co., Inc. (not related to Crescent Navigation, Inc.); that at that time Far Eastern was unknown to him; that during that period he

dealt with a Mr. Sung on matters concerning New World Research; that in the early 1970's he was employed by Brag International, an ocean freight forwarder, and at this time became familiar with Far Eastern as a shipper; that upon leaving Crescent Transport, Inc., he stopped forwarding for New World Research; that there was a lapse of a year or two between forwarding of shipments for New World Research with Crescent Transport, Inc., and his commencing forwarding for Far Eastern at Brag; that as to matters concerning Far Eastern, he dealt with a Mr. Peter Pai; that he was employed for two and a half years to three years before April 1976 by Aquino Shipping, an ocean freight forwarder; that during this time both New World Research and Far Eastern utilized Aquino as forwarder; that Mr. Pai continued to represent Far Eastern and a Mr. Light dealt with matters concerning New World Research; and that both firms followed Mr. Arciero as forwarder when he started his own company (Crescent). From these facts, respondent claims that Mr. Arciero had a historical reason to think of Far Eastern and New World Research as separate and distinct entities, and that he had associated different individuals with each one and had performed services for them independently of one another. To strengthen the point, it is added that forwarding fees of \$35.00 per shipment were negotiated with Mr. Pai, while a \$50.00 fee per shipment applied to New World Research shipments, a fee negotiated with Mr. Light. But in viewing these conditions, one must put in perspective the respondent's conduct as to these particular shipments.

The record establishes that respondent should have known of the relationship between the two companies and that its conduct demonstrates a participation in an operation whose purpose was to improperly take advantage of the dual rate contract system through the use of the two names. Those shipments moving under the name of Far Eastern received instruction on paper bearing the letterhead of New World Research and signed with that name typed on the document. Respondent also received instructions on paper with the printed letterhead of Far Eastern with the name and address of New World Research also stamped across the top and signed with the typed name of New World Research.

Respondent invoiced New World Research for shipments it forwarded for Far Eastern. As already noted, the files of respondent in ten instances contained letters of credit made out to New World Research and in fourteen instances contained documents (letters, invoices, bills of lading) from suppliers or inland transportation companies referring to the shipment as being shipped by New World Research. During the initial compliance check that district investigators of the Commission made of respondent's files, files shown as New World Research files contained bills of lading which named Far Eastern as shipper. Four of its shipment files where Far Eastern appeared on the bill of lading

included a piece of paper on which New World Research had been handwritten along the side. Five dock receipts prepared by respondent listed the exporter as New World Research where the corresponding bill of lading listed Far Eastern as the shipper. Respondent's files for eight of the bills of lading which listed Far Eastern as the shipper also contained its own correspondence referring to the particular shipment as a shipment of New World Research. Even a letter refers to "(o)ur principals, New World Research Corporation." In addition, Mr. Arciero testified that Mr. Pai had told him that Far Eastern was set up strictly to ship cargo to China via non-conference vessels. Since respondent had performed freight forwarding services for New World Research on shipments transported by the Far East Conference, it also was aware that the conference was a dual rate conference, and that New World Research was a contract signator.

The Bureau also points out that the last shipment of Far Eastern forwarded by respondent was dated June 16, 1978. Mr. Kane conducted his compliance check interview with Crescent during which this matter was raised in June 1978. It submits that the time of these two events was not coincidental. Mr. Pai testified that Far Eastern stopped exporting cargo to Taiwan because the United States recognized the Peoples Republic of China and that the Republic of China trade had become very slow. The United States' recognition of the Peoples Republic of China was not effective until January 1, 1979. 44 *Fed. Reg.* 1075 (1979).

Respondent also contends that Far Eastern was shipping to the Far East in 1963, before New World Research signed a merchant contract with the Conference, and existed as a genuine shipper to the Far East and was not as a firm whose sole purpose was to circumvent the conference rates. Furthermore, there would have been no reason for Far Eastern and New World Research to coexist during a period when New World Research was not a signator to a merchant agreement. However, the Bureau does not contend that the sole purpose for the forming of Far Eastern was to circumvent the conference rate, rather its position here specifically relates to the period of time involved in the shipments under consideration.

Respondent argues that the savings on freight rates, if any, would be minimal (\$8,000) as contrasted to a volume of freight expended by these companies (\$677,000). On the other hand, the record shows that savings on freight charges did exist and lower freight rates were obtained through the operation. And while respondent points out that consignees requested Chinese carriers and could exempt the signatory of a merchant freight contract, the record provides no basis for a finding that the companies did not have a right to select the carrier.

The separate arrangements for forwarding fees or the administering of arrangements with different individuals for Far Eastern and New

World Research shipments does not alter the conclusions reached here. Certainly, in a company the size of New World Research (based upon its total freight charges during this period), different individuals assume responsibilities for the operation of the business. And lower freight forwarding fees were paid for Far Eastern shipment simply because lower freight charges were assessed.

This record goes far beyond the limited concession of the respondent that "(t)here is undoubtedly a relationship between Far Eastern Forwarding and the other firms," and that the relationship "exceeded just sharing office space." What this record demonstrates is that for the shipments involved in this proceeding, both Far Eastern and New World Research were not operating as separate shippers but essentially as one and that the use of one name or the other resulted in the obtaining of lower freight rates.

The Bureau correctly views this record as showing that as a result of respondent's participation in the operation of Far Eastern and New World Research to evade the dual rate contract system, respondent has violated sections 510.24(a) and 510.23(d) and (h) of General Order 4.⁵ Section 510.24(a) prohibits a forwarder from receiving compensation in connection with any shipment for which the name of the actual shipper was not disclosed on the shipper identification line on the bill of lading. Respondent received compensation for twenty-seven of the thirty-three shipments for which Far Eastern appeared on the bills of lading. The evidence shows that the actual shipper in these instances was New World Research and that respondent knew or should have known this fact. Respondent also violated section 510.23(d) on all thirty-three occasions by knowingly imparting to the oceangoing common carrier false information relative to a forwarding transaction. Respondent knowingly disguised the true identity of the shipper. A violation which requires knowledge on the part of the alleged violator is established if the facts demonstrate that the alleged violator should have known of the illegal nature of his activity. *Hohenberg Brothers Co. v. Federal Maritime Commission and United States*, 316 F.2d 381, 385 (D.C. Cir. 1963).

Section 510.23(h) states that a forwarder may not file or assist in the filing of any paper or document with respect to a shipment handled by the forwarder which the forwarder had reason to believe was false or fraudulent. Respondent prepared the export declarations for at least twenty-nine of the thirty-three shipments in question. Export declarations are filed with the United States Customs Service, Department of the Treasury. These declarations require the preparer to sign them certifying that all the information contained therein is true and correct. By preparing and signing these declarations, which respondent knew

⁵ The Bureau does not argue that Crescent has violated section 510.23(c) since there is no evidence that its principal executed any of the documents in connection with the shipments in question.

would be filed with the Department of the Treasury, it also violated section 510.23(h) on twenty-nine occasions.

Although respondent views the evidence as failing to sustain a finding of violations of General Order 4 and considers that no sanctions are proper, it argues that civil penalties of \$10,000, as urged by the Bureau, would be excessive. It points to other Commission proceedings and compares number of violations with the amount of penalty imposed. The Bureau submits that the potential liability of respondent is \$89,000 based upon 89 violations.⁶ Obviously, the imposition of any sanction and the amount to be assessed are governed by the particular factual considerations presented in a proceeding. The weakness of arguing numbers and prior assessment cases is borne out by the differing types of violations involved, the circumstances surrounding the violations, and the mitigating factors, if any. Here the circumstances justify the imposition of a penalty in the amount of \$10,000.

One final matter requires some attention. Respondent suggests that "there is no substantial evidence" to find certain violations in this proceeding. In support of that view, as contrasted to traditional "preponderance of the evidence" standard, it relies upon section 10(e) of the Administrative Procedure Act, 5 U.S.C. § 706, the explicit "scope of review" provision that declares that agency action shall be held unlawful if "unsupported by substantial evidence." However, in *Sea Island Broadcasting Corp. v. Federal Communications Commission*, U.S. App. D.C., 627 F.2d 240, 243 (1980), the Court stated: "The use of the 'preponderance of evidence' standard is the traditional standard in civil and administrative proceedings. It is the one contemplated by the APA, 5 U.S.C. § 556(d)." cert. denied, 449 U.S. 834 (1980). Indeed, the Supreme Court recently stated: "Where there is evidence pro and con, the agency must weigh it and decide *in accordance with the preponderance.*" *Steadman v. Securities and Exchange Commission*, 450 U.S. 91, 101, (1981). The standard of proof in this proceeding has been met by the Bureau and the preponderance of the evidence established the violations found here.

FINDINGS

Upon consideration of all evidence in this proceeding, the Judge finds that the respondent, Crescent Navigation, Inc., violated section 510.24(a) of General Order 4 on twenty-seven occasions, section 510.23(d) on thirty-three occasions, and section 510.23(h) on twenty-nine occasions, and that civil penalties in the amount of \$10,000 are

⁶ Section 32(c) of the Shipping Act, 1916 (46 U.S.C. 831(c)) provides:

Whoever violates any order, rule, or regulation of the Federal Maritime Commission made or issued in the exercise of its powers, duties, or functions, shall be subject to a civil penalty of not more than \$1,000 for each day such violation continues.

hereby assessed against Crescent Navigation, Inc., pursuant to section 32(c) (46 U.S.C. 831(c)) of the Shipping Act, 1916.

(S) PAUL J. FITZPATRICK
Administrative Law Judge

FEDERAL MARITIME COMMISSION

INFORMAL DOCKET NO. 1046(1)
COTEY CHEMICAL CORP.

v.

SEA-LAND SERVICE, INC.

ORDER OF PARTIAL ADOPTION

August 17, 1981

The Commission determined to review the decision of Settlement Officer Donald F. Norris in which he reviewed the claim of Cotey Chemical Corp. (Cotey) and directed Cotey to pay Sea-Land Service, Inc. the unpaid balance of the freight charges assessed by that carrier on a shipment of "Dry Acid Cleaning Compound" from Houston, Texas to Riyadh, Saudi Arabia. Cotey was further directed to pay interest on that balance.

Section 22 of the Shipping Act, 1916, under which this claim was filed, confers no jurisdiction on the Commission to order shippers or consignees to pay reparation in any form. *Ideal Toy Corp. v. Evergreen Line*, 23 F.M.C. 1008 (1981). The Settlement Officer had no authority to direct Cotey Chemical Corp., a shipper, to pay to Sea-Land any amount. Accordingly, this portion of the Settlement Officer's decision must be vacated.

Except as stated above, the Commission finds that the Settlement Officer's findings and conclusion are correct. Sea-Land is therefore directed to take the steps necessary to collect from Cotey Chemical Corp. unpaid freight charges in the amount of \$3,170.00.

THEREFORE, IT IS ORDERED, That the portion of the Settlement Officer's decision directing Cotey Chemical Corp. to pay to Sea-Land Service, Inc. the amount of \$3,170.00 plus interest is reversed and vacated;

IT IS FURTHER ORDERED, That in all other respects, the decision of the Settlement Officer is adopted and made a part hereof.

By the Commission.*

(S) FRANCIS C. HURNEY
Secretary

* Commissioner Daschbach's separate opinion is attached.

Commissioner Richard J. Daschbach's separate opinion.

I am not participating because I do not believe that the Commission should review the decisions of Settlement Officers in informal docket proceedings. Under Subpart S of the Commission's Rules of Practice and Procedure (46 C.F.R. 502.301), parties consent to waive the rights and obligations associated with normal adjudicatory proceedings for the express purpose of receiving prompt consideration of a small claim. Commission review precludes the inexpensive and expeditious handling of small claims which is the foundation of the informal docket process. The Settlement Officer's decisions in informal dockets do not have precedential value. Commission review therefore imposes unnecessary expense and delay in an arbitration process designed to settle minor commercial disputes in a prompt and responsive manner.

FEDERAL MARITIME COMMISSION

INFORMAL DOCKET NO. 1046(I)
COTEY CHEMICAL CORP.

v.

SEA-LAND SERVICE, INC.

DECISION OF DONALD F. NORRIS, SETTLEMENT OFFICER ¹

Partially Adopted August 17, 1981

Respondent's Rate Assessment Affirmed. Respondent Awarded Freight Due, Plus Interest.

By its complaint filed with the Commission during February 17, 1981, the Cotey Chemical Corporation (Cotey), through its attorney, protests the ocean freight assessed a Cotey shipment of 60 drums of "Dry Acid Cleaning Compound" transported by Sea-Land Service, Inc. (Sea-Land) from Houston to Riyadh, Saudi Arabia, pursuant to a Sea-Land bill of lading dated February 17, 1979. Sea-Land billed Cotey for a total of \$7,366.29 representing ocean freight and ancillary charges. During March 26, 1979, Cotey paid Sea-Land a total of \$4,196.29, or what it thought proper. Cotey contends that it is entitled ". . . to a reduction of \$3,170 plus such other reparation to which Claimant is entitled and including Attorney's fees reasonably incurred to institute this claim in the amount of \$500." Conversely, and, in fact, Sea-Land maintains that it rated the shipment correctly and that it is owed \$3,170.

No violation of section 18(b)(3) of the Shipping Act, 1916, is alleged by Cotey as none is required with respect to "overcharge" claims. See 46 C.F.R. 502.304. Technically, no overcharge has occurred here inasmuch as Cotey has steadfastly refused to pay the amount in dispute. However, the filing of the complaint and Sea-Land's acquiescence to an informal proceeding here manifest a mutual desire to have the matter arbitrated by the Settlement Officer (S.O.). The S.O. cannot perceive of any logical reason why he cannot do so.

There is no dispute as to the commodity shipped, nor are any of the ancillary charges amounting to \$746.29 contested in any way. At issue is how the shipment should have been rated. Cotey claims that the acid should be considered an "drilling mud additive" entitled to the special,

¹ Both parties having consented to the informal procedure set forth in the Commission's Rules of Practice and Procedure (46 C.F.R. 502.301 et seq.), this decision will become final unless the Commission elects to review it within 30 days of the date of service.

lump sum rate of \$3,450 per 35-foot container in effect at the time of shipment. Sea-Land's view is that the acid was properly accorded a lump sum rate of \$6,620 applicable to "Compounds: . . . Cleaning, including Dry Washing Compound (Non-Hazardous)" in accordance with the rate and terms appearing in the tariff controlling here, that of The "8900" Rate Agreement Freight Tariff No. 7, FMC No. 7 (the Tariff), 6th revised page 83, and 1st revised page 43 specifically.

In support of its contention, Cotey has submitted a copy of a Sea-Land letter to Cotey dated February 13, 1979; an Exhibit "C" appended to its complaint which describes the "use" and "application" of dry acid; what appears to be sales literature; and copies of the Sea-Land bill of lading and freight invoice both of which are identical in describing the commodity shipped as "Dry Acid Cleaning Compound."

The Sea-Land letter informs Cotey that ". . . we have filed the following rate in the . . . Tariff: 'Mud, drilling, including additives: In carriers 35 foot container - \$3,450 per container; this rate is effective from 2/15/79 to 3/15/79.'" ² Cotey contends that this was intended to encompass dry acid.

Cotey's Exhibit C and sales sheet reveal that "dry acid" is, actually, a registered trade name of Cotey's. However, both counsel's contribution and the sheet demonstrate clearly that that dry acid ". . . is used to remove clays, drill cuttings, and mud from water wells, thus should be used in drilling new wells to prevent build-up of mud on the face of the water zone and to keep the drilling muds from settling to the bottom of the hole. In older wells Dry Acid should be used to dissolve any mud cake in and on the gravel pack - a common occurrence which reduces yield. Dry Acid can also be used to loosen drill pipe which may become stuck in the mud." ³

Cotey's sales sheet is somewhat more detailed. Dry acid is used to remove "clays, shales, drilled 'cuttings' and commercial drilling muds from water wells. Excellent for 'gravel slipping' and freeing stuck drill pipe." Further, it will develop "[n]ew wells to their maximum specific capacity by breaking down 'mud cake' produced during drilling." Additionally, dry acid will serve to "[r]edevelop: Old Wells producing in sand or gravel formations to their original flow or greater." Parts of Cotey's submissions deal with dry acids' application or "How to Use Dry Acid." These are quite explicit in that it be mixed with water.

The Tariff is silent as to what constitutes "drilling muds," and its "additives." However, extrinsic sources provide definitions and clues. ⁴

² Here, Sea-Land was exercising its right of independent action as it is authorized to do by the terms of the 8900 Rate Agreement.

³ See, Exhibit C, Complaint.

⁴ As to the resort to, and application of, "extrinsic evidence," the S.O. relies upon ALJ John Cograve's exposition upon the point in *C.S.C. International v. Lykes Bros.*, 20 F.M.C. 552, 555-6 (1978).

Firstly, at page 691, *Webster's Third New International Dictionary (Unabridged)*, 1961, defines drilling mud as "... a preparation of water, clays, and chemicals circulated in oil-well drilling for lubricating and cooling the bit, flushing the rock cuttings to the surface, and plastering the side of the well to prevent cave-ins."

The Condensed Chemical Dictionary, 8th Edition, 1971, is more specific. Drilling mud is:

"Mud used in drilling oil wells. It is sent down through the drilling pipe under high pressure and returns through the annular space between the walls of the hole and the pipe. The mud helps control gas, oil and water pressures and to maintain the walls of the hole. Its basic components are clay and water, but other materials are added, e.g., barytes to increase weight, an alkali to increase pH, gelatinized starches to prevent loss of water, and cellophane flakes to add bulk. Special clays such as bentonite are also used."

Despite this, Cotey's sales sheet indicates that drilling mud has a wider applicability than that appearing in the definitions. The S.O. believes that this is reasonable.⁵ A drilling bit, for example, probably can get just as hot drilling for oil as for water, thus necessitating cooling and lubrication although different grades and compositions of mud may well be more suitable for one type of operation than the other. The question remains, however, what of the mud's "additives," and dry acid in particular?

Both definitions of drilling mud have common denominators. Both describe it as used in drilling operations. Both indicate the general nature of its additives which, logically, contribute to the mud's basic drilling function. In contrast, all of Cotey's explanatory submissions reveal that dry acid is mixed with water, not mud, for water well cleansing and rehabilitative purposes.

We turn now to Sea-Land's letter to Cotey of February 13th, quoted above. It concerns "Mud, drilling, including additives" No mention is made of dry acid as included in the additive category. In fact, no mention is made of dry acid at all, and there is no way that that letter and resultant tariff filing can be associated with the shipment in question. Conceivably, it could relate to another Cotey transaction. Accordingly, the S.O. is compelled to conclude that the bill of lading, prepared by Cotey's forwarder, accurately described the shipment as a "... Cleaning Compound" and that Sea-Land rated the shipment correctly.

⁵ The S.O. interviewed the secretaries of three conferences whose member lines are known to transport drilling muds. One said its tariff references referred to "all" muds; another said "oil well drilling" mud is referenced specifically as such; the third said that its "muds, drilling" category "usually" referred to oil well muds.

Sea-Land did not request interest. However, it is the Commission's present practice to award shippers interest with respect to sums awarded them arising from carriers' "overcharges," not as a penalty in any way but on the theory that the carrier's have enjoyed the use of sums to which they were not entitled. Here, Sea-Land has been denied the use of money to which it was entitled. Fairness would dictate that the same principle apply here. Accordingly, interest in the amount of 11.1 percent per annum will be awarded Sea-Land. This rate reflects the average of the monthly rates quoted in the secondary market for U.S. Treasury notes for its 6 months' bills for the period April 1979 through May 1981, the latest month for which such quotations are available.

In conclusion, Cotey is directed to pay Sea-Land the sum of \$3,170 plus interest at the rate of 11.1 percent per annum, pro rata, from April 1979.

So ordered.

(S) DONALD F. NORRIS
Settlement Officer

FEDERAL MARITIME COMMISSION

DOCKET NO. 80-12

DART CONTAINERLINE COMPANY, LTD.
POSSIBLE VIOLATIONS OF SECTION 16 SECOND
PARAGRAPH AND 18(b)(3), SHIPPING ACT, 1916

ORDER OF REMAND

August 18, 1981

This proceeding was instituted on February 29, 1980 to investigate certain alleged rebating activities by Dart Containerline Company, Ltd. (Dart) in the trade between the United States and the Iberian Peninsula and to determine whether civil penalties should be assessed for any violations of section 16 Second and 18(b)(3) of the Shipping Act, 1916 (46 U.S.C. 815 Second and 817(b)(3)) found to have occurred. Shortly thereafter, the parties engaged in negotiations which led to a proposed settlement agreement, accompanied by a stipulation of facts and separate memoranda in support of the proposed settlement agreement.

On September 18, 1980, Chief Administrative Law Judge John E. Cogrove rejected the settlement agreement and directed the parties to submit a new settlement proposal or to proceed to litigate the case. The latter alternative was chosen and discovery was commenced by the Commission's Bureau of Investigation and Enforcement (BIE) on November 14, 1980.

Respondent's submission in answer to BIE's initial discovery requests were followed on January 9, 1981 by a status report from BIE indicating that its discovery efforts had been unproductive. BIE's status report concluded with a determination that, given the circumstances, it was unable to contribute anything further to the record in this proceeding.

On March 24, 1981, Dart filed a motion to dismiss the proceeding. This motion was unopposed by BIE and was granted by the Presiding Officer. The Commission, on its own motion, determined to review that order of dismissal. Upon review and for reasons stated below, the Commission has decided to remand the proceeding for further development of the record.

DISCUSSION

This proceeding is being conducted under Shipping Act provisions which were significantly strengthened in 1979 to deter unlawful rebating in the foreign commerce of the United States (P.L. 96-25, 93 Stat. 71). Three aspects of this Congressional action are relevant here. First, the maximum penalty for violating section 16 Second or section

18(b)(3) was increased from \$5,000 to \$25,000. Second, Congress vested in the Commission the power to assess these increased civil penalties, a power formerly reserved for U.S. District Courts. Third, in response to numerous complaints from U.S.-flag carriers that anti-rebating laws were being unevenly enforced because of the difficulty of obtaining evidence from companies located overseas, the Commission was given the power to suspend any or all tariffs of a carrier which fails to comply with subpoenas or discovery orders in a rebating investigation.

Since the Commission now has greater investigative and enforcement powers than it had in the past, particularly with respect to foreign-flag carriers, it is now possible to effectively and economically continue a proceeding such as this, despite the difficulties in obtaining documents located outside the United States.

Prior to the institution of this proceeding, the Commission's Bureau of Enforcement had conducted a field investigation into possible rebating activities in the inbound Iberian/United States trade. As a result of this investigation, a claim was made against Monsieur Henri Wines, Ltd. (Henri Wines) in which it was charged that Monsieur Henri's subsidiary, Bodegas Riojas Santiago, S.A. (BRS) received rebates in violation of section 16 from various common carriers in this trade in connection with certain shipments of Yago Sangria wine. As indicated by the instant Order of Investigation and Hearing, that claim was settled with Henri Wines on July 9, 1979 for \$12,500.

Respondent is one of the carriers alleged to have paid rebates to Henri Wines, BRS, or both. As indicated by BIE's Memorandum in Support of Proposed Settlement, there is some evidence that Dart may have paid rebates amounting to \$41,959.18 to this shipper/consignee on twenty-six shipments between November 18, 1973 and December 15, 1973. This evidence is said to consist of bank drafts and invoices indicating that freight charges paid on Henri Wines' account by BRS for these twenty-six shipments amounted to \$58,286.90 while the applicable tariff charges should have been \$100,245.75. However, these bank drafts and invoices have not been entered into the record of this proceeding despite the Presiding Officer's observations on their importance in his September 16, 1980 order rejecting the proposed settlement.

In that same order, the Presiding Officer also expressed concern that no demand had been made of Dart for evidence which might clearly establish whether it had billed or collected less than the applicable tariff rates from the shipper. Particularly troublesome to the Presiding Officer was the reliance on a statement made by Dart's counsel to Commission field investigators that "he personally" could find nothing in Dart's Antwerp office dealing with the 26 shipments described in the June 23,

1980 Stipulations of Hearing Counsel and Dart Containerline Company, Ltd.¹

In the discovery which ensued after the rejection of the proposed settlement, BIE served the following interrogatory upon Dart:

3. For each shipment of Yago Sangria wines transported by Dart and listed in the Stipulation please provide:

a. The total amount of monies received by Dart from Bodegas Riojas Santiago, S.A. (BRS) as payment for freight, including any ancillary charges (bunker or currency adjustment factors).

b. All documents recording or reflecting in any manner the monies received by Dart from BRS as payment for freight.

c. All documents recording or reflecting in any manner any deposits into any bank account maintained directly or indirectly by or for the account of Dart either within the United States or overseas where such deposits reflect such monies received by Dart from BRS as payment for freight.

The response to this interrogatory was:

"Dart has no documents responsive to Request No. 3."

Contrary to the Commission's Rules of Practice and Procedure (46 C.F.R. 502.206) this response was not made under oath and was not signed by an officer or agent of Respondent, but rather by Dart's attorney.² Moreover, the response raises more questions than it answers, in view of the fact that Dart has stipulated that it carried the shipments in question and in view of Dart's unequivocal negative answer to BIE's Interrogatory No. 5 which asks whether Dart transported any other shipments of wine for these parties during the same period of time. However, no follow-up discovery was conducted.

In addition to the absence on this record of any direct input from responsible officers or agents of Dart, there is nothing to indicate that any cooperation was solicited from Henri Wines, in order to determine the nature and extent of Dart's alleged violations within the context of this proceeding. In its July 18, 1979 Settlement Agreement with the Commission, Henri Wines, agreed to the following:

¹ The Presiding Officer correctly noted in his September 16, 1980 order (p. 10, note 9) that the Order of Investigation and Hearing in this proceeding is broader in scope than the twenty-six shipments set forth in the parties' stipulations. In fact, there was no mention of the twenty-six shipments in that Order, but rather, only a reference to the settlement agreement with Henri Wines. However, the Commission believes that the proceeding on remand should focus upon the 26 shipments for which there appears to be substantial available information, although this emphasis should not preclude the development of other relevant data pertaining to alleged rebating violations by Dart as contemplated by the Commission's February 29, 1980 Order of Investigation and Hearing.

² The Commission is by no means challenging the integrity of Dart's attorneys, but rather wishes to emphasize that the purpose of this rule (and similar federal rules of discovery) is to ensure that a person charged with responsibility for the records in question responds to such an inquiry.

2. Respondent shall preserve and maintain at Respondent's main office at White Plains, New York, or at such other location as may be agreeable to the Commission for five (5) years from the date of execution of this Agreement the originals of all records and documents provided to the Commission during its investigation of the alleged violations described above. Upon reasonable notice, Respondent will allow Commission investigators or attorneys unimpeded access to such records and documents, and will allow the removal of any documents as specifically requested by Commission investigators or attorneys for the purpose of duplication.*

In short, the Commission is unwilling to discontinue this investigation on the basis of the present record and is not persuaded that the only untapped source of evidence is the Spanish shipper, BRS.

THEREFORE, IT IS ORDERED, That this proceeding is remanded to the presiding Administrative Law Judge for further development of the record consistent with this order.

IT IS FURTHER ORDERED, That the proceeding on remand shall focus on but not be limited to investigation of the twenty-six shipments described in the Stipulations of Hearing Counsel and Dart Containerline Company, Ltd., dated June 23, 1980.

By the Commission **

(S) FRANCIS C. HURNEY
Secretary

* Paragraph 3 of the Settlement Agreement also raises the possibility that the cooperation and information from the Spanish shipper may be obtained through Henri Wines.

** Chairman Green did not participate.

FEDERAL MARITIME COMMISSION

DOCKET NO. 80-78

ANTONIO LOPEZ QUINTANA D/B/A

TONY QUINTANA FREIGHT FORWARDERS

INDEPENDENT OCEAN FREIGHT FORWARDER LICENSE NO.

1324

NOTICE

August 18, 1981

Notice is given that no exceptions have been filed to the July 13, 1981 initial decision in this proceeding and the time within which the Commission could determine to review that decision has expired. No such determination has been made and, accordingly, that decision has become administratively final.

(S) FRANCIS C. HURNEY
Secretary

FEDERAL MARITIME COMMISSION

DOCKET NO. 80-78

ANTONIO LOPEZ QUINTANA D/B/A

TONY QUINTANA FREIGHT FORWARDERS

INDEPENDENT OCEAN FREIGHT FORWARDER LICENSE NO.
1324

Held:

- (1) Where the respondent freight forwarder allowed his ocean freight forwarder's license to be used by a friend and where the respondent was not materially unjustly enriched, cooperated in the Commission's investigation and the illegal forwarding did not result in damage to others, a settlement setting a penalty of \$5,000 is just and proper. Such a penalty gives due consideration to mitigating circumstances and is within that reasonable area of settlement and compromise which lends itself to the deterrence of future similar conduct by the respondent and others so inclined, and which will secure compliance with the law and the Commission's rules and policies.
- (2) Where the respondent freight forwarder "loaned" his ocean freight forwarder's license to a friend not believing it a "serious violation," and where he now recognizes its seriousness, and where the respondent has demonstrated that he is able to carry on the business of freight forwarding in accordance with the pertinent law and regulations and has sworn to do so in the future, it is held that he is "fit," willing and able to carry on such business and his license need not be suspended or revoked.

Carlos Rodriguez for respondent.

Stuart James for the Bureau of Investigation and Enforcement.

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

Finalized August 18, 1981

PRELIMINARY MATTERS

By Order of Investigation dated November 3, 1980, the Commission ordered that pursuant to sections 22, 32 and 44 of the Shipping Act, 1916, and section 510.9 of the Commission's General Order 4 a proceeding be instituted to determine:

1. Whether Quintana violated section 510.23(a) of General Order 4 by permitting a person not in its employ to use its license for the performance of ocean freight forwarding services.
2. Whether Quintana violated section 44(e) of the Shipping Act, 1916 and section 510.24(e) of the Commission's General Order

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

- 4 by collecting compensation from oceangoing common carriers on shipments for which it did not perform ocean freight forwarding services.
3. Whether civil penalties should be assessed against Quintana pursuant to section 32(e), Shipping Act, 1916 for violations of the Shipping Act, 1916, and/or the Commission's rules and regulations and, if so, the amount of any such penalty which should be assessed, taking into consideration factors in possible mitigation of such a penalty.
 4. Whether Quintana's ocean freight forwarder's license should be suspended or revoked pursuant to section 44(d) of the Shipping Act, 1916, for:
 - (a) willful violations of the Shipping Act, 1916, or the Commission's rules or regulations or both;
 - (b) such conduct as the Commission finds renders Quintana unfit properly to carry on the business of forwarding in accordance with section 510.9(e) of General Order 4.

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

STIPULATION OF FACTS

1. Antonio Lopez Quintana d/b/a Tony Quintana Freight Forwarders (Quintana) located at 941 West Flagler Street, Miami, Florida, is an independent ocean freight forwarder operating under FMC license number 1324 issued May 4, 1971.
2. During the course of a compliance check of licensee, and of a record review conducted pursuant to discovery procedures in this proceeding, it was determined that Quintana permitted a then-unlicensed firm, Trans-World International, Inc. (T.W.I.) to use its license for the performance of ocean freight forwarding services during the period May 17, 1977 to September 13, 1977.
3. During the aforementioned period Quintana allowed T.W.I. to use its license for sixty-six (66) ocean shipments.
4. Quintana collected \$600 in compensation for thirty (30) of the shipments described above, and no forwarding fees.
5. During discovery procedures conducted of Quintana forwarding files and books of account by FMC personnel on January 12, 13, 1981, it was determined that there were no other apparent violations of the Shipping Act, 1916, from January 1, 1977 to the present.
6. Quintana was motivated by his friendship of T.W.I.'s principal, Mr. Frank Reyes, in allowing him to use his license during the interim that T.W.I. was processing its own application for a freight forwarder's license.

7. Quintana's activities with T.W.I. were initially discovered by FMC investigators during a compliance check of T.W.I. in November, 1978. Mr. Quintana was cooperative in supplying documents and information during the course of that compliance check as well as during the current discovery proceedings.

8. Mr. Quintana submitted a notarized financial statement including a profit and loss statement for 1980 which indicates that Mr. Quintana's total net income (from all sources) for that year was \$23,851.00, after taxes.

9. The above noted financial statement includes all of Mr. Quintana's personal assets and liabilities since he operates as sole proprietorship.

10. Mr. Quintana has never been the subject of any other FMC investigation, even though he has been working in ocean freight forwarding since 1950.

11. Mr. Quintana had known Mr. Frank Reyes, President of T.W.I., since approximately 1966 as a co-worker for a freight forwarder, and had met with him and his family socially also since that time.

12. The respondent did not consider the loan of his freight forwarder's license to a friend as a "serious violation" at the time he undertook to do so.

13. The respondent now better understands the law relating to fitness and qualifications for a freight forwarder's license.

14. In the future the respondent will not allow his license to be used by anyone other than himself.

15. The respondent agrees that if he misuses his freight forwarder's license in the future it will be revoked.

ULTIMATE FINDINGS OF FACT

16. The record in this proceeding justifies a settlement whereby the respondent pays \$5,000.00 to the Federal Maritime Commission. Such a settlement takes into consideration relevant mitigating circumstances and is within the parameters of that reasonable area of settlement and compromise which lends itself to the deterrence of future similar conduct by the respondent and others so inclined, and which will secure compliance with the law and the Commission's rules and policies.

17. The respondent is fit to continue as a licensed ocean freight forwarder.

DISCUSSION AND CONCLUSIONS

1. Settlement of Civil Penalties

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

The agency shall give all interested parties opportunity for—

- (1) The submission and consideration of facts, arguments, offers of settlement, or proposals of adjustments when time, the nature of the proceedings, and the public interest permit.

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

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

Further, the Commission has by rule encouraged settlement³ and has often favorably looked upon them as a matter of policy.⁴

Here, in arriving at a settlement of the civil penalties counsel considered various factors including:

1. The nature of the violations alleged;

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

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

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

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

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

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

⁴ See *Perry Crane Service v. Port of Houston Authority, of Port of Houston, Texas (Approval of Settlement)*, FMC Docket No. 79-51, served June 21, 1979 (22 F.M.C. 31). Administratively Finalized, July 27, 1979, *Del Monte Corp. v. Matson Navigation Co. (Approval of Settlement)*, FMC Docket No 79-11, served November 20, 1979 (22 F.M.C. 365), Administratively Finalized, December 27, 1979; *Merck, Sharp & Dohme v. Atlantic Lines*, 17 F.M.C. 244 (1973).

2. The period of time during which the alleged violations occurred and the frequency of those alleged violations;
3. The extent of the conduct in question;
4. The cessation of the allegedly violative conduct;
5. The amount of money generated through the allegedly violative conduct;
6. The distribution of the monies generated through the violative conduct;
7. The impact of the conduct in question upon Quintana's performance of its duties and responsibilities as an independent ocean freight forwarder; and
8. The level of cooperation provided.

As can be seen from the findings of fact, once one moves past the initial wrongdoing all of the other factors weigh in favor of the respondent. While he allowed his freight forwarder's license to be used by another unlicensed party, he was not materially unjustly enriched; once on notice he did not continue in the prohibited activity; he has cooperated throughout the investigation, and his wrongdoing was not so extensive and prolonged so as to be harmful to others.

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

2. *Fitness*

After settlement of the penalty provisions the only issue left for decision is whether or not the respondent's ocean freight forwarder's license should be suspended or revoked pursuant to section 44(d) of the Shipping Act, 1916 (Issue No. 4 of the Order of Investigation and Hearing). In *Independent Freight Forwarder's License—E.L. Mobley Inc.*, 18 S.R.R. 451 (1979), Initial Decision 21 F.M.C. 849 (1978), where the Commission issued an Order of Investigation regarding both civil penalties and the question of fitness, the Commission held that:

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

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

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

SEC. 44.(a) No person shall engage in carrying on the business of forwarding as defined in this Act unless such

person holds a license issued by the Federal Maritime Commission to engage in such business

(b) A forwarder's license shall be issued to any qualified applicant therefor if it is found by the Commission that the applicant is, or will be, an independent ocean freight forwarder as defined in this Act and is fit, willing, and able properly to carry on the business of forwarding and to conform to the provisions of this Act and the requirements, rules and regulations of the Commission issued thereunder, and that the proposed forwarding business is, or will be, consistent with the national maritime policies declared in the Merchant Marine Act, 1936; otherwise such application shall be denied. . . .

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

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

and in *E. Allen Brown—Independent Ocean Freight Forwarder License No. 1246*, FMC Docket No. 79-16, Initial Decision served October 19, 1979 (22 F.M.C. 585), and partially adopted 22 F.M.C. 583 (1980), that:

. . . Thus, the courts as the Commission have recognized that evidence of mitigation should be considered when determining whether a license applicant should be found to be fit although implicated in violations of the Act in the past (citations omitted). Furthermore, in previous cases the Commission has expressed its belief that the Freight Forwarder Law, P.L. 87-254, was enacted as remedial statute in order to correct abuses in the forwarding industry (citations omitted).

The principle that the Commission should not rush to extreme sanctions without considering all factors of mitigation in an effort to fashion a just and reasonable remedy is well supported by the courts. Although agencies are not required to impose sanctions in a perfectly even manner because of the wide latitude they are given by the courts as the expert bodies most skilled in devising means to carry out specific legislative purposes, the agencies are nevertheless expected to consider less drastic alternative remedies and to base whatever remedy they select on facts and reasonable interpretations of law (footnote omitted).

Applying the above law and principles to the facts involved in this case, we must determine whether or not the respondent is fit to continue to be licensed as an ocean freight forwarder. The evidence establishes, and he admits, that he made a mistake in allowing a friend to use his freight forwarder's license. It also established that he is now aware of the seriousness of his offense, that it will not happen again, and that if it does the license will be suspended or revoked. Given Mr. Quintana's expertise in the area of freight forwarding, his demonstrated ability and intent to operate in a proper manner for the last three years, his obvious sincerity in testifying that he was determined to operate in accordance with the Commission's rules in the future and the fact that his business is a small one and his livelihood depends on future compliance with the law and regulations—suspension or revocation of his freight forwarder license is too harsh a sanction. In essence, he deserves another chance and therefore, it is held that the respondent is fit to carry on the business of an independent ocean freight forwarder.

The proceeding is hereby discontinued.

(S) JOSEPH N. INGOLIA
Administrative Law Judge

APPENDIX
BEFORE THE FEDERAL MARITIME COMMISSION

DOCKET NO. 80-78

ANTONIO LOPEZ QUINTANA D/B/A
TONY QUINTANA FREIGHT
FORWARDERS - INDEPENDENT
OCEAN FREIGHT FORWARDERS
LICENSE NO. 1324

PROPOSED SETTLEMENT OF CIVIL PENALTIES

This Proposed Settlement has been entered into between the Bureau of Investigation and Enforcement (Bureau) and Respondent Tony Quintana Freight Forwarders (Quintana). It is submitted to the Presiding Administrative Law Judge for approval pursuant to Rule 162 of the Commission's Rules of Practice and Procedure, 46 C.F.R. 502.162, and section 505.3 of the Commission's General Order 30, 46 C.F.R. 505.3, and is to be incorporated into the Final Order in this proceeding, if so approved.

WHEREAS, by Order of Investigation and Hearing dated November 3, 1980, the Commission instituted the present proceeding to determine whether Quintana had violated sections 510.23(a) and 510.24(e) of the Commission's General Order 4, and section 44(e) of the Shipping Act, 1916, 46 U.S.C. 841(b), and whereas, that Order includes the issue of whether civil penalties should be assessed for any violations of sections 510.23(a) and 510.23(e) of the Commission's General Order 4, and/or violations of section 44(e) of the Shipping Act, 1916, if so found;

WHEREAS, the Order of Investigation alleges that Quintana may have violated sections 510.23(a) and 510.24(e) of the Commission's General Order 4, and section 44(e) of the Shipping Act, 1916;

WHEREAS, Quintana has admitted that it has engaged in activities which may be violative of sections 510.23(a) and 510.24(e) of the Commission's General Order 4, and section 44(e) of the Shipping Act, 1916;

WHEREAS, Quintana has terminated its participation in conduct which may be violative of sections 510.23(a) and 510.24(e) of the Commission's General Order 4, and section 44(e) of the Shipping Act, 1916, and has indicated its willingness and commitment to maintain measures designed to prevent future violations of the Shipping Act, 1916 and the Commission's Rules and Regulations;

WHEREAS, the parties in order to avoid the delays and expense which would be occasioned by further litigation of the issues specified in the Order of Investigation and Hearing, are desirous of settling expeditiously the issue of the appropriate amount to be paid by Quintana in accordance with the terms and conditions of this Agreement; and WHEREAS, section 32(e) of the Shipping Act, 1916, 46 U.S.C. § 831(e), authorizes the Commission to assess or compromise all civil penalties claims under the Shipping Act, 1916.

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

1. Quintana hereby agrees, as a condition of the settlement agreement, to pay a monetary amount of Five Thousand Dollars (\$5,000) of which One Thousand Dollars (\$1,000) shall be payable thirty (30) days following approval by the Commission of this Proposed Settlement and Four Thousand Dollars (\$4,000) shall be payable according to the terms of the Promissory Note attached hereto as Appendix I in the following installments:

One Thousand Dollars (\$1,000), plus 12% interest, shall be paid on or before six (6) months following approval by the Commission of this Proposed Settlement;

One Thousand Dollars (\$1,000), plus 12% interest, shall be paid on or before twelve (12) months following approval by the Commission of this Proposed Settlement;

One Thousand Dollars (\$1,000), plus 12% interest, shall be paid on or before eighteen (18) months following approval by the Commission of this Proposed Settlement;

One Thousand Dollars (\$1,000), plus 12% interest, shall be paid on or before twenty four (24) months following approval by the Commission of this Proposed Settlement;

2. It is understood by Quintana that this Agreement shall not serve as a bar or defense to any criminal prosecution or civil litigation by the Commission or any other department or agency of the United States Government for conduct engaged in by Quintana, other than that reflected in the factual record submitted in the present proceeding.

3. In the event changes in law or other circumstances occur during the term of this Agreement which Quintana believes warrant modification or mitigation of the Agreement, Quintana may petition for this purpose.

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

5. The undersigned counsel for Quintana represents that he is properly authorized and empowered to execute this Agreement on behalf of Quintana and to fully bind Quintana to all of the terms and conditions herein.

CARLOS RODRIGUEZ
Counsel for Respondent

ROBERT EWERS, DIRECTOR
Bureau of Investigation & Enforcement

STUART JAMES
Attorney

April 3, 1981

APPENDIX I
PROMISSORY NOTE CONTAINING
AGREEMENT FOR JUDGMENT

For value received, Tony Quintana Freight Forwarders (Quintana), promises to pay to the Federal Maritime Commission (the Commission) the principal sum of Five Thousand Dollars (\$5,000) to be paid at the offices of the Commission in Washington, D. C., by bank cashier's or certified check in the following installments:

One Thousand Dollars (\$1,000) on or before thirty (30) days following the approval by the Commission of the Proposed Settlement in FMC Docket No. 80-78;

One Thousand Dollars (\$1,000) on or before six (6) months following the approval by the Commission of the Proposed Settlement in FMC Docket No. 80-78;

One Thousand Dollars (\$1,000) on or before twelve (12) months following the approval by the Commission of the Proposed Settlement in FMC Docket No. 80-78;

One Thousand Dollars (\$1,000) on or before eighteen (18) months following the approval by the Commission of the Proposed Settlement in FMC Docket No. 80-78;

One Thousand Dollars (\$1,000) on or before twenty-four months following the approval by the Commission of the Proposed Settlement in FMC Docket No. 80-78;

In addition to the principal amount payable hereunder, interest on the unpaid balance thereof shall be paid with each installment. Such interest shall accrue from the date upon which the Commission approves the Proposed Settlement in FMC Docket No. 80-78 and be computed at the rate of twelve percent (12%) per annum on the unpaid balance.

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

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

consent to immediate execution on said judgment. Quintana hereby ratifies and confirms all that said attorney may do by virtue thereof.

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

TONY QUINTANA FREIGHT FORWARDERS

By: _____

Date: _____

FEDERAL MARITIME COMMISSION

46 C.F.R. PART 502

GENERAL ORDER 16; AMENDMENT 39

DOCKET NO. 81-38

RULES OF PRACTICE AND PROCEDURE

August 19, 1981

ACTION: Final Rule

SUMMARY: Present Rules of Practice suggest that a former FMC employee wishing to practice before the agency, with respect to a matter that was pending during the employee's tenure, is absolutely precluded from such activity if "associated" with a barred former FMC employee, by reason of current common employer. This amendment makes clear that a former employee may practice before the FMC under such circumstances subject to certain conditions and restrictions.

DATE: Effective August 26, 1981.

SUPPLEMENTAL INFORMATION:

46 C.F.R. 502.32(b)(2) currently requires a former employee wishing to appear or practice before the agency within one year of the termination of FMC employment on a particular matter, which was pending during the employee's tenure, to file an affidavit attesting, among other things, that the affiant "is not associated with" nor will be associated with any other former member, employee, or officer who is precluded from practicing, appearing or representing anyone before the FMC in connection with that matter.

The term "not associated with" is neither defined nor explained in section 502.32(b)(2). The term could be read, however, as absolutely precluding an otherwise qualified former FMC employee from appearing before the agency solely because that employee now happens to be associated, by reason of a common employer, to another former FMC employee who is precluded by law or regulation from so appearing. The Commission did not intend such a result.

Section 502.32(b)(2) is intended to forbid a former employee intending to practice before the agency on a particular matter, that was pending during the employee's tenure, from obtaining an unfair or unethical advantage by conferring with or soliciting the assistance of another former FMC employee who is precluded from appearing before the Commission in connection with such matter. Interpreted in

this manner, section 502.32(b)(2) is consistent with section 502.32(c), which permits a former employee's partners or associates to appear before the Commission, even if the former employee is precluded from so doing, provided that such partners or associates do not discuss the matter with, utilize the services of, or share any fees with the former FMC employee. This is the standard the Commission intended to apply to associations among former employees rather than the absolute bar that could be implied from the existing language of section 502.32(b)(2).

In recognition of the foregoing the Commission on June 10, 1981 (46 F.R. 30666) published a proposed rule designed to clarify this matter. No comments were filed in response to the proposed rule. The Commission is of the belief that the rule as proposed should be adopted with one minor modification. As proposed, § 502.32(b)(2)(ii) would have prohibited discussion by a former employee of "any" matter with an associated former employee. Our intention is to preclude only discussion of the particular matter for which permission to appear is sought. Accordingly, the words "any matter" have been changed in this final rule to read "the particular matter."

THEREFORE, pursuant to E.O. 11222 of May 11, 1965 (30 F.R. 6469), 18 U.S.C. 207, section 43 of the Shipping Act, 1916 (46 U.S.C. 841a), and 5 U.S.C. 553, section 502.32(b)(2) of Title 46 of the Code of Federal Regulations is revised to read as follows:

§ 502.32 Former Employees

* * * * *

(b) * * *

(2) Such applicant shall be required to file an affidavit to the effect that the particular Commission matter was not under the applicant's official responsibility as a member, officer or employee of the Federal Maritime Commission at any time within a period of one year prior to the termination of his or her service with the Commission; that the applicant will not: (i) utilize the service of, (ii) discuss the particular matter with, or (iii) share directly or indirectly any fees or revenues received for services provided in the particular matter with a partner, fellow employee, or legal or business associate who is a former member, officer or employee of the Commission and who is either permanently or temporarily precluded from practicing, appearing or representing anyone before the Commission in connection with the particular matter; and that the applicant's employment is not prohibited by any law of the United States or by the regulations of the Commission. The statements contained in such affidavit shall not be sufficient if disproved by an examination of the files and records of the case.

By the Commission.

(S) FRANCIS C. HURNEY
Secretary

FEDERAL MARITIME COMMISSION

DOCKET NO. 80-63

WEST COAST OF ITALY, SICILIAN AND ADRIATIC PORTS, NORTH ATLANTIC RANGE PORTS CONFERENCE (WINAC) - TARIFF RULE 26

Conference tariff rule prescribing penalties against persons responsible for misdescribing cargo, but enforcing those penalties by means of a lien against the cargo is found to violate sections 17 and 18(b)(1) of the Shipping Act, 1916. The conference is ordered to cancel the rule and to cease and desist from collecting or publishing unspecified cargo verification charges, enforcing cargo liens at private sales, and enforcing penalties by means of a cargo lien which effectively penalizes persons other than those responsible for misdescribing cargo.

Stanley O. Sher and John R. Attanasio for West Coast of Italy, Sicilian and Adriatic Ports, North Atlantic Range Ports Conference.

Paul J. Kaller and Deana E. Rose for the Bureau of Investigation and Enforcement.

REPORT AND ORDER

August 21, 1981

BY THE COMMISSION: (THOMAS F. MOAKLEY, *Vice Chairman*;
RICHARD J. DASCHBACH AND JAMES V. DAY, *Commissioners*) *

This proceeding was commenced on September 19, 1980 by an Order to Show Cause directed to the member lines of the West Coast of Italy, Sicilian & Adriatic Ports, North Atlantic Ports Conference (WINAC). The Conference was ordered to demonstrate why Rule 26 of its Tariff FMC No. 3 should not be cancelled for permitting the assessment of certain unclear, variable and discriminatory charges; for unreasonably restricting the delivery of cargo to U.S. consignees; and for unfairly penalizing innocent parties for errors in shipping documents, in violation of sections 18(b)(1), 17 and 15 of the Shipping Act, 1916 (46 U.S.C. 817(b)(1), 816 and 814), respectively.¹

* Chairman Alan Green, Jr. did not participate.

¹ The following practices were authorized by Tariff Rule 26 as it read on September 19, 1980:

- (a) Collection of freight undercharges from the "interested party" with underlying liability in the "freight payor."
- (b) Collection from the "interested party" of a penalty equal to double the amount of any freight undercharge caused by any error of the shipper or consignee, with underlying liability in the "party at fault."
- (c) Collection from the "interested party" of unspecified "verification expenses" incurred by the carrier in ascertaining any freight undercharge, with underlying liability in the "party at fault."

Continued

On November 14, 1980, WINAC submitted a Memorandum of Law, an affidavit from Conference Secretary Giovanni Ravera, and an amendment to Rule 26. The amendment, as further modified on December 30, 1980, became effective February 12, 1981, and is attached as Appendix "A" hereto. The amended version of Rule 26 cures two of the deficiencies perceived in the earlier version by quoting the exact amount to be charged for verification expenses and permitting foreclosure of a cargo lien only at a public sale.² In addition, the term "interested party" was replaced by the term "cargo interests" and the term "party at fault" was defined as the "party responsible for the misdescription or error," thereby clarifying the Rule's intended operation to some degree.

Both WINAC and the Commission's Bureau of Investigation and Enforcement contend that amended Tariff Rule 26 is lawful in all respects. The arguments raised in favor of assessing a "double the unpaid freight" penalty plus a verification charge, and making both collectable by means of a lien against the cargo can be summarized as follows: (1) penalty charges imposed by ocean carrier tariffs have been judicially enforced; (2) special circumstances in the WINAC trade require carrier-imposed penalties to deter otherwise unmanageable cargo misdescription practices; (3) private penalties are consistent with Shipping Act section 18(b)(3) because ocean carriers have no duty to verify cargo descriptions and need only apply the correct rate to the shipper's description; and (4) Shipping Act section 18(b)(1) does not require an advance statement of tariff charges in every situation.³ For

-
- (d) Securing each of the above amounts by means of a lien against the cargo.
 - (e) Enforcement of cargo liens securing the above amounts by either public or private sale.
 - (f) Application of penalty and verification amounts collected under the above procedures to the Conference's "Verification Service" rather than the general revenues of the carrier involved.

² Verification expenses are now stated as \$100 plus \$25 per ton if container stripping is necessary.

³ WINAC also claims that the September 19, 1980 Show Cause Order represented an improper attempt to "shift the burden of going forward to the Respondents," but WINAC is clearly mistaken in this regard. The validity of show cause procedures such as those set forth in 46 C.F.R. 502.66 are well established in situations where the agency possesses sufficient facts to establish a *prima facie* case against the respondent. See *American Export & Isbrandtsen Lines v. Federal Maritime Commission*, 334 F.2d 185 (9th Cir. 1964). WINAC does not contend that the Commission's Show Cause Order failed to state a *prima facie* case against Rule 26, but claims only that the Order does not demonstrate the unlawfulness of the amended Rule, in light of the facts contained in Mr. Ravera's affidavit. This simply rephrases the ultimate question before the Commission—does the record establish the invalidity of all or part of Rule 26?

Intertwined in WINAC's apparent procedural argument is the statement that "[a] tariff rule which has continued in effect without challenge for a number of years carries with it a presumption of lawfulness." If this statement is intended to advise the Commission that it, as the moving party, bears the ultimate burden of proof under 5 U.S.C. 556(d), WINAC belabors the obvious. If, however, WINAC believes that common carrier practices authorized by properly filed tariffs achieve some measure of protection from subsequent challenge under Shipping Act sections 14 through 18 because the tariff has been accepted for filing, this belief is erroneous. Tariff filings are neither adjudicatory proceedings nor finally determinative of individual rights and privileges. It does not follow that because a carrier must

Continued

the reasons given below, the first three of these arguments fail to justify the particular penalty/lien arrangement published in Tariff Rule 26.

DISCUSSION

Factual Background

Rule 26 has been in WINAC's tariff since March, 1959.⁴ Until March 13, 1964, it imposed "treble damage" penalties in the case of cargo misdescription. On May 15, 1968, the Rule was again amended to indicate that only the "party at fault" would be subject to penalty and verification charges.⁵ Nonetheless, the simultaneous presence of other language stating that the "interested party" is liable created an ambiguity in this regard, and it appears that the Conference commonly invokes the leverage of a cargo lien to collect both freight undercharges and penalty/verification amounts from the consignee, regardless of whether the consignee is the party at fault.⁶ The consignee is then left to adjust its account with the shipper as best it can. Application of this procedure to a shipment of chestnuts in October, 1979 led to the reparation action against a WINAC member line adjudicated in *William Kopke, Jr. v. Sea-Land Service, Inc.*, 23 F.M.C. 39 (1980).

The WINAC trade is heavily containerized and over 94% of the Conference's cargo is loaded into containers by shipper-controlled personnel at shipper-controlled premises. Under Tariff Rule 20-2(f), shippers of such cargo must provide the carrier with a certified packing list for each container which describes the goods therein and gives their gross weight, measurement and F.O.B. value, as may be necessary for accurate rating.⁷ Containers loaded by the shipper are accepted subject to "Shipper's Load and Count," a term which may affect the carrier's

adhere to its tariff that the contents of that tariff are in any other respect lawful. See *Chicago M. St. P. & P.R. Co. v. Alouette Peat Products*, 253 F.2d 449, 454-456, n.5 (9th Cir. 1957). Cf. *States Steamship Co. Far East/U.S.A. Household Goods Tariff*, 19 F.M.C. 793, 794-798 (1977). The two decisions interpreting the scope of conference ratemaking practices under specifically-approved section 15 agreements which WINAC cites at pages 28 and 29 of its Memorandum are inapposite to the present controversy. The section 15 authority of the WINAC member lines concertedly to impose "double the unpaid freight" penalties enforced by cargo liens is not at issue here.

⁴ Tariffs giving advance notice of ocean carrier rates and practices for foreign commerce transportation were not required to be filed until Congress added section 18(b) to the Shipping Act, 1916, on October 3, 1961 (P.L. 87-347, 75 Stat. 762).

⁵ WINAC FMC Tariff No. 1, first revised page 61. Rule 26 was designated as Rule 17 in previous editions of WINAC's FMC tariff.

⁶ WINAC consignees cannot take possession of their cargo unless all charges, including penalty/verification amounts, are paid or a bond is posted to cover amounts in dispute. Ravera affidavit at 8-9; WINAC Memorandum at 25-26.

⁷ If the shipper is unaware or mistaken as to the necessity for stating weight and measure or F.O.B. value on a given shipment, adequate certification would not be present and the cargo is presumably not transported by the carrier. To deliberately transport goods without ascertaining the freight rate until their arrival is a highly questionable practice, likely to result in violations of section 18(b)(3).

liability under the Carriage of Goods by Sea Act (46 U.S.C. 1300 *et seq.*, hereafter "COGSA").⁸

THE VALIDITY OF CARRIER-IMPOSED PENALTIES

WINAC argues that Rule 26 is reasonable and lawful because similar carrier-imposed misdescription penalties were allowed by courts reviewing cargo forfeiture proceedings. In *North-German Lloyd v. Elting*, 96 F.2d 48 (2d Cir. 1938), where a penalty of double the total correct freight was assessed, and *North-German Lloyd v. Heule*, 44 F.100 (S.D.N.Y. 1890), involving a 5% penalty surcharge, cargo had been seized and forfeited for violations of United States customs laws (*i.e.*, smuggling), and the validity of the ocean carrier's lien for such penalty amounts was at issue. In both instances, the court ruled in favor of the carrier, but these decisions are not based on the Shipping Act, 1916 or any of its regulatory precepts.⁹ *Elting* simply reflected the court's view that the charge in question was not unconscionably high under contract law principles which permit the collection of liquidated damages, but not "forfeitures" or "penalties." The court did not pass upon the reasonableness of this charge as a transportation practice, but evaluated it only in light of the carrier's "additional trouble, expense and long delay in payment" occasioned by the seizure and sale of a particular shipment of Swiss watches by the U.S. Treasury Department.¹⁰

WINAC alleges that Italian origin shipments present special difficulties for ocean carriers when containers are loaded away from the carrier's pier because Italian Customs clearance is obtained at the point of loading and the cleared containers cannot be reopened by the carrier.¹¹ When WINAC has requested waivers of Italian Customs regulations, the Guardia di Finanza (Ministry of Finance) has denied the requests. Thus, WINAC cannot verify the accuracy of containerized cargo descriptions prior to vessel loading except in the case of cargo rated on the basis of weight.¹²

⁸ See Ravera affidavit at 7. COGSA does not define or discuss the term "Shipper's Load and Count." *Cf.* section 21 of the Federal Bills of Lading Act (49 U.S.C. 101), a statute inapplicable to U.S. import trades. However, 46 U.S.C. 1303(5) does provide for the shipper to indemnify the carrier against all loss, damages and expenses arising from inaccuracies in the shipper's description of the cargo's "marks, number, quantity and weight." WINAC's reliance upon COGSA as excusing affirmative cargo verification responsibilities by its members is discussed below.

⁹ These cases did not involve tariff interpretation. *Heule* was decided before enactment of the Shipping Act, 1916. *Elting* was decided before enactment of Shipping Act section 18(b). See note 4, *supra*.

¹⁰ The court held that the "double the total freight" charge was not so high it could not be considered as payment for additional transportation related expenses. 96 F.2d at 49.

¹¹ WINAC does not indicate what percentage of its shipper-loaded container cargo originates in Italy. It is presumed to be substantial.

¹² WINAC states that it has had a policy of verifying all weight-rated containers at the port of loading since 1977. Ravera affidavit at 6 and 9. WINAC further states that in weight discrepancy cases, the shipper is "immediately notified to request an amendment to the declaration and a recalculation of charges based on the adjusted rate." *Id.* at 9. The 1979 *Kopke* shipment was rated on a weight basis, however, and when the carrier erroneously calculated its weight, the consignee and not the shipper was required to pay the penalty and verification charges before the cargo was released.

In addition, freight forwarders in Italy effectively control much of the cargo moving in the U.S. trade and can insulate underlying shippers from direct contact with ocean carriers.¹³ Because 80% of WINAC's total shipments are made on a freight collect basis, WINAC believes that U.S. consignees commonly instruct Italian forwarders to prepare false shipping documents in apparent violation of Section 16 Initial Paragraph of the Shipping Act, 1916 (46 U.S.C. 815).¹⁴ The Commission declines to make such a finding on the present record.

WINAC's inspection program uncovered misdescriptions affecting significantly less than one percent of WINAC's 1978 and 1979 containerized shipments.¹⁵ There is no evidence that Italian forwarders regularly retain portions of the freight monies advanced by their clients, encourage clients to obtain reduced rates through deceitful practices, or even that they ordinarily represent U.S. consignees. WINAC itself states that the shipper and not the consignee is presumed to be the party at fault in misdescription cases.¹⁶ Moreover, when a WINAC carrier has reason to believe a U.S. consignee has conspired with an Italian intermediary, that U.S. consignee is subject to the full jurisdiction of the United States and its courts for purposes of redressing the carrier's injuries.¹⁷

The difficulty WINAC encounters in inspecting cargo in Italy should not cloud the fact that it can make inspections before the cargo is delivered in the United States. When a misdescription is verified prior to delivery, the carrier must collect the full amount of freight undercharges and any verification expenses provided for in its tariff. Under these circumstances, the consignee responsible for payment of the legal tariff rate cannot be said to "benefit" from the shipper's misdescriptions in any respect.

WINAC claims that certain provisions of the Carriage of Goods by Sea Act obligate shippers to describe accurately the cargo they tender to a carrier and that this obligation signifies a Congressional intention to absolve ocean carriers of section 18(b)(3) liability for tariff errors

¹³ The Commission has observed this situation in earlier proceedings focusing on carrier malpractices. E.g., *WINAC Trade Investigation*, 10 F.M.C. 95 (1966). It apparently contributes to the WINAC trade's reputation for having a high incidence of deliberate cargo misdescription designed to evade carrier scrutiny as well as untariffed carrier inducements to shippers.

¹⁴ Ravera affidavit at 5 and 13.

¹⁵ Ravera affidavit at 11-12. The total penalty and verification charges collected on these shipments averaged \$147,500 per year and is minuscule in comparison to the conference's annual revenues of \$110,000,000. *Id.* WINAC does not indicate what percentage of its annual container inspections uncover cargo misdescriptions.

¹⁶ Ravera affidavit at 9 and 13.

¹⁷ WINAC, however, states that its members cannot risk their customers' good will by subjecting them to ordinary commercial collection practices or possible Shipping Act penalties. Memorandum at 18-19. Assuming that the U.S. consignee is in fact the carrier's "customer," the customer's good will is also unlikely to be enhanced by a lien enforced demand for double damages and verification charges. See Ravera affidavit at 12-13.

made in reliance on the shippers' cargo descriptions.¹⁸ The Commission disagrees and concludes that WINAC's exceedingly broad interpretation of COGSA contravenes the plain meaning of COGSA and the Shipping Act and finds no support in legislative history or prior judicial decisions.

The decisions in *Nitram, Inc. v. Cretan Life*, 599 F.2d 1359 (5th Cir. 1979) and *Atlantic Overseas Corp. v. Feder*, 452 F.Supp. 347 (S.D.N.Y.), *aff'd*, 594 F.2d 851 (2d Cir. 1978), both deal with the limited question of a carrier's COGSA rights against a shipper which furnishes the carrier with false information. The existence of such rights is not inconsistent with the strict liability imposed upon carriers by section 18(b)(3) for "charging, demanding, collecting or receiving" an amount different than that specified in their FMC tariffs.¹⁹ Moreover, COGSA itself clearly states that it "shall not affect rights or obligations under the provisions of the Shipping Act, 1916." 46 U.S.C. 1308.

WINAC finally contends that its penalty charges are valid because they are logically related to the additional costs of detecting cargo misdescription and the revenue losses resulting from those misdescriptions which remain undetected. WINAC maintains a separate verification charge for the purpose of recovering the costs of ascertaining any particular misdescription and has not attempted to demonstrate that Rule 26's revenues are reasonably related to the overall cost of its cargo inspection program.²⁰ The number of containers WINAC inspects annually and the type, number and cost of the personnel employed to conduct inspections have not been revealed.

Despite the invalidity of WINAC's arguments, the Commission is not now prepared to rule that all penalty charges designed to deter shipper misdescriptions are unlawful. Although reliance upon shipper descriptions does not excuse a carrier from accurately rating each piece of cargo it transports, the Commission recognizes that it is not commercially reasonable for ocean carriers to personally inspect all cargo and

¹⁸ WINAC cites 46 U.S.C. 1303(5) and 46 U.S.C. 1303(3)(b) for the proposition that an ocean carrier may conclusively rely upon shippers' descriptions in performing cargo rating obligations. The former provision is described at note 9, *supra*. The latter merely requires the carrier to issue a bill of lading which shows, among other things, the "number of packages or pieces, or the quantity or weight, as the case may be, as furnished in writing by the shipper." Thus, COGSA does not relieve the carrier of its obligation to accurately ascertain the nature of the cargo for tariff application purposes, but only of the need to place the omitted number, weight or measure on its bill of lading.

¹⁹ Section 18(b)(3) imposes liability without regard to fault or intent. This liability is for damages caused to private parties and for civil penalties of up to \$5,000 per occurrence. *E.g., Sanrio Co., Ltd. v. Maersk Line*, 23 F.M.C. 154, 163 (1980); *United States v. Seatrain Lines, Inc.*, 370 F.Supp. 483 (S.D.N.Y. 1973); *United States v. Pan American Mail, Inc.*, 359 F.Supp. 728 (S.D.N.Y. 1972).

²⁰ A penalty rule intended to deter misdescriptions could reasonably recover revenues which exceed the carrier's costs of inspecting those shipments actually found to have been misdescribed, thereby partially subsidizing the cost of a conference's container inspection program. It does not follow, however, that a penalty system is justifiable merely because it helps finance a conference's mandatory self-policing operations or that the full recovery of self-policing costs is in itself a permissible objective of such a system.

that shipper honesty and thoroughness in preparing shipping documents are critical elements in an efficient ocean transportation system. Ocean common carriers may therefore take reasonable steps to encourage accuracy in shipper descriptions. It is the ambiguity of Rule 26 and its unreasonable impact upon innocent consignees, discussed more fully below, which render the penalty charge unlawful in this instance. The Commission does not rule that carrier-imposed penalties are unlawful *per se*, but only that in order for such a penalty system to be valid under the Shipping Act, it must be fairly and evenly applied against the party at fault.

INDEFINITENESS OF TARIFF RULE 26

Section 18(b)(1), in conjunction with Part 536 of the Commission's regulations, requires all practices which affect a carrier's rates or charges in any fashion whatsoever to be clearly stated in its tariff.²¹ The Commission's Show Cause Order noted that Rule 26 did not state the amount of verification expenses which would be charged, expressed the penalty amount in terms of "twice the unpaid freight," and could, but would not necessarily, collect the penalty charges from an innocent U.S. consignee. The first matter has been temporarily resolved by the February 12, 1981 amendment to Rule 26.²²

Although the freight payor may not know in advance whether a cargo misdescription has occurred or what twice the unpaid freight would total, WINAC argues that this variable penalty assessment formula is necessary to produce the desired deterrent effect upon shipper misrepresentations.²³ Upon reflection, the Commission concludes that as long as reasonable carrier-imposed penalties are permitted for the purpose of deterring cargo misdescriptions, a penalty charge described only as a percentage of the unpaid freight represents an acceptable balance between the legitimate objectives of the penalty system and the shipper's right to advance notice of the amounts for which it will be liable.

The third source of ambiguity concerns the application of WINAC's cargo lien to the collection, of misdescription penalties and, as discussed more fully below, continues to be a significant factor contributing to the invalidity of Rule 26.

²¹ 46 C.F.R. 536.6(a) states that:

The application of all rates shall be clear and definite and explicitly stated per 100 pounds . . . or some other expressly defined unit.

46 C.F.R. 536.6(k) states that:

Publication of rates which duplicate or conflict with the rates published in the same or any other tariff is forbidden

²² An option to dispose of unclaimed cargo at public or private sale was also eliminated by the February 12, 1981 amendment. The Rule now restricts the carrier to the use of public sale arrangements.

²³ See Ravera affidavit at 11 and 14.

WINAC's Cargo Lien Procedures

Rule 26's principal infirmity is that it permits the entire economic impact of its shipper penalty system to be placed upon U.S. consignees. Consignees do not ordinarily prepare shipping documents and must therefore be presumed "innocent" of misdescribing cargo unless the carrier has express evidence to the contrary. Nonetheless, WINAC directs its penalty collection efforts against the consignee even in cases such as the *Kopke* matter, *supra*, where the misdescription should be known before the cargo leaves Europe. This practice is not described with reasonable clarity, if at all, by Rule 26's present language, which creates the impression that only the "party at fault" will be required to pay the penalty.

The collection of penalties from consignees rather than shippers is encouraged by the economic leverage available through the use of Rule 26's cargo lien.²⁴ Although WINAC believes this method of penalty collection is the only "practical" remedy available to its member lines, the Conference simultaneously believes U.S. consignees should have no difficulty obtaining reimbursement from their European shippers.²⁵ The latter supposition is disproven by WINAC's own conduct as well as the Commission's experience in adjudicating cargo rating controversies involving foreign freight payors. Shippers without a legal presence in the United States can be difficult to locate and even more difficult to persuade. The Conference lines maintain offices and regularly transact business in Europe. They are clearly more capable of obtaining payments from European shippers than are U.S.-domiciled consignees.

WINAC also claims to have a policy of identifying and then contacting the "guilty" party before penalties are assessed.²⁶ The record in the *Kopke* decision, however, reveals that the carrier neither identified nor attempted to collect from the European shipper at fault before collecting an erroneously assessed penalty from the consignee.²⁷ Moreover, none of WINAC's alleged procedural protections for innocent parties is described in Rule 26. This omission not only violates section 18(b)(1)'s directive to disclose all practices which affect the rates to be charged, but raises the prospect that member lines possess and exercise the discretion to apply cargo liens in an uneven and discriminatory fashion depending upon their business relationships with the parties involved.

²⁴ See notes 6 and 12, *supra*.

²⁵ Compare Ravera affidavit at 3 and at 9 and 6.

²⁶ Ravera affidavit at 13. In the Italian trade, this practice apparently involves contacting the Italian forwarder rather than the shipper. WINAC states that in recent years, the forwarder has always paid "when confronted with evidence of a misdescription, except where it is claimed that the forwarder had instructions from the [consignee]." *Id.* Elsewhere, WINAC states that the responsible parties ordinarily agree to settle the matter without protest. *Id.* at 6.

²⁷ The *Kopke* shipment was perishable and required prompt delivery to the consignee against whom the cargo lien was enforced.

One provision not disclosed in Rule 26 is the shipper's purported option to secure the release of disputed cargo through the submission of a bond.²⁸

It is also an unreasonable practice within the meaning of section 17 for a carrier to condition cargo delivery upon the consignee's payment of penalties imposed because of the shipper's fault or omission. Basic fairness requires that carrier-imposed penalties be accompanied by protective measures which assure that only the parties at fault are penalized—either ultimately or in the first instance through the use of a cargo lien device—and that these measures be described in the governing tariff.²⁹

It has not been proven that collecting penalties from "innocent" parties is necessary to deter misdescriptions in the WINAC trade and the Commission finds no basis for accepting the contention that Rule 26 strikes the perfect balance between wholesale shipper misdescriptions and the loss of shipper good will. The relatively small number of misdescriptions which have been discovered by WINAC and the relatively small amount of the penalties assessed during 1978 and 1979 do not support the conclusion that collection of penalties by means of a lien against the cargo is critical to WINAC's commercial vitality.³⁰ A strong conference inspection program, coupled with a compensatory verification charge and the additional freight revenues collected when undercharges are discovered by cargo inspections, is just as likely to achieve the results WINAC attributes to Rule 26's present penalty/lien system.³¹

The fact that penalties are typically small does not justify the unfairness of Rule 26 when it is applied to a particular U.S. consignee which is in no way responsible for the misdescription or the general vagueness and potential for unjust discrimination reflected in the present language of the Rule.³² Accordingly, the Conference will be directed to cancel the February 12, 1981 version of Rule 26 from its tariff and hereafter to cease and desist from publishing imprecise and unfair penalty/cargo lien provisions and from imposing inexact or unspecified cargo verification

²⁸ Ravera affidavit at 8-9; Memorandum, at 25-26.

²⁹ Although the use of a cargo lien system to collect penalties from a person not accurately determined to be the party at fault is an unreasonable practice, cargo liens may be used to collect verification charges of the type contained in amended Rule 26 without unreasonably restricting the consignee's right to receive delivery of its cargo.

³⁰ WINAC states that its penalties are judiciously applied, provide few complaints and ordinarily do not exceed several hundred dollars. Ravera affidavit at 6 and 3.

³¹ See *Report on Reconsideration of Docket No. 73-64*, 21 F.M.C. 380, 385 (1980), affirmed, *Trans-Pacific Freight Conference of Japan/Korea v. Federal Maritime Commission*, 15 S.R.R. 775 (D.C. Cir. 1980), cert. den. 451 U.S. 984 (1981), regarding the need for self-policing system to include unintentional as well as intentional tariff deviations by conference member lines.

³² William Kopke was required to pay a penalty of \$562.74.

charges of the type described in the Commission's September 19, 1980 Order to Show Cause.

THEREFORE, IT IS ORDERED, That Rule 26 of the West Coast of Italy, Sicilian and Adriatic Ports, North Atlantic Range Ports Conference Tariff FMC No. 3 is cancelled, such cancellation to take place 60 days from the service date of this Order; and

IT IS FURTHER ORDERED, That the member lines of the West Coast of Italy, Sicilian and Adriatic Ports, North Atlantic Range Ports Conference listed in Appendix "B" hereto shall—effective 60 days from the service date of this Order—cease and desist from publishing tariff matter purporting to authorize or otherwise engaging in activities which have the following results:

- (1) the imposition of a cargo lien enforceable by means of a private sale of the cargo;
- (2) assessing a cargo verification charge which is not stated in exact terms in the applicable FMC tariff;
- (3) enforcing cargo misdescription penalties by means of a lien against the cargo which allows such penalties to be collected from persons other than the party at fault; and
- (4) refusing to deliver cargo on the basis of any reason or condition not fully and clearly set forth in the applicable FMC tariff.

and

IT IS FURTHER ORDERED, That this proceeding is discontinued.

By the Commission.

(S) FRANCIS C. HURNEY
Secretary

APPENDIX "A"

The carrier . . . [is to] verify the weight, volume, contents, value and nature of cargo, whenever reasonable doubts exist as to their correctness.

Should it result from this verification that there was a misdescription or misdeclaration or error of any kind in connection with said cargo, whether innocent or intentional, and whether known or unknown to the consignee, the [cargo interests] shall be liable to pay:

- (a) The difference of freight due on such cargo if the . . . error concern[s] the volume of the cargo, provided cargo is not containerized. Such difference to be paid, in any case, by the freight payer.
- (b) The difference of freight due on such cargo and the verification expenses [*] plus an amount equal to double such difference of freight if the said misdescription or misdeclaration or error concern the weight, contents, value and nature of cargo, or dimension of containerized cargo. The difference of freight to be paid, in any case, by the freight payer whilst the amount equal to double such difference plus the verification expenses is to be paid by the party [responsible for the misdescription or misdeclaration or error ("Party at Fault").]

The Carrier shall have a lien for any or all of said sums which he may enforce by public sale on notification given to the Consignee of the proposed sale even if said Consignee is not the party at fault. In the event of Consignee not being yet identified, steps will be taken by the Carrier or by the Conference Verification Service to notify the Shippers of the action to be taken.

* The verification expenses shall be \$100.00 per container plus, if the container is stripped for verification, an additional \$25.00 per ton.]

APPENDIX "B"

Member Lines of the West Coast of Italy, Sicilian and Adriatic Ports,
North Atlantic Range Ports Conference.

- 1) Black Sea Canada/U.S.A. Line
- 2) Concordia Lines
- 3) Constellation Line
- 4) D.B. Turkish Cargo Lines
- 5) Egyptian National Line
- 6) Farrell Lines, Inc.
- 7) Hansa Line
- 8) Hellenic Lines, Ltd.
- 9) Ibero Lines, S.A.
- 10) Italian Line
- 11) Jugolinija
- 12) Nedlloyd
- 13) Ro-Ro Charters Corporation
- 14) Sea-Land Service, Inc.
- 15) Seatrain International, S.A.
- 16) Zim Israel Navigation Co., Ltd.

FEDERAL MARITIME COMMISSION

DOCKET NO. 81-20
PROCTOR & SCHWARTZ, INC.

v.

MITSUI O.S.K. LINES, INC.

ORDER ADOPTING INITIAL DECISION

August 26, 1981

This proceeding was instituted by the filing of a complaint by Proctor & Schwartz, Inc. (Complainant) against Mitsui O.S.K. Lines, Inc. alleging an overcharge on two shipments, one from Baltimore, Md. to Kobe, Japan and the other from Portsmouth, Va., to Kobe. The complaint sought reparations of \$10,115.02.* On July 13, 1981, Administrative Law Judge Charles E. Morgan issued an Initial Decision finding for the Complainant and awarding reparation in the amount requested. No exceptions to the Initial Decision have been filed. The Commission, however, has determined to review the Initial Decision pursuant to Rule 227(d) of the Commission's Rules of Practice and Procedure (46 C.F.R. 502.227(d)).

Upon review, the Commission has determined that the Presiding Officer's findings and conclusions are correct. The Initial Decision will accordingly be adopted with the modification discussed below.

The Presiding Officer did not include interest on the reparation awarded. In order to make the Complainant "whole" and compensate it for the loss of the use of money due to the freight charges improperly assessed, the Commission believes that interest on the amount of reparations awarded should have been included as an element of damages. *U.S. Borax and Chem. Corporation v. Pacific Coast European Conference*, 11 F.M.C. 451, 470 (1968). The Commission will therefore modify the Presiding Officer's award to include interest at the rate of 12% per annum from the dates the Complainant paid the excess freight charges on the two shipments. *Allied Stores Int., Inc. v. United States Lines, Inc.* 20 S.R.R., 97 (1980). These dates are January 24, 1980 and March 4, 1980.

THEREFORE, IT IS ORDERED, That the Initial Decision served on July 13, 1981 in this proceeding is adopted and made a part hereof.

* The Complainant alleged an overcharge of \$6,020.10 on the first shipment and \$4,094.92 on the second shipment.

IT IS FURTHER ORDERED, That the Respondent Mitsui O.S.K. Lines, Inc. pay to the Complainant reparation in the amount of \$6,020.10 plus interest at the rate of 12% per annum from January 24, 1980 on the first shipment and \$4,094.92 plus interest at the rate of 12% per annum from March 4, 1980 on the second shipment.

By the Commission.

(S) FRANCIS C. HURNEY
Secretary

FEDERAL MARITIME COMMISSION

DOCKET NO. 81-20
PROCTOR & SCHWARTZ, INC.

v.

MITSUI O.S.K. LINES, INC.

Complainant found to have been overcharged \$10,115.02 on two shipments of film tender or stenter from Baltimore, Md., and Portsmouth, Va., to Kobe, Japan.

Joseph F. Queenan for the complainant.

Elmer C. Maddy and *Walter H. Lion* for the respondent.

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

Adopted August 26, 1981

The shortened procedure was followed. The Commission's Office of Energy and Environmental Impact has determined that section 547.4(a)(22) of the Commission's "Procedures for Environmental Policy Analysis" applies to this proceeding, and that "No environmental analysis needs to be undertaken nor environmental documents prepared in connection with this docket."

By complaint served February 23, 1981, the complainant, Proctor & Schwartz, Inc., a manufacturer of various types of machinery, alleges that it was overcharged in violation of section 18(b)(3) of the Shipping Act, 1916 (the Act), on two shipments, one shipment from Baltimore, Maryland, to Kobe, Japan, bill of lading No. BAKB-2001, dated January 11, 1980, and the other shipment from Portsmouth, Virginia, to Kobe, bill of lading No. NKFB-2006, dated February 18, 1980.

The charges billed and paid on the first shipment were based on a rate of \$174 per cubic meter for 223.962 cubic meters. Basic charges were \$38,969.39, plus currency adjustment factor (C.A.F.) of 12 percent or \$4,676.33, plus bunker fuel surcharge (B.S.C.) of \$17 per cubic meter or \$3,807.35, making total charges billed and paid of \$47,453.07.

The complainant seeks a rate on the first shipment of \$150 per cubic meter. Sought basic charges are \$33,594.30, plus 12 percent C.A.F. of \$4,031.32, plus the same B.S.C. of \$3,807.35, making total sought charges on the first shipment of \$41,432.97.

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

The complainant actually paid the amount of the total freight charges plus \$50, for forwarding fees and other charges, to its forwarder, Southern Overseas Corporation, on both of the two shipments, after the forwarder apparently prepaid the freight on the two shipments.

For the second shipment, the freight charges billed and paid were based on a rate of \$184 per cubic meter. Basic charges on 157.983 cubic meters were \$29,068.87, Plus 8 percent C.A.F. of \$2,325.51, plus B.S.C. of \$19 per cubic meter or \$3,001.68, making total charges billed and paid of \$34,396.06.

The complainant seeks a rate on the second shipment of \$160 per cubic meter. Sought basic charges are \$25,277.28, plus 8 percent C.A.F. of \$2,022.18, plus the same B.S.C of \$3,001.68, making total sought charges on the second shipment of \$30,301.14.

The differences in rates between the 1st and 2nd shipments were caused by advances in rates effective February 1, 1980.

The grand total for the two shipments of charges billed and paid was \$81,849.13. The total for the two shipments of sought charges is \$71,734.11. The difference of \$10,115.02 is the total of claimed overcharges on the two shipments.

The first shipment was described on the bill of lading as 5 containers said by the shipper to contain: 7 boxes and 312 loose pieces plastic working machinery "Part of one (1) set of film stenter (No. 8)."

The second shipment was described on the bill of lading as 4 containers said by shipper to contain: 34 boxes and 72 nozzles plastic working machinery "Part of one (1) set of film stenter (No. 8)."

Southern Overseas Corporation, the foreign freight forwarder, acting on behalf of the complainant, issued shipping advices dated January 7, 1980, and February 18, 1980, in connection with the two shipments herein, giving certifications of the origins of the shipments as products of the United States of America, and also describing the shipments in the exact same fashion as they were described in the bills of lading.

The complainant has plants in Philadelphia, Pennsylvania, Lexington, North Carolina, and Glasgow, Scotland. The term "stenter," according to the complainant, is used in Great Britain, while the same article is referred to as a "tenter" in the United States of America. The complainant's principal place of business is in Philadelphia.

The two bills of lading both list the shipper/exporter as Proctor and Swartz on behalf of Seknoy Co., Limited, 280 Earl's Court Road, London SW5. The consignee on both bills of lading is listed as "To Order." The "Notify Party" on each bill of lading is Nikko Trading Co., Inc., Tokyo, Japan.

The commodities shipped were licensed by the U.S. for ultimate destination Japan, and diversion contrary to U.S. law was prohibited, according to notations on the bills of lading.

On bill of lading BAKB-2001, dated January 11, 1980, "Seknoy Co. Limited L/C No. 04 2827/011/001" is listed below "Import Declaration No. I.D. (9) L (30)-00188." The letter of credit No. correctly should have been listed as 042327/011/001 as shown on the invoice dated December 26, 1979, to Nikko Trading Co., Inc., from Proctor & Schwarz, Inc.

On bill of lading NFKB-2006, dated February 18, 1980, under the same "Import Declaration No. I.D. (9) L (30)-00188," is the certification, "We certify that goods are of United States of America origin and manufacture," following which is "(blacked out name) L/C No. 042327/011/001."

Inasmuch as the same letter of credit apparently covered both shipments herein, it is reasonable to conclude that these two shipments were part of the same order. This is confirmed by the descriptions on both of the bills of lading, "Part of One (1) Set of Film Stenter (No. 8)."

This conclusion also appears to be confirmed by the fact that both shipments had the same Import Declaration No. I.D. (9) L (30)-00188.

The record does not otherwise disclose who or what Seknoy Co., Limited is, nor why the shipper/exporter was listed as Proctor and Swartz on behalf of Seknoy Co., Limited, nor why Seknoy Co., Limited is listed under the Import Declaration No. on one bill of lading, and apparently was blacked out in the same place on the second bill of lading. Seknoy Co. Limited is not blacked out on the Shipper's Export Declaration (Exhibit C. page 1 of 3 attached to the answering memorandum of the respondent) which covers bill of lading No. NFKB-2006, the second shipment.

In the shipper's export declaration prepared by its forwarder for the first shipment Schedule B Commodity No. 670.3100 was listed, which covers, "Weaving Machines, knitting machines, and textile machines—Other (including fabric trimmings or embroidery producing machines)."

In the shipper's export declaration for the second shipment Schedule B Commodity No. 670.3400 was listed, which covers, "Machine for making felt and non-woven fabrics included bonded fabrics, in the piece or in shapes, including felt-hat making machines and hat-making blocks; and parts thereof, n.s.p.f."

Because of the shipper's declarations of "Schedule B" numbers, the shipments were rated by the respondent according to the Far East Conference Commodity Code 006-0405-00, which provides rates on textile machines, laundry and dry cleaning machines; sewing machines; and parts—N.O.S.

Respondent states that even assuming the truth of complainant's statement that its forwarder erred in the description of Schedule B numbers in the shipper's export declarations, nevertheless that the complainant has not shown the Commodity Code which properly should

apply. Respondent states that the proper commodity code would have been 678-5000-00 covering "Machines not specially provided for, and parts, N.O.S.," as per Far Eastern Conference Tariff No. 28-FMC No. 12, page 704, as shown on Exhibit A to respondent's answering memorandum. The rate for this item as shown on the 10th revised page 704, effective January 1, 1980, was \$174, as was charged on the 1st shipment and the rate effective February 1, 1980, was \$184, as was charged on the second shipment.

The complainant contends that the shipment consisted of "one set of film stenter consisting of panels and nozzles and guidance system," and that the shipments were knocked down into separate component forms to save shipping space.

The complainant contends that the commodity shipped should have been rated under commodity code No. 678-3545-40 on "Plastic foamed sheet making and film making machines," taking the special rates of \$150 and \$160, respectively, for the first and second shipments.

The respondent points out that the complainant's sales literature shows that a "tenter" is only one of many components of a "Proctor Film Tenter and Oven" unit, and accordingly argues that a tenter is not qualified to be rated as a full "plastic sheet making or film making machine."

The complainant answers the respondent's contention above, by stating that Tariff No. 28, FMC 12, Far Eastern Conference, Item 3, paragraph (k), 1st Revised Page #16 reads:

Unless otherwise specifically provided by an individual commodity item for parts, the *rates provided therein also apply on the named parts of the articles described in the tariff Item when so declared on Ocean Bills of Lading.* (Emphasis supplied.)

The above provision makes it clear that a commodity item will also apply on parts of the commodity item when so declared on ocean bills of lading.

To obtain the rate on commodity code item No. 678-3545-40, this could have been accomplished by declaring on the bill of lading that the article shipped was "plastic foamed sheet making and film making machines," or by declaring that the article shipped was a part of such a machine or machines.

As seen, the bills of lading described the articles shipped as boxes and loose pieces plastic working machinery (first shipment), and as boxes and nozzles plastic working machinery (second shipment), both "Part of one (1) set for film stenter (No. 8)."

The bills of lading descriptions establish that plastic working machinery was shipped, and that such machinery was part of a set of film stenter.

The complainant states that while the incorrect commodity code Nos. 670-3400 and 670-3100 were used in the shipper's export declarations, this was nothing more than a clerical error.

It easily is understandable why the respondent charged the rate it did based on the commodity codes in the export declarations, Particulary when the commodities were shipped in containers. Had these articles not been in containers and if they had been subject to visual inspection by respondent, perhaps it would have been evident that these articles were not textile machines nor hat making machines.

Nevertheless, the record as a whole, including the sales literature furnished by the complainant, together with the bills of lading descriptions, of parts of one set of film stenter, appears sufficient to support the conclusion that the complainant has met its heavy burden of proof as to the nature of the commodity shipped.

It is concluded and found that the commodity shipped in each shipment was part of one set of film stenter, and that these articles are entitled to the special rates of \$150 (first shipment) and \$160 (second shipment) on "plastic foamed sheet making and film making machines."

The complainant was overcharged the total sum of \$10,115.02 on the two shipments, and reparation of that amount hereby is awarded.

(S) CHARLES E. MORGAN
Administrative Law Judge

FEDERAL MARITIME COMMISSION

DOCKET NO. 80-79
TUPPERWARE COMPANY

v.

COMPANIA SUD-AMERICANA DE VAPORES
(CHILEAN LINE)

ORDER REVERSING DISMISSAL OF COMPLAINT

August 26, 1981

This proceeding is before the Commission upon its determination to review the May 19, 1981 Order of Administrative Law Judge William Beasley Harris. That Order acknowledged the parties' settlement of a \$72,072.37 overcharge claim for \$40,000.00, granted the parties' motion to dismiss the complaint, and discontinued the proceeding.

At issue in this proceeding are eleven¹ shipments which Complainant shipper alleged were incorrectly rated by the Respondent carrier in violation of section 18(b)(3) of the Shipping Act, 1916 (46 U.S.C. 817). Complainant argued that the commodities should have been assessed the rates for "Utensils, Cooking, Kitchen or Toilet, N.O.S., non-electric, Plastic or Rubber," but were instead rated as "Plastic Articles." Respondent argued that the commodities were correctly rated, and that Complainant failed to meet the heavy burden of proof that attaches when the cargo has left the custody of the carrier.²

The Commission has determined that approval of the settlement as presented was improper and that the dismissal of the proceeding was therefore both premature and inappropriate. Although the Commission generally favors the settlement of controversies, it is at the same time concerned that settlements of section 18(b)(3) matters not provide a means for rebating or discriminatory rating practices. Carriers are required under section 18(b)(3) to charge or receive compensation only at the rates published in their tariff filed with the Commission. Failure to charge or receive the appropriate compensation is a violation of that section. In *Organic Chemicals (Glidden-Durkee) Division of SCM Corp. v. Atlantrafik Express Service*, 18 S.R.R. 1536a (1979), the Commission

¹ The complaint originally referred to twelve shipments. However, one shipment and the payment therefor took place more than two years before the November 12, 1980 filing of the instant complaint, and Complainant's claim based on this shipment was dismissed at a hearing held on April 14, 1981.

² Respondent initially rejected Complainant's attempt at a voluntary, informal settlement because of its "six-month rule."

imposed the following requirements for settlements under section 18(b)(3):

1. A signed agreement is submitted to the Commission;
2. The parties file with the settlement agreement an affidavit setting forth the reasons for the settlement and attesting that the settlement is a bona fide attempt by the parties to terminate their controversy and not a device to obtain transportation at other than the applicable rates and charges or otherwise circumvent the requirements of the Shipping Act, 1916, or of the Intercoastal Shipping Act, 1933, as amended, as the case may be;
3. The complaint on its face presents a genuine dispute and the facts critical to the resolution of the dispute are not reasonably ascertainable.

18 S.R.R. 1539.

Upon review of the record, it is evident that the instant settlement is not approvable under the aforementioned standards. The second condition imposed by *Organic* has not been satisfied in that no such affidavit has been filed. More importantly, the third condition has not been met in this instance, nor does it seem likely that it could be. The facts critical to the resolution of this dispute—*i.e.*, what constituted the shipments in issue—would appear to be reasonably ascertainable. First, Complainant's submissions include invoices listing the commodities in issue, all of which appear to be Tupperware products. Moreover, the parties' settlement agreement includes an exhibit in which the parties list, shipment by shipment, the rates "As Charged," the charges that "Should Be," and the amounts of "Reparation/Overcharge," which total \$72,072.37.

A \$40,000.00 settlement of a proceeding in which the parties agree that there have been \$72,072.37 in freight overcharges would permit a continued violation of section 18(b)(3) of the Act and is not approvable under the *Organic* standards. The Presiding Officer's Order discontinuing the proceeding will therefore be reversed, and the proceeding will be remanded to the Presiding Officer with instructions to make a specific finding whether the third criterion of the *Organic* decision can be met. If it cannot, the Presiding Officer shall disapprove the settlement agreement and proceed with the adjudication.

THEREFORE, IT IS ORDERED, That the May 19, 1981 Order granting the motion to dismiss and discontinuing the proceeding is vacated; and

IT IS FURTHER ORDERED, That this proceeding is remanded to the Presiding Officer for further action consistent with this Order.

By the Commission.

(S) FRANCIS C. HURNEY
Secretary

FEDERAL MARITIME COMMISSION

46 C.F.R. PART 536

GENERAL ORDER 13, AMDT. NO. 10,

DOCKET NO. 80-56

PUBLISHING AND FILING TARIFFS BY COMMON CARRIERS IN THE FOREIGN COMMERCE OF THE UNITED STATES; PROHIBITION OF FILING TEMPORARY AMENDMENTS

August 31, 1981

ACTION: Stay of Final Rule

SUMMARY: The Commission's decision in the proceeding removed the provisions of 46 C.F.R. 536.10(c), which would prohibit the practice of accepting the filing of temporary amendments to tariffs published by carriers and conferences of carriers in the foreign commerce of the United States, effective September 8, 1981. Various conferences have filed petitions requesting a stay of the effective date to allow opportunity to comment on the rationale explained by the Commission in arriving at its decision. The Commission now has decided to stay the effective date of its order so that it may have the benefit of a full staff analysis and recommendation on the issues raised by petitioners.

DATE: Effective September 3, 1981.

SUPPLEMENTARY INFORMATION:

The Commission published its final rule in this proceeding July 7, 1981, (46 FR 35092). The rule contains a provision which prohibits the filing of any type of temporary tariff amendment. The Commission has received petitions from various conferences requesting a stay of the effective date of its decision to allow interested parties the opportunity to comment on the rationale explained by the Commission in arriving at its decision to prohibit the acceptance of temporary tariff amendments. So that the Commission may have the benefit of a full staff analysis and recommendation on the issues raised by the petitioners, the effective date must necessarily be stayed.

Therefore, it is ordered, that the effective date of the removal of 46 C.F.R. 536.10(c) is stayed pending further order of the Commission.

By the Commission.

(S) FRANCIS C. HURNEY
Secretary

FEDERAL MARITIME COMMISSION

46 C.F.R. PART 502

[GENERAL ORDER NO. 16, AMDT. 40; DOCKET NO. 81-22]
RULES OF PRACTICE AND PROCEDURE

September 3, 1981

ACTION: Final Rule

SUMMARY: Fluctuations in interest rates have required the FMC to modify its past practice regarding awards of interest in reparation proceedings. This rule prescribes the rate of interest to be granted as part of reparation awards in cargo misrating cases. Interest will be based on the rates on 6-month U.S. Treasury bills. The intended effect of the rule is to compute interest awards that more accurately reflect prevailing interest rates during the reparation period involved in each case.

DATE: Effective September 10, 1981.

SUPPLEMENTAL INFORMATION:

On March 17, 1981, the Commission issued a notice of proposed rulemaking providing for the grant of interest on awards of reparation in cases involving the misrating of cargo arising under section 18(b)(3) of the Shipping Act, 1916 (46 U.S.C. 817 (b)(3)) and section 2 of the Intercoastal Shipping Act, 1933 (46 U.S.C. 844). The interest awarded would be based on the rate paid on six-month U.S. Treasury bills averaged over the reparation period.

Eight responses to the proposed rule were submitted, on behalf of numerous conferences of carriers.¹ Comments received are summarized and discussed below.

¹ Comments were submitted by:

- (a) Pacific Westbound Conference, Pacific-Straits Conference, Pacific Indonesian Conference, and Far East Conference;
- (b) Australia-Eastern U.S.A. Shipping Conference, Greece/U.S. Atlantic Agreement, Iberian/U.S. North Atlantic Westbound Freight Conference, Italy, South France, South Spain, Portugal/U.S. Gulf and The Island of Puerto Rico (Med-Gulf) Conference, Marseilles North Atlantic U.S.A. Freight Conference, Mediterranean-North Pacific Coast Freight Conference, North Atlantic Mediterranean Freight Conference, U.S. Atlantic & Gulf/Australia-New Zealand Conference, U.S. South Atlantic/Spanish, Portuguese, Moroccan and Mediterranean Rate Agreement, The West Coast of Italy, Sicilian and Adriatic Ports/North Atlantic Range Conference (WINAC);

Continued

Some commenting parties argue that the proposed rule is inconsistent with the holdings in *Consolo v. FMC*, 383 U.S. 607 (1966) and *Flota Mercante Grancolombiana, S.A. v. FMC*, 373 F.2d 674 (D.C. Cir. 1967), that awards of reparation under section 22 of the Shipping Act, 1916 (46 U.S.C. 821) are discretionary. They contend that because the rule does not allow for exceptions it constitutes an abdication of statutory discretion. The rule is also alleged to be contrary to prior Commission decisions indicating that interest on reparation awards will be denied if the misrating is the result of the negligence or misrepresentations of the shipper. Accordingly, the Commission is urged to modify the rule to allow a case-by-case determination of interest awards.

While the proposed rule does alter the existing Commission practice of making a strict case-by-case determination of all elements of interest awards in reparation proceedings, it is neither improper nor inconsistent with case law. Generally, the choice made between proceeding by general rule or on an *ad hoc* basis is one that rests with the discretion of the administrative agency. *SEC v. Chenery Corp.*, 332 U.S. 194, 203 (1947); *British Caledonia Airways, Ltd. v. CAB*, 584 F.2d 982, 993 (D.C. Cir. 1978). While *Consolo* and *Flota, supra*, did construe section 22 of the Act as allowing the Commission some discretion in reparation proceedings to consider the equities of each case before it, those cases did not address the issue of whether it would be permissible to eliminate such discretion by rule. In any event, it is not the intent of the rule to remove all discretion from the Commission. The rule does contemplate exceptions. These exceptions, however, would be narrow and generally limited to situations involving shipper fraud or misconduct. See *Girton Manufacturing, Co. v. Prudential Lines, Inc.*, 23 F.M.C. 74, 75

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- (c) The Associated Latin American Freight Conferences, consisting of United States Atlantic & Gulf-Haiti Conference, United States Atlantic & Gulf-Jamaica Conference, United States Atlantic & Gulf-Santo Domingo Conference, Southeastern Caribbean Conference, Atlantic & Gulf/West Coast of South America Conference, United States Atlantic & Gulf/Venezuela Conference, West Coast of South America Northbound Conference, East Coast Colombia Conference, and Atlantic & Gulf/Panama Canal Zone, Colon and Panama City Conference;
 - (d) The North European Conferences, consisting of North Atlantic United Kingdom Freight Conference, North Atlantic French Atlantic Freight Conference, North Atlantic Continental Freight Conference, North Atlantic Baltic Freight Conference, Scandinavia Baltic/U.S. North Atlantic Westbound Freight Conference, Continental North Atlantic Westbound Freight Conference, North Atlantic Westbound Freight Association, United Kingdom & U.S.A. Gulf Westbound Rate Agreement, Continental-U.S. Gulf Freight Association, Gulf-United Kingdom Conference, and Gulf-European Freight Association;
 - (e) Agreement No. 10107, Agreement No. 10108, Japan/Korea Atlantic & Gulf Freight Conference, Japan-Puerto Rico & Virgin Islands Freight Conference, New York Freight Bureau, Trans-Pacific Freight Conference (Hong Kong), Trans-Pacific Freight Conference of Japan/Korea, Thailand/Pacific Freight Conference, and Thailand/U.S. Atlantic & Gulf Conference;
 - (f) Inter-American Freight Conference;
 - (g) Atlantic and Gulf-Indonesia Conference;
 - (h) Atlantic and Gulf-Singapore, Malaya and Thailand Conference.

(1980). Because the rule intends exceptions under certain circumstances, it has been modified to make this clear.

The comments urge that the Commission consider other factors in determining whether and in what amount interest will be awarded in proceedings involving the misrating of cargo. It is argued that in cases where delay in presenting a claim is attributable to the shipper, the period upon which interest is based should be proportionately reduced. The commenting parties also suggest that some time limit on interest awards be imposed to protect carriers from interest charges caused by delays beyond their control. Because the award of interest is intended to compensate the shipper for the loss of use of funds, the Commission is further urged to take into consideration the *actual* financial losses of the claimant. As an example, it is argued that freight auditors, who have no actual losses, should not be allowed to benefit from the rule.

These comments in effect urge the Commission to inject fault considerations into the proposed rule. Fault of the shipper is irrelevant to the award of reparation in cases involving the misrating of cargo and the only consideration is proof of what was actually shipped. *Kraft Foods v. Moore McCormack Lines*, 19 F.M.C. 407, 410 (1976). Because interest in reparation proceedings is intended to make the shipper "whole," *U.S. Borax & Chem. Corp. v. Pacific Coast European Conference*, 11 F.M.C. 451, 470 (1968), the same rule, holding that fault is irrelevant, will generally apply. Moreover, if fault were to become a factor in interest awards, proceedings involving routine misrating claims could evolve into legally and factually more complex negligence actions, frustrating efforts to dispose of these claims efficiently.

Other "equitable" considerations suggested in the comments which tend to undermine the overall purpose of the general rule are similarly rejected. Because the party who actually paid the freight charge has been held to have suffered the "injury" within the meaning of section 22, and not the party who "ultimately bore the cost of the overcharge," *Sanrio, Inc. v. Maersk Line*, 19 S.R.R. 907 (1979), the carrier may not avoid the payment of interest on the basis of third party relationships for which there is no privity. Similarly, assignees, *i.e.*, "freight auditors," obtain for a consideration legal title to the claim of an "injured" party for reparations, and such assignments do not extinguish any part of the recognized section 22 damages, including interest. *See Ocean Freight Consultants, Inc. v. Bank Line, Ltd.*, 9 F.M.C. 211 (1966).

Commenting parties further point out that carriers cannot bring a claim for undercharges against the shipper before the Commission but rather must proceed in court, thereby limiting them to that forum's statutory rate of interest. Because these parties believe this interest rate is likely to be lower than the Treasury bill rate, and is therefore seen as giving an unfair advantage to shippers, the Commission is requested to seek an amendment to the Shipping Act to allow carrier claims against

shippers. The commenting parties believe that until this is done the Commission should limit interest awards to the statutory rate of the forum in which such claims would otherwise have to be brought.

This suggestion not only ignores the realities of the situation but also overlooks the basis of the rule. First, the Commission's statutory inability to entertain undercharge claims by carriers against shippers cannot act as a basis for denying relief to shippers for overcharges.² The Commission cannot amend the Shipping Act by rulemaking nor refuse to fulfill its statutory obligations pending any such amendment.

Second, the Commission has determined that a "statutory" rate of interest or any fixed level of interest does not reflect contemporary conditions. The rule as proposed establishes a method of computing interest that accurately and fairly reflects the loss incurred by shippers. Because the Shipping Act does not prescribe the manner in which compensation for injuries under section 22 is to be computed, the Commission is necessarily entitled to exercise discretion in determining which rate of interest is appropriate in reparation awards.

Two perspectives can be taken in evaluating the choice of an interest rate. One perspective is that the shipper has effectively "loaned" money to the carrier during the period of the overpayment and that the carrier should pay a rate of interest as if it were a borrower. This would suggest a rate such as the prime which is typically higher than the rates on commercial paper in investment portfolios. The other perspective is that, were it not for the overpayment, the shipper would have had the additional funds to use or to invest, and thus the shipper should be compensated according to investment rates in the money and capital markets. These rates are lower than those charged by lenders and should put no undue burden on the carrier because the overpayment is money that the carrier could have invested anyway. Thus, the carrier is paying interest at a rate which is approximately that which the shipper could have earned if the shipper had been able to invest the amount of the overpayment. In order to borrow that same amount of money, the carrier would have had to pay a much higher rate of interest.³

Once having concluded that it is more appropriate to focus on an investment rather than a loan rate, a further question arises as to whether the rate selected should reflect short term or long term investment opportunities. The rule suggests six-month Treasury bills because the Commission is of the opinion that the combination of uncertainty

² However, carriers are entitled to a set-off for undercharges against a claim for overcharges when both arise under a single bill of lading. *Colgate Palmolive Co. v. The Grace Line*, 17 F.M.C. 279 (1974).

³ It is interesting to note in this context that the Internal Revenue Service, by statute, focuses on the higher rate at which money could be borrowed when it establishes a rate for the overpayment or underpayment of taxes (Section 5521(b) of the Internal Revenue Code, 26 U.S.C. 6621(b)).

and generally short duration of overpayment circumstances makes it unlikely that these funds could be used for longer term investments.

One commenting party suggests that the Treasury bill interest level is too high because the small amounts of money generally involved in reparation cases are not eligible for investment at the Treasury bill rate. The Commission cannot agree with this suggestion. While most reparation amounts, by themselves, would probably not be large enough to invest in Treasury bills, there are a myriad of investment opportunities at rates approximating the Treasury bill rate which are available to the smaller investor.⁴ Thus, the Commission continues to believe that the use of an average Treasury bill rate as opposed to a fixed "statutory" rate or "passbook" rate is a valid exercise of agency discretion. *Global Van Lines v. ICC*, 627 F.2d 546, 553 (D.C. Cir. 1980).

Several specific amendments to the proposed rule have been advanced. One commenting party requests that the term "misrating" be redefined to exclude shipper misrepresentation. As stated above, the rule will be modified to exclude cases where shipper deception or misconduct is shown. No further redefinition is deemed necessary.

It also has been suggested that the rule specify whether interest will be simple, compounded or prorated. The Commission agrees that clarification of this point is appropriate and the rule has accordingly been revised to specify that simple interest is contemplated. The final rule also specifies that interest will accrue from the date of payment of freight charges to the date reparations are paid.

Finally, it is proposed that interest not be made mandatory where the claim is settled between the parties. This suggestion is also found to have merit. Except in situations where facts critical to the resolution of a dispute are not reasonably ascertainable, settlements of section 22 reparations claims based on misrating of cargo must reflect the applicable freight rate to comply with the requirements of section 18(b). *Organic Chemicals v. Atlanttrafik Express Service*, 18 S.R.R. 1536a (1979). However, because interest is not part of the freight rate, it is appropriate that its treatment in settlement agreements be left up to the parties. The Commission has modified the rule to except settled claims from its scope.

This proposed rule would appear to be exempt from the requirements of the Regulatory Flexibility Act (5 U.S.C. 601 et seq.). Section 601(2) of that Act excepts from its coverage any "rule of particular applicability relating to rates . . . or practices relating to such rates. . . ." This rule would seem to be one "relating to rates." However, since an initial

⁴ See, e.g., Statement of the Honorable John R. Evans, Commissioner of the Securities and Exchange Commission, before the House of Representatives Subcommittee on Domestic Monetary Policy of the House Committee on Banking, Finance and Urban Affairs, concerning the Regulation of Money Market Funds, April 8, 1981.

regulatory flexibility analysis was issued in this proceeding, providing a final flexibility analysis will not delay or protract this rulemaking proceeding, although this analysis may not be required. Accordingly, and without prejudice to any future determination as to the applicability of the Act to this or any related rule, the following final regulatory flexibility analysis is being provided.

The need for, and the objectives of, the rule are stated in the "Summary" above. No comments in response to the initial regulatory flexibility analysis published in this rulemaking proceeding have been received by the Commission.

This rule is intended to result in a favorable economic impact on small entities. Accordingly, consideration of alternatives which minimize the economic impact of the rule would appear to be unnecessary. However, the Commission has considered alternatives to the proposed rule and has determined that they are impractical. A discussion of one of these alternatives was provided in the Notice of Proposed Rulemaking issued in this proceeding on March 17, 1981 (46 F.R. 17064).

Therefore, pursuant to 5 U.S.C. 553 and sections 22 and 43 of the Shipping Act, 1916 (46 U.S.C. 821 and 841(a)), Part 502 of the Code of Federal Regulations is amended by the addition of a new section 502.253 as follows:

Section 502.253. Interest in Reparation Proceedings.

Except as to applications for refund or waiver of freight charges under section 502.92 of this part and claims which are settled by agreement of the parties, and absent shipper fraud or misconduct, interest will be granted on awards of reparation in cases involving the misrating of cargo and arising under section 18(b)(3) of the Shipping Act, 1916 and section 2 of the Intercoastal Shipping Act, 1933. Interest (simple) will accrue from the date of payment of freight charges to the date reparations are paid. The rate of interest will be calculated by averaging the monthly rates on six-month U.S. Treasury bills commencing with the rate for the month that freight charges were paid and concluding with the latest available monthly Treasury bill rate at the time reparations are awarded.

By the Commission.

(S) FRANCIS C. HURNEY
Secretary

FEDERAL MARITIME COMMISSION

46 C.F.R. PART 537

[GENERAL ORDER 18, AMDT. 5; DOCKET NO. 81-4]
FILING OF MINUTES

September 11, 1981

ACTION: Final Rule

SUMMARY: This excludes from existing reporting requirements discussions and decisions dealing with certain routine rate actions. Experience has shown that such reporting is redundant and of little use as a surveillance tool. This exemption will lessen regulatory requirements.

DATE: Effective October 19, 1981.

SUPPLEMENTARY INFORMATION:

The Commission previously gave notice (46 F.R. 8599-8600) that it proposed to amend 46 C.F.R. § 537.3 to exclude from the reporting requirements minutes of conference or rate agreement meetings dealing with certain routine rate actions. Section 537.3 presently requires that:

(a) Within 60 days of the effective date of this part, the parties to each approved conference agreement, agreement between or among conferences, or agreements whereby the parties are authorized to fix rates (except two-party rate-fixing agreements and except leases, licenses, assignments or other agreements of similar character for the use of marine terminal property or facilities) shall, through a designated official, file with the Federal Maritime Commission a report of all meetings describing all matters within the scope of the agreement which are discussed or taken up at any such meeting, and shall specify the action taken with respect to each such matter. For the purpose of this part, the term 'meeting' shall include any meeting of parties to the agreement, including meetings of their agents, principals, owners, committees or subcommittees of the parties authorized to take final action in behalf of the parties. If the agreement authorizes final action by telephonic or personal polls of the membership, a report describing each matter so considered and the action taken with respect thereto shall be filed with the Commission. These reports need not disclose the identity of parties that propose actions, or the identity of parties that participated in the discussions of any particular matter.

Since these rules became effective in 1966, experience has shown that the majority of minutes filed with the Commission involve decisions by the conference or rate agreement membership to adopt new or initial rates or to alter the level of or delete existing rates, with little or no substantive discussion being presented as to the basis for the proposals or the decisions reached. The minutes reporting those rate actions are essentially redundant because such rates must also be filed in an appropriate FMC conference tariff. Also, many conference actions involving rates are taken pursuant to requests received from shippers. All such requests are ultimately included in reports filed with the Commission annually under General Order 14 (46 C.F.R. § 527) which include more detail than is usually incorporated in conference minutes. These rate related minute filings, standing alone, generate a considerable paper flow through the Commission at substantial expense to all concerned without providing significant useful information.

Therefore, it was proposed that 46 C.F.R. § 537.3 be amended to exclude from its scope reports of decisions by ratemaking groups to adopt a new or initial commodity rate or alter the level of or delete an existing commodity rate, to the extent said rate actions are filed in tariffs pursuant to the notice requirements of section 14(b) and 18(b) of the Shipping Act, 1916 (46 U.S.C. 813a and 817b). At the same time, and in order to preserve the essential elements of those reports required under 46 C.F.R. § 537.3, it was proposed that those discussions and decisions relating to general rate policy, *i.e.*, rule changes, general rate increases, surcharges, the opening of a rate or rates, etc., must continue to be reported. Periodic reports related to these matters are useful to the Commission in carrying out its responsibility to assure, on a continuing basis, that rate activities under approved agreements are consistent with Shipping Act objectives.

Commentators were requested to respond with specific examples, if any, as to how, in their view, the proposed exclusion would substantially impair effective regulation by the Federal Maritime Commission or significantly affect the overall design of regulation contemplated by the Act.

Twelve responses were received representing the views of 35 conferences and ocean carriers, including the members of one discussion agreement. The commentators either supported the proposed rule as written or with modifications. The main area of concern related to the distinction between "routine rate actions," which do not have to be reported, and "general rate policies," which do. The commentators maintain that the proposed rule puts conferences and rate agreements in the position of making decisions with respect to minute filing requirements without clear and precise guidelines. One conference noted that such uncertainty and confusion could subject the group to penalties due to their not reporting certain actions which the Commission may have

intended them to report. Accordingly, it was suggested that the rule be revised to more clearly define those actions that are either included in, or exempted from the Commission's minute filing requirements.

Several commentators expressed concern that the rule might actually increase the industry's paperwork burdens. These commentators argue that because minutes of conference meetings will be kept regardless of any Commission requirement and because such meetings virtually never involve decisions on only "exempt" commodity rates, the proposed rule would require the conference to (1) either keep two sets of minutes for the same meeting, one for commodity rate adjustment items and the other for the rest of the tariff items being considered, or (2) continue to submit a full set of minutes to the Commission. The Commission has considered these comments, but since minutes of routine rate actions may still be filed at the conference's option, it is unlikely that the rule would result in increased paperwork.

To eliminate the confusion which apparently exists as to which discussion or action items are to be considered "routine rate actions," and therefore exempt, and which items relate to "general rate policy," and therefore must be reported, the Commission is including appropriate criteria for such determinations into the final rule. Under these criteria, which relate to tariff format requirements presently outlined in 46 C.F.R. § 536.4(f),* rate actions or discussions of rate actions that, if adopted, would be required to be filed in the Commodity Rate Section, Class Rate Section or Open Rate Section of the applicable tariff need not be reported. Actions on, and discussion of, matters of general rate policy, general rate changes, the act of opening or closing rates, or the removal of an item from inclusion in a dual rate system must be reported as are all other "general rate policy" items that would, if adopted, be published in other tariff sections specified in 46 C.F.R. § 536.4(f), e.g., the Surcharge Section, the Rules and Regulations Section.

The rule promulgated herein is intended to reduce the volume of minutes required to be filed without jeopardizing the Commission's ability to carry out its statutory responsibilities. As such, it is in furtherance of the Commission's continuing effort to more clearly define those matters considered necessary for effective regulation. The Commission therefore intends to periodically evaluate the quality and quantity of minutes filed to determine whether they enable it to effectively and

* 46 C.F.R. § 536.4(f) provides as follows:

(f) To the extent applicable, all tariffs filed pursuant to this part shall be arranged in the following order:

Title Page. Check Sheet. Table of Contents. Participating Carrier Page. Surcharge and/or Arbitrary/Differential/Outport Differential (or other identifying term) Section. Rules and Regulations Section. Index of Commodities and Classifications. Commodity Rate Section. Classifications and Class Rate Section. Routing Section. Open Rate Section.

efficiently monitor the concerted activities of carriers operating under FMC approved agreements or, alternatively, whether they impose unnecessary regulatory burdens. In the event the existing minute reporting requirements prove inadequate or without valid regulatory purpose, further revisions will be considered.

Pursuant to the Regulatory Flexibility Act (5 U.S.C. 601 *et seq.*) the Commission certifies that this rule will not have a significant economic impact on a substantial number of small entities. The rule will not impose any reporting or record keeping requirements which might result in a compliance or reporting burden on small entities. It will primarily benefit carriers by lessening reporting requirements imposed on conferences and rate agreements.

THEREFORE, IT IS ORDERED, That pursuant to sections 15, 21 and 43 of the Shipping Act, 1916 (46 U.S.C. 814, 820 and 841a), and 5 U.S.C. 553, 46 C.F.R. Part 537 is amended by adding paragraph (d) to section 537.3 to read as follows:

(d) No report need be filed under paragraph (a) of this section with respect to any discussion of or action taken with regard to rates that, if adopted, would be required to be published in the Commodity Rate Section, Class Rate Section or Open Rate Section of the pertinent tariff on file with the Commission. This reporting exemption does not apply to 1) discussions involving general rate policy, general rate changes, the opening or closing of rates or the removal of items from a dual rate system, or 2) discussions involving items, that, if adopted, would be required to be published in other tariff sections as specified in 46 C.F.R. § 536.4(f).

By the Commission

(S) FRANCIS C. HURNEY
Secretary

FEDERAL MARITIME COMMISSION

[46 C.F.R. PART 524]

[GENERAL ORDER 23, REVISED: DOCKET 81-6]

EXEMPTION OF CERTAIN AGREEMENTS FROM THE REQUIREMENTS OF SECTION 15 SHIPPING ACT, 1916

September 23, 1981

AGENCY: Federal Maritime Commission

ACTION: Final Rule

SUMMARY: This exempts agreements which relate to routine administrative or housekeeping matters from the filing and approval requirements of section 15 of the Shipping Act, 1916. These agreements have previously been routinely approved and appear to have little or no anticompetitive potential. Exemption should lessen the regulatory burden on ocean carriers and encourage the formation of agreements involving routine housekeeping or administrative matters which should promote efficiencies and economies in operation for such carriers.

DATE: Effective November 2, 1981.

SUPPLEMENTARY INFORMATION:

Section 35 of the Shipping Act, 1916 (the Act) (46 U.S.C. 833a) provides that the Commission, upon application or on its own motion, may by order or rule exempt for the future any class of agreements between persons subject to the Act, or any specified activity of such persons from any requirement of the Act, where it finds that such exemption will not substantially impair effective regulation by the Commission, be unjustly discriminatory, or be detrimental to commerce.

The Commission previously gave notice (16 FR 10178) that it proposed to amend 16 C.F.R. Part 524 to exempt certain agreements from the filing and approval requirements of section 15 of the Act (46 U.S.C. 814). The agreements proposed to be exempted involve non-substantive routine housekeeping or administrative matters. Specifically, this type of agreement: 1) reflects changes in the name of a port or country currently served; 2) substitutes officers and/or committee assignments; or 3) relates to the procurement, maintenance and sharing of office facilities, furnishings, equipment, supplies and personnel.

Eight responses to the proposed rulemaking were filed on behalf of 31 conferences/rate agreements, one discussion agreement and one independent carrier. All but one commentator support the rule as proposed or with modifications.

Two commentators suggest that the rule's reference to "committee assignments" is unclear and that it should refer to "establishment of committees." The Commission believes the reference to "committee assignments" can be modified to remove any confusion, and this has been accomplished in the final rule. Furthermore, the establishment of a committee by the members of an agreement should be allowed under the rule. Accordingly, the rule has been revised to so allow.

Uncertainty has also been expressed as to whether exempted non-substantive provisions must be included in the basic agreement of a conference and filed with the Commission before such provisions may be carried out, and, if so, whether they must be designated in some manner to indicate they have been filed for informational purposes only. The Commission does not believe that such provisions need a special designation to indicate they have been filed for informational purposes. Section 524.3 provides that an informational filing must be made within 30 days of the effective date of the provisions.

The U.S.-Flag Far East Discussion Agreement participants contend that potential adverse effects in the form of undue risks of antitrust exposure outweigh any benefits of the proposed exemption. For example, they believe it conceivable that even the exchange of information relating to the sharing of office facilities may give rise to a claim by certain parties of a restraint of trade. They view the filing option as unrealistic and one that would rarely be exercised. This result is anticipated because the U.S.-flag carriers in the several U.S./Far East conferences are minority members, and the majority foreign-flag members may be less concerned about the potential application of U.S. antitrust laws and thus would not vote to file the agreements for the optional approval provided. The Commission is, therefore, urged to continue to require the filing and approval of such agreements and adopt a simplified processing procedure so that they can be handled under delegated authority or approved by notation.

The concern expressed by the U.S.-Flag Far East Discussion Agreement parties does not, in the Commission's opinion, establish a justifiable basis or regulatory need for continued Commission approval of arrangements with *de minimus* anticompetitive impact*. Moreover, it is unlikely that coordinated activity under such agreements will result in violations of the antitrust laws. However, if problems arise because of

* The filing of such agreements will remain optional under the current rule (46 C.F.R. 524.7).

the filing option, this should be brought to the Commission's attention for such further action as may be warranted.

Pursuant to a commentator's suggestion, the Commission will amend Item 3 of the final rule to include provisions for the allocation and assessment of costs and the administration and management activities incidental to agreements providing for the procurement, maintenance or sharing of office facilities, furnishings, equipment and personnel, including employees and contractors.

Certain other suggestions regarding amendments which should also be defined as non-substantive agreements (for example, those involving a change in the name of an agreement or in the names of parties to an agreement, corrections to typographical and grammatical errors, renumbering and relettering of articles and subarticles of agreements, changes in the tables of contents of agreements or changes in the names and/or numbers of any other section 15 agreements or designated provisions thereof referred to in an agreement and changes in the date or amendment number contained in agreements) have been added to the rule.

Pursuant to the Regulatory Flexibility Act (5 U.S.C. 601 *et seq.*), the Commission certifies that the proposed rulemaking will not have a significant economic impact on a substantial number of small entities. The proposed exemption will not impose any reporting or record-keeping requirements which might result in a compliance or reporting burden on small entities. The exemption will primarily benefit carriers. The shipping public, some of whom fall within the definition of small entities, may enjoy a secondary benefit from this exemption, but it is not foreseen that this benefit will amount to a "significant economic impact," within the meaning of 5 U.S.C. 605(b).

THEREFORE, pursuant to sections 15, 35 and 43 of the Shipping Act, 1916 (46 U.S.C. 814, 833a and 841a) and 5 U.S.C. 553, 46 C.F.R. Part 524 is amended by adding a new paragraph (d) to section 524.2 *Definitions*, as follows:

- (d) A non-substantive agreement is an agreement between common carriers by water acting individually or through approved agreements which:
 - (1) reflects changes in the name of any geographic locality stated therein, the name of the agreement or the name of a party to the agreement, the names and/or numbers of any other section 15 agreement, or designated provisions thereof referred to in an agreement, the table of contents of an agreement, the date or amendment number through which agreements state they have been reprinted to incorporate prior revisions thereto or which corrects typographical and grammatical errors in the text of the agreement, renumbers or reletters articles or subarticles of agreements and references thereto in the text,

- (2) reflects changes in the titles of persons or committees designated therein or transfers the functions of such persons or committees to other designated persons or committees or which merely establishes a committee, or
- (3) concerns the procurement, maintenance, or sharing of office facilities, furnishings, equipment, supplies and personnel, including employees and contractors, the allocation and assessment of the costs thereof, or the provisions for the administration and management of such agreements by duly appointed individuals.

Section 524.3 would be amended by adding a final sentence which reads:

524.3 . . . and provided further, that a non-substantive agreement which modifies an agreement which is subject to the requirements of section 15 shall be filed with the Commission for informational purposes only within 30 days of its effective date.

By the Commission

(S) FRANCIS C. HURNEY
Secretary

FEDERAL MARITIME COMMISSION

DOCKET NO. 81-25

UNION CARBIDE CORPORATION

v.

NIPPON YUSEN KAISHA (N.Y.K. LINES)

NOTICE

September 23, 1981

Notice is given that no exceptions have been filed to the August 18, 1981 initial decision in this proceeding and the time within which the Commission could determine to review has expired. No such determination has been made and, accordingly, the initial decision has become administratively final.

(S) FRANCIS C. HURNEY
Secretary

FEDERAL MARITIME COMMISSION

DOCKET NO. 81-25

UNION CARBIDE CORPORATION

v.

NIPPON YUSEN KAISHA (N.Y.K. LINES)

Held:

- (1) Where a shipper transported "cooling towers" but did not specifically so describe the cargo on the pertinent bill of lading, the appropriate freight rate is that rate applicable to "cooling towers," rather than an N.O.S. (Not Otherwise Specified) rate, since what is actually shipped determines the applicable rate.
- (2) Where a bill of lading inadequately described the cargo to be shipped, neither is the carrier bound by the description on the bill of lading nor is it valid to argue that inadequately described cargo should be assessed at the highest possible tariff rates.

Warren Wytzka for complainant.

Henry Bieg for respondent.

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

Finalized September 23, 1981

This proceeding began with the filing of a Complaint by Union Carbide Corporation (UCC) against Nippon Yusen Kaisha Lines (NYK).² The facts and law regarding the issues raised in the Complaint are set forth in the following portions of this decision. Both parties have requested the "Informal Procedure."³

FINDINGS OF FACT

1. The Complainant, Union Carbide Corporation (UCC), is a corporation incorporated in the State of New York. It is located at 11 W. 42nd Street in New York City.

2. UCC operates many businesses, one of which is the marketing of cryogenic equipment.

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

² The Complaint refers to "violation of Section 18(b)(3) of the Shipping Act of 1936, as amended." Obviously, the Complainant is seeking relief under the Shipping Act of 1916, and we have considered the issue presented on the basis of the 1916 Act.

³ Subpart K of the Commission's Rules of Practice and Procedure, Section 502.181 *et seq.*, 46 C.F.R. 502.181, refers to "Shortened Procedure." We have treated the parties' requests as requests to decide the issue presented on the basis of the record as it now stands, which is in accord with oral communications had with both of them and which provides a decision in the most expeditious manner.

3. The Respondent, Nippon Yusen Kaisha (NYK), is a common carrier engaged in transportation by water from U.S. Atlantic Ports to Japan and other Far East destinations and is subject to the Shipping Act, 1916.

4. Effective April 1, 1979, and through September 30, 1979, the Far East Conference Tariff No. 28-FMC No. 12, relating to shipments from United States Atlantic and Gulf Ports to Yokohama, Kobe, Osaka, Nagoya and Tokyo, Manila, Hong Kong, Kaohsiung/Keelung and Busan was on file with the Federal Maritime Commission (Commission). The tariff included various commodities and rates, including "Cooling towers, and parts" (Item No. 661 7075 40) at a special rate of \$126.00 W/M to Busan, and "Industrial Machinery, plant, and similar laboratory equipment (except furnaces and ovens) whether or not electrically heated, for the treatment of materials by a process involving a change in temperature, and parts - N.O.S." at a rate of \$166.00 to Busan. (See 5th Revised Page 675 attached to Complaint.)

5. On July 27, 1979, UCC shipped certain cargo from New York to Inchon via Kobe, Japan, aboard a vessel owned by NYK. The cargo was described in the pertinent bill of lading as "Industrial Machinery For The Treatment Of Materials Involving A Change In Temperature." The Shipper's Export Declaration contains the same language, but also lists the cargo with a Schedule B Commodity No. 661.7075, which refers to the special rate on cooling towers. (See Bill of Lading attached to the Answer and the Shipper's Export Declaration attached to the Complaint.)

6. The freight on the above-described shipment was prepaid as follows:

at 170	=	\$ 98,960.40	582.120 cm HEAVY LIFT
at 50.01	=	1,497.15	29.937 MT
at 43.75	=	930.74	21.274 MT
			EXTRA LENGTH
at 19.80	=	5,062.98	255.706 cm
at 23.85	=	7,784.97	326.414 cm
SUBTOTAL		\$114,236.24	
5%	=	5,711.81	Currency Adjustment 5%
			BUNKER
at 11.00 cm		6,403.32	582.120 cm
TOTAL		\$126,351.37	

The rate used by NYK was \$170.00 (the \$166.00 N.O.S. rate to Busan, plus a \$4.00 Arbitrary). (See Bill of Lading attached to Answer.)

7. On January 25, 1981, UCC filed a claim with NYK whereby it asserted that the N.O.S. classification was incorrect and that the cargo should have been classified as "Cooling Towers" and rated at \$130 (the \$126.00 rate to Busan with a \$4.00 Arbitrary). According to UCC, the freight bill would then have been:

at 126.00 + 4.00	=	\$ 75,675.60	582.120 cm HEAVY LIFT
		1,497.15	29.937 MT
		930.74	21.274 MT
			EXTRA LENGTH
		5,062.98	255.706 cm
		7,784.97	326.414 cm
SUBTOTAL	=	\$ 90,951.44	
5%	=	4,547.57	Currency Adjustment 5% BUNKER
		6,403.32	582.120 cm
TOTAL		\$106,449.90	

8. The claim filed by UCC was denied by NYK under Rule 19.1 of the tariff which reads:

Claims for adjustments of freight charges, if based on alleged errors in description, weight and/or measurement, will not be considered unless presented to the carriers in writing before the shipment leaves the custody of the carrier.

And further:

Claims seeking the refund of freight overcharges may be filed [sic] in the form of a complaint with the Federal Maritime Commission, Washington, D.C. 20573, pursuant [sic] to Section 22, Shipping Act, 1916 (46 U.S.C. 821). Such claims must be filed within two years of the date the vessel sails or the date the disputed charges are paid, whichever is later.

(See pertinent tariff pages filed with the Answer.)

9. On March 26, 1981, UCC filed the Complaint in this proceeding. On April 16, 1981, NYK filed its answer. In it the Respondent notes that it denied UCC's claim because of Rule 19.1 of the tariff and that "with the new information supplied on January 25, 1981, i.e., packing list and corrected export declaration it appears that this shipment did consist of 'cooling towers.'"

ULTIMATE FINDINGS OF FACT

11. The cargo shipped by UCC on July 27, 1979, was "cooling towers."

12. The failure to specifically designate the cargo on the bill of lading as "cooling towers" is not controlling as to its classification.

DISCUSSION AND CONCLUSIONS

The findings of fact in this case are patently clear and will not be belabored or repeated in this section of the decision. Suffice it to say that the Complainant shipped "cooling towers"; that perhaps because of some initial ambiguity in the bill of lading the Respondent mistakenly gave the cargo a N.O.S. rating; that the shipper made claim of the carrier based on the proper rating; and that but for a restrictive conference rule in the tariff relating to the claim, the matter would have been concluded without recourse to the Commission.

Having found as a fact that the Complainant shipped "cooling towers," the legal question remains as to how the cargo should have been rated and what freight charges were applicable. It is well settled that what is actually shipped determines the applicable rate rather than what is declared on the bill of lading. *Union Carbide Inter-America v. Norton Line*, 14 F.M.C. 262 (1971); *Union Carbide Corp. v. American & Australian S.S. Line*, 17 F.M.C. 177 (1973); *Johnson & Johnson International v. Venezuelan Lines*, 16 F.M.C. 84 (1973). Also, a carrier is not bound by a shipper's misdescription appearing on the bill of lading. *CSC International Inc. v. Orient Overseas Container Line, Inc.*, 19 F.M.C. 465 (1977); and any contention that a tariff requires that cargo inadequately described on the bill of lading be assessed at the highest tariff rates is erroneous. *Abbott Laboratories v. Alcoa SS Co.*, 18 F.M.C. 376 (1975). So here, even assuming *arguendo* that the bill of lading was ambiguous or even incorrect,⁴ the evidence in this case clearly shows that the Complainant has established that "cooling towers" were actually shipped. This being so, the proper rate was \$126.00 (plus \$4.00 Arbitrary), which was applicable to that specific item, and not \$166.00, which was the N.O.S. rate, and it is so held. Consequently, rather than the amount of \$126,351.37, the Complainant should have paid the Respondent \$106,449.90. The difference of \$19,901.47, with interest at the rate of 12 percent,⁵ is hereby awarded as reparation to the complainant.

(S) JOSEPH N. INGOLIA
Administrative Law Judge

⁴ Such an assumption could be open to argument because while the original bill of lading did not include the words "cooling towers" in the description of the cargo, the export declaration referred to the tariff item number which was applicable to cooling towers.

⁵ *Belco Petroleum Corp., Inc. v. Lykes Bros. Steamship Co., Inc. & Peruvian State Line*, 23 F.M.C. 1001 (1981); *Interpur, A Div. of Dart Industries, Inc. v. Barber Blue Sea Line, et al.*, 22 F.M.C. 679 (1980).

FEDERAL MARITIME COMMISSION

DOCKET NO. 81-10

SEA-LAND SERVICE, INC., TRAILER MARINE TRANSPORT CORPORATION, GULF CARIBBEAN MARINE LINES, INC., AND PUERTO RICO MARITIME SHIPPING AUTHORITY, PROPOSED GENERAL RATE INCREASES IN THE PUERTO RICO AND VIRGIN ISLANDS TRADES

ORDER PARTIALLY ADOPTING INITIAL DECISION

September 25, 1981

This proceeding was instituted by Order of Investigation, served January 29, 1981, to determine the lawfulness of general rate increases filed by Sea-Land Service, Inc. (Sea-Land), Trailer Marine Transport Corporation (TMT), Gulf Caribbean Marine Lines, Inc. (GCML) and Puerto Rico Maritime Shipping Authority (PRMSA) in the Puerto Rico and Virgin Islands domestic offshore trades.¹

The Government of the Virgin Islands, the Puerto Rico Manufacturers Association (GVI/PRMA), the Chamber of Commerce of Puerto Rico² and the Drug and Toilet Preparation Traffic Conference, Inc. (DTPTC) were named Protestants in the proceeding. The Commission's Bureau of Hearings and Field Operations (Hearing Counsel) was made a party to the proceeding pursuant to Rule 42 of the Commission's Rules of Practice and Procedure (46 C.F.R. 502.42).

On July 20, 1981, Administrative Law Judge Norman D. Kline issued an Initial Decision holding that all the carriers, with the exception of TMT, had adequately established the reasonableness of the proposed rate increases. A final determination of the reasonableness of TMT's rate increases was withheld to allow TMT a further opportunity to justify those rates on exception to the Initial Decision and allow the Commission to determine their reasonableness. Exceptions to the Initial Decision have been filed by GVI/PRMA, DTPTC, PRMSA, Sea-Land and TMT. Replies to Exceptions have been filed by GVI/PRMA, PRMSA, Sea-Land, TMT and Hearing Counsel.

¹ On February 27, 1981 the Commission issued an Order Amending Order of Investigation to include a PRMSA tariff in the proceeding.

² The Chamber of Commerce of Puerto Rico, although technically a party did not actively participate at any stage of the proceeding.

DISCUSSION

Pursuant to the requirements of P.L. 95-475,³ the Order of Investigation issued by the Commission limited the issues to be determined in this proceeding to the following:

1. What is an appropriate rate of return for the carriers named as Respondents? In addressing this question consideration should be given to the average rate of return earned by other U.S. corporations and the inherent risks, if any, in operating in the affected trades.
2. Is the methodology used by Respondents in making revenue and cargo volume projections appropriate?
3. Are Respondents' revenue and cargo volume projections sufficiently accurate, and if not, what are the appropriate projections?
4. Have Respondents properly calculated their cost projections covering labor, fuel, vessel maintenance and administrative and general expenses, and, if not, what are the proper calculations?
5. Do the proposed rate increases impose an economic hardship on the affected interests represented by Protestants and Interveners, and, if so, to what extent should this factor be considered in determining a reasonable rate of return for the carriers?

The February 27, 1981 Order Amending Order of Investigation stated that because of PRMSA's peculiar capital structure,⁴ consideration should be given to the fixed charges coverage ratio standard of reasonableness stated in 46 C.F.R. 512.6(d)(3) in determining the reasonableness of its proposed rate increases.

Due to the number of issues and subissues presented, and their complexity, the findings of the Presiding Officer, Exceptions and Replies of the parties and discussion of the issues will be presented according to subject matter. These issues will be treated under three major topics, i.e. Rate of Return, Revenues and Expenses, and Economic Hardship.⁵

³ P.L. 95-475, which became effective January 16, 1979, enacted the most recent amendments to the Interoceanic Shipping Act, 1933 (the Act) (46 U.S.C. 843 *et seq.*). These amendments included, *inter alia*: (a) a definition of "general rate increase" and "general rate decrease" for purposes of the Act; (b) an increase in the advance notice provisions for such rate changes to sixty days; (c) an increase in the Commission's suspension authority of such rate increases to six months; (d) a 180-day limit and 60-day maximum extension on proceedings initiated pursuant to the Act; (e) a requirement that specific reasons for investigation under the Act be included in Orders of Investigation; and (f) refund authority for rate increases investigated but not suspended and subsequently found to be unreasonable.

⁴ PRMSA is an instrumentality of the Government of Puerto Rico and as such is 100% debt financed and tax-exempt.

⁵ The Presiding Officer devoted a substantial portion of his Initial Decision to a discussion of the overall problems faced by the Commission in general rate investigations under P.L. 95-475 and how the Commission should generally modify its approach to this area of law to make these proceedings

Continued

RATE OF RETURN

The Initial Decision

The Presiding Officer explained that an appropriate rate of return for a carrier in the domestic offshore trades requires a determination of: (1) what average rate of return is earned by other U.S. corporations, the so-called "benchmark" rate of return; and (2) whether, in light of the inherent risks facing a carrier in its particular trade, the carrier should be allowed a greater or lesser rate of return than this average in order to put it on a generally equal footing with other industries in its ability to attract investment capital. This is the so-called "comparable earnings test" of reasonableness adopted by the Commission as the standard to be applied to carriers' rates under P.L. 95-475.

In this proceeding each party used a different analysis to arrive at the benchmark rate of return and the particular adjustments that must be made to reflect the peculiar risks faced by each carrier under investigation. After carefully analyzing each proposal the Presiding Officer found that none of them was entirely satisfactory, either because they failed to adhere to the basic requirements of the Commission's regulations in General Order 11 (46 C.F.R. Part 512) (G.O. 11) or because the statistical data bases used were not reliable indices of average rates of return.

It was determined, however, that although somewhat flawed in one aspect, Hearing Counsel's analysis was the one that could best be utilized in this proceeding, because of its objectivity, adherence to the Commission's regulations and statistical reliability. The reference group of corporations chosen by Hearing Counsel, that of all manufacturing firms, was found to be the one most comparable to the shipping industry and was therefore found to avoid distortions resulting from selecting either a more restricted or wide-ranging group. Also found appropriate was Hearing Counsel's use of the average returns of these corporations from 1974 through 1980 with adjustments for current trends in the cost of money and rates of return. This method was held to yield a more reliable average return because it accounted for the general average of returns over time, thereby eliminating distortions from particular good or bad business years, while at the same time accounting for the cumulative effects of inflation on corporate earnings in the near projected future. In applying this methodology Hearing Counsel arrived at an average rate of return for 1974 through 1980 of 12.5% with an upward adjustment of 2% for current trends⁶ and a reference group rate of

more manageable and meaningful. Because this portion of the Initial Decision addresses matters not ordered to be considered and is not necessary for a final disposition of this proceeding it will not be discussed here.

⁶ The 2% upward adjustment for current trends was based upon overall rate of return trends from 1968-1979.

return of 14.5% for the projected year at issue. Hearing Counsel then analyzed the business and financial risks of each carrier as it compared to the reference group and concluded that: PRMSA should be awarded a risk premium of 2.5% for a total reasonable rate of return of 17%; Sea-Land should be awarded a risk premium of 1.5% for a total reasonable rate of return of 16%; TMT should be awarded a risk premium of 1.5% for a total reasonable rate of return of 16%; and GCML should be awarded a risk premium of 2.5% for a total reasonable rate of return of 17%.

The Presiding Officer construed the conclusions reached by Hearing Counsel as suggesting that on a trade-wide basis a risk premium of 1.5%-2.5% should be awarded and a rate of return "zone of reasonableness" of 16-17% should be established. However, based upon a perceived technical fault in the computations of Hearing Counsel, the Presiding Officer expanded this zone to 16-18%. In computing the reference group's returns, Hearing Counsel had used Federal Trade Commission Quarterly Financial Reports as a data base. In order to utilize the data in computing rates of return according to the formula required by Commission regulation, a long-term debt cost figure had to be computed. This figure does not appear in the FTC-QFR data published and had to be estimated by Hearing Counsel's economic witness, Mr. Jay Copan. Mr. Copan estimated this figure to be 7%. The Presiding Officer found that the record did not indicate how this figure was computed and advised that he felt it was "too low." He accordingly adjusted the range of allowable returns upward by 1%. This, he explained, results in a more reliable range of returns, particularly in view of the testimony of the carriers who proposed much higher ranges and the testimony of GVI/PRMA which proposed a uniform 15% ceiling with no adjustment for risk.

The Presiding Officer also discussed PRMSA's proposals to apply alternatives to the G.O. 11 rate of return formula due to its peculiar capital structure and tax-exempt status. He rejected the use of before-tax figures and the exclusion of non-operating assets to compare PRMSA's rate of return with that of comparable U.S. industries. It was found that true comparability was impossible on this basis and was, in any event, contrary to the requirements of G.O. 11. Moreover, the results using the standard G.O. 11 formula were found not unreasonable and justified the carriers' rates. The Presiding Officer noted that the alternative to the G.O. 11 rate of return formula is the fixed charges coverage ratio referred to in the Order Amending Order of Investigation. Although Hearing Counsel recommended this as the primary test to be applied to PRMSA, the Presiding Officer found it useful only as a secondary "check" on the results of the rate of return formula which should be "considered." He adopted Hearing Counsel's proposed 1.8-2.0 ratio range of reasonableness although he characterized it as being

"too low." PRMSA was found not to have exceeded this range of reasonableness.

Position of the Parties

Exceptions

GVI/PRMA argue that because none of the proposed analyses were accepted by the Presiding Officer, the carriers have not met their burden of proof on the reasonableness of their rate increases. Because all of the analyses were found flawed, none can allegedly support the findings of reasonableness made by the Presiding Officer. Alternatively, they argue that their own rate of return analysis, which excluded the use of risk premiums after arriving at a benchmark rate of return, is most reliable and reveals the unreasonableness of the rate increases. It is further argued that because no combination of subjective/statistical measures of risk can support the risk premiums awarded the carriers, the Presiding Officer erred in relying upon a presumption of risk to find the rates of return of the carriers reasonable. GVI/PRMA submit that the carriers are entitled only to cover their costs of service, including a reasonable cost of capital. On this basis, it is concluded that the carriers are entitled to no more than a 15% rate of return on total capital.

DTPTC argues that the burden of proof in the proceeding was erroneously assigned to the Protestants. Further, it is argued that the Presiding Officer allowed unprecedented rates of return to be enjoyed by the carriers based primarily on the poor historical earnings and his reluctance to order refunds. DTPTC submits that the carriers will be realizing profits akin to a highly profitable enterprise or a speculative venture, a result that is completely contrary to regulatory principles.

PRMSA takes exception to the Presiding Officer's rejection of its proposed range of reasonableness of 19-20% for its rate of return. It is argued that in arriving at a benchmark rate of return of the comparable industries reference group, the reported total capital of these firms should not be used. PRMSA maintains that the proper computation of the reference group total capital should be net fixed assets plus working capital (computed as current assets minus current liabilities). Moreover, it is pointed out that the use of manufacturing firms as a reference group excludes mining and trading companies, which are high-profit enterprises, and their exclusion depresses the benchmark return. Finally, it is argued that before-tax rate of return figures should have been used to test the reasonableness of PRMSA's rate of return because this is the only method by which its tax-exempt status can be adequately considered.

Sea-Land excepts to the refusal of the Presiding Officer to allow it a risk premium above the otherwise reasonable limit on its rate of return to account for historical shortfalls in its rate of return.

Replies

GVI/PRMA argue that Sea-Land cannot be awarded risk premiums to compensate for past shortfalls in earnings, because this would violate the legal prohibition against allowing a carrier excess profits in the future to compensate for past losses. They also argue that PRMSA's Exceptions should be rejected on the grounds that PRMSA has already been allowed a rate of return that is greater than any previously allowed by the Commission and that it is attempting to reap excessive profits.

TMT's Reply finds the rate of return determinations of the Initial Decision acceptable. GVI/PRMA's refusal to consider risk premiums is allegedly based upon a cost of capital approach which is contrary to G.O. 11.

PRMSA's Reply also supports the Presiding Officer's zone of reasonableness and his risk premiums findings. PRMSA points out that both statistical and subjective studies were utilized to support the Presiding Officer's determinations and it was proper for him to reject a cost of capital approach as contrary to G.O. 11. PRMSA denies that its 100% debt financing reduces its business risk.

Sea-Land's Reply challenges the allegation that none of the rate of return testimony was accepted by the Presiding Officer, pointing out that its testimony was accepted with the exception of the premiums for past shortfalls.

Hearing Counsel contends that the Presiding Officer was correct in rejecting the alternative rate of return analyses proffered. Hearing Counsel submit that the comparable earnings test of reasonableness based upon an examination of rates of return on total capital is not only appropriate but required by Commission regulations and the award of risk premiums is warranted to the extent the carrier's risk exceeds that of the reference group. However, it is alleged that the interest expense estimated by Mr. Copan is reasonable in light of the time frame of earnings examined. Hearing Counsel submit that the computation of a rate of return on total capital advanced by PRMSA was properly rejected. The Commission is urged to assert that no rate of return premium can be awarded carriers because of past shortfalls in profit projections as past losses cannot be used to justify future excess earnings.

Conclusion

In light of the evidence of record, the Presiding Officer was correct in relying chiefly upon the presentation of Hearing Counsel in determining what is an appropriate rate of return for the carriers included in this proceeding. The two reasons advanced for this decision by the Presiding Officer are sound and support the result reached.

First, Hearing Counsel's analysis is most objective. Ordinarily, the fact that a party in interest has tendered an analysis does not automatically disqualify that analysis on the grounds of bias. However, bias is properly a factor to be considered in determining the weight to be accorded any testimony. In this proceeding an evaluation of the disparities in methodology utilized by the various parties resulted, in each instance, in rates of return markedly favorable to the ultimate position of the party advancing such methodology. Satisfactory justification for these novel methodology approaches was not supplied. As examples, Dr. Ileo, DTPTC's witness, used an extremely narrow data base and very selective risk factors to achieve a maximum rate of return below that which all of the other witnesses agree is the average current return for U.S. businesses.⁷ Dr. Nadel, testifying for TMT, GCML and Sea-Land, although possibly accurate as to his computation of past average returns for U.S. corporations, uses these findings to predict what appears to be unreasonable levels of returns in the test year.⁸

Second, Hearing Counsel's witness, Mr. Copan, adhered closely to the requirements of G.O. 11. P.L. 95-475, pursuant to which this proceeding was undertaken, requires the Commission by regulation to prescribe the method by which a carrier's rate of return will be evaluated for reasonableness (46 U.S.C. 845(a)). G.O. 11, as recently revised, represents the Commission's compliance with this legislative mandate.⁹ Adherence to G.O. 11 therefore is essential. Departures from its requirements cannot generally be permitted in rate proceedings if the regulation is to fulfill its statutory purpose. The alternative "middle ground" analyses in this proceeding, to some degree depart from the requirements of G.O. 11. Dr. Germaine, for TMT and GCML, utilizes a cost-of-capital analysis in crucial portions of his presentation, a

⁷ Although Dr. Ileo surveyed rates of return from 1976-1980, he ultimately based his rate of return findings only on the results of 1980. (Ileo Testimony at 7). His risks differential was based solely upon the difference in the imbedded debt cost of PRMSA and that of the average U.S. manufacturing firm. (Ileo Testimony at 10).

⁸ In addition to projecting a comparatively high 18.5% average rate of return for 1981, Dr. Nadel proposed a 2% premium as a "desirable target" for TMT, GCML and Sea-Land and an additional 3% premium in light of past shortfalls in achieving the maximum permissible rates of return for these carriers. (Nadel Testimony at 38). Dr. Nadel bases his benchmark rate of return on specific companies selected under restrictive and subjective criteria (Nadel Testimony at 18), and projects a 1981 average by attempting to establish a correlation with Aaa bond yield trends using regression analysis (Nadel Testimony at 23). His 2% premium is based upon an assumption that the actual average rates of return in the 1970's did not achieve "desirable" levels. This conclusion is again based upon an assumed correlation with Aaa bond yields. (Nadel Testimony at 26). Dr. Nadel's 3% premium to account for past shortfalls in the carriers' rates of return is an overadjustment above any reasonable maximum level of return. (Nadel Testimony at 29-30). Allowing a carrier to achieve an unreasonably high rate of return to compensate it for past shortfalls in earnings is impermissible in rate regulation. *Galveston Elec. Co. v. Galveston*, 258 U.S. 388, 395 (1922). This rule of law is not unfair to the carrier in light of the fact that confiscatory rates cannot be established on the basis of the carriers' past actual profits. *Board of Public Utility Commissioners v. N.Y. Telephone Company*, 271 U.S. 23 (1926).

⁹ See, *Financial Reports of Common Carriers in the Domestic Offshore Trades*, FMC Docket No. 78-46, 22 F.M.C. 403 (1980).

method specifically rejected by the Commission in its promulgation of G.O. 11.¹⁰

The same infirmity applies to the testimony of Dr. Brennan, testifying for GVI/PRMA.¹¹ Dr. Silberman, sponsored by PRMSA, substituted the G.O. 11 formula for computing a rate of return based upon total capital with one which computes a rate of return on selected assets.¹² While these analyses are subject to other deficiencies, the failure to follow the requirements of G.O. 11 precludes any reliance upon them.

The Presiding Officer, however, did not accept Mr. Copan's estimated imbedded debt cost figure utilized to compute the benchmark rate of return for U.S. manufacturing firms. Mr. Copan used a 7% estimated interest figure which he derived from his primary data base, FTC Quarterly Reports. While certain adjustments to Mr. Copan's conclusions are warranted based on certain policy considerations discussed below, the Commission does not share the Presiding Officer's skepticism regarding the imbedded debt cost.

The bases cited for the Presiding Officer's belief that the 7% interest figure was "too low" were the current cost of money, the estimate of Dr. Ileo and the arguments of PRMSA in its brief.¹³ The figure used by Mr. Copan was not intended to reflect the current cost of money but the average interest costs of U.S. manufacturing firms from 1968-1979.¹⁴ It is certainly beyond dispute that average interest rates were lower during that period of time than they are today. Mr. Copan adjusted his rate of return results for current trends in the cost of money by 2%, thereby compensating for any potential distortion. Dr. Ileo's 9.5% interest estimate was applicable *only* to 1980¹⁵ and this supports rather than undermines Mr. Copan's estimate of a significantly lower rate for an earlier period. Finally, assertions of PRMSA's counsel on brief do not alone impeach the otherwise reliable expert opinion of Mr. Copan.¹⁶ Therefore, the benchmark rate of return computed by Mr. Copan, 14.5%, is the most, and possibly the only, reliable testimony on the rate of return issue in the record.

The determination of a reasonable rate of return, however, does not stop with a determination of what U.S. corporations earn generally. Consideration must be given to the peculiar risks faced by the carriers in this trade. While it is true that there is no presumption of risk,

¹⁰ See, Germaine Testimony at 18.

¹¹ See, Brennan Testimony at 5.

¹² See, Silberman Testimony at 6, Silberman Rebuttal Testimony at 13-14.

¹³ See, I.D. at 38.

¹⁴ See, Copan Testimony at 8.

¹⁵ See, Ileo Testimony at 7, Table IV.

¹⁶ Even as an "unexplained" expert opinion, it is entitled to more weight than the *argument* of a party in interest on brief. See 7 Wigmore on Evidence § 1922, 1933 (Chadbourne rev. 1978); *Franklin Supply Co. v. Tolman*, 454 F.2d 1059, 1071 (9th Cir. 1972).

consideration of this factor must be given if the comparable earnings test is to fulfill the requirement that the carriers are to be allowed sufficient earnings to attract necessary capital and compensate investors for the risks they have assumed.¹⁷

The question remains, however, as to how risk is to be considered in this proceeding. The threshold issue, and one not answered by the Presiding Officer, is whether consideration is to be given to the risks faced by each *individual* carrier or the risks faced *generally* by carriers operating in the trade. Stated another way, should the Commission establish a maximum rate of return for each individual carrier or a trade-wide maximum rate of return? Hearing Counsel and the carriers would take into account the individual financial and business risk of each carrier. GVI/PRMA advance a trade-wide rate of return and the Presiding Officer constructs a "zone of reasonableness" within which all the carriers' rates of return must fall.¹⁸

The factors militating in favor of an individualized approach are: (a) it ensures that full consideration is given to the question of the risks assumed by the investors in each carrier, and (b) it is susceptible to a greater degree of precision in measurement due to the narrower focus of the inquiry. The factors militating against an individualized approach are: (a) it discourages efficiency of operation and in effect rewards past faulty management decisions;¹⁹ and (b) it necessarily requires an analysis of each carrier's debt-equity ratio, a difficult and unreliable procedure which the Commission sought to avoid by adopting the rate of return on rate base test and rejecting the rate of return on equity test of reasonableness.²⁰ Each of these considerations operates in an opposing manner when used in evaluating the desirability of establishing a trade-wide maximum rate of return.²¹

¹⁷ See *Permian Basin Area Rate Cases*, 390 U.S. 747, 791-792 (1968). The use of an average U.S. corporate rate of return as a "benchmark" necessarily requires a determination of whether the carriers display different risk characteristics than the average firm. The alternative approach, that of eliminating risk premiums or discounts by carefully selecting highly comparable firms (including comparable risk) to arrive at a benchmark return, is not consistent with the approach prescribed by the Commission in G.O. 11. See, 46 C.F.R. 512.6(d)(2)(i).

¹⁸ The "zone of reasonableness" as that term has been defined by the Supreme Court is that area between minimum nonconfiscatory rates and the maximum reasonable level of rates. *FPC v. Natural Gas Pipeline Co.*, 315 U.S. 575, 585 (1942). As used by the Presiding Officer, however, the "zone of reasonableness" is simply a range of the maximum rates of return applicable for the particular carriers surveyed. To allow a zone of 16-18% is just another way of establishing an 18% maximum rate of return for the carriers.

¹⁹ Establishing rates of return on the basis of individualized financial structures and earnings variations takes these factors as a "given" and allows carriers who have high risk financial structures, high comparative costs and erratic earnings histories to be allowed a higher overall return than a carrier who has a conservative financial structure, low comparative costs and a stable earnings history.

²⁰ See Docket No. 78-46, *supra*.

²¹ Trade-wide maximum rates of return would establish an average rate of return in light of the individual carrier rates of return. This admittedly does not take into account individual investor's risks but only an average investor's risks and is essentially an estimate of what the average carrier in the

Continued

A third "compromise," approach would give carriers individualized treatment in terms of the business risks they face in the trade but give no consideration to the individualized financial risks assumed by each carrier's financial structure. Business risk is an objective factor based upon earnings variations resulting from, to the most part, external market forces over which the carrier has little, if any, control.²² Financial risk is a more subjective factor. It is based upon the potential of variations on earnings to *equity holders* due to the *internal financing structure* of the carrier which, to a very large degree is the result of the carrier's *own business judgments*.²³ The advantages of this approach are that: (a) it avoids the problem of attempting to establish each carrier's debt-equity ratio;²⁴ (b) it eliminates the apparent inconsistency with G.O. 11; (c) it considers the risks assumed by investors;²⁵ and (d) it encourages efficiency of operation.²⁶

Because this third approach eliminates the inconsistencies inherent in awarding financial risk premiums and permits individual consideration of the business risks faced by each carrier in the trade, it is the one which appears most appropriate under the circumstances of this case.²⁷ Accordingly, it will be adopted here. Applying this approach and giving individualized treatment for each carrier's business risk but eliminating consideration of financial risk, the maximum reasonable rates of

trade "should" earn, in light of the condition of *all* the carriers. While it does assume the theoretical existence of an "average" carrier, the trade-wide approach does allow for more competition by permitting a carrier to reap rewards for its efficiency and preventing a carrier a higher return because of its inefficiency.

²² See Copan Testimony at 13.

²³ See Copan Testimony at 11.

²⁴ The reason rate of return on equity was rejected by the Commission in its recent revision of G.O. 11 was primarily due to the difficulty of establishing debt/equity ratios of carriers which are subsidiaries of a large corporate entity. This problem is revealed in this proceeding where the difference in rates of return allowed the carriers results in large part from differences in financial risk. Two of the four carriers were not awarded financial risks premiums because their debt/equity ratios could not be determined. See Copan's Testimony at 18-20.

²⁵ Under this approach, consideration is given to the individual market risks faced by each carrier. Also, because the Commission only determines the reasonableness of the return on *rate base* the carrier is free to increase its return on *equity* by means of financial leverage. Accordingly, the carrier who assumes the additional risk of financial leverage will necessarily be compensated for this factor without an upward adjustment of its return on rate base.

²⁶ Large variances in maximum permissible returns based on financing structures will be moderated, encouraging carriers to achieve higher earnings through a reduction of costs rather than increasing leverage.

The Commission is not unmindful of disadvantages of this approach. First, it imputes to each carrier a debt-equity ratio comparable to that of the average U.S. corporation. This is because financial risk premiums are based upon a determination of a higher degree of leverage than the average U.S. firm. Second, it does to some degree allow premiums to be awarded on the basis of potential past faulty management decisions. Carriers would still be allowed business risk premiums due to variations in earnings which may have in part resulted from poor marketing decisions. However, these disadvantages are clearly outweighed by the advantages stated above.

²⁷ Vice Chairman Moakley agrees with the majority decision to exclude financial risk premiums in this proceeding but solely on the basis of the economic hardship shown by Protestants. See Concurring Opinion of Vice Chairman Moakley.

return for each carrier are: (a) 16.5% for GCML;²⁸ (b) 15.5% for TMT;²⁹ (c) 16% for Sea-Land; and (d) 17% for PRMSA.³⁰

The Commission will now consider the fixed charges coverage ratio as an alternative standard for measuring the reasonableness of PRMSA's rates. Hearing Counsel's suggestion that the fixed charges coverage ratio be used as the primary test of reasonableness of PRMSA's rates is contrary to the requirements of G.O 11 which clearly contemplates the use of this standard only when the rate of return on rate base test produces unreasonable results.³¹ Under any of the above rate of return analyses PRMSA is entitled to the highest rate of return in the trade and will obtain a significant margin of net profit over and above all operating costs and debt maintenance. Accordingly, it does not appear that in this case the results of the rate of return analysis are unreasonable regardless of the theoretical problems presented by its application to PRMSA. The fixed charges coverage ratio utilized by Hearing Counsel of 1.8-2.0,³² is a useful check on the results of the rate of return analysis and should be utilized whenever PRMSA rates are examined. However, this case does not present any compelling reason for replacing the rate of return standard as the primary test for all cases involving PRMSA.

REVENUES AND EXPENSES

The Initial Decision

The major issues addressed in the Initial Decision, concerning revenues and expenses of the carriers, centered around the proper methodology to be applied in estimating the cargo tonnage to be carried in the test year, the adjustment for inflation in the carrier's cost projections (excluding labor³³ and fuel), and the projected cost of fuel for the test year. Also, there were disputes over particular administrative and general expenses of the carriers.

The basic methodology utilized by PRMSA in projecting tonnage for the test year was accepted by the Presiding Officer with some exceptions. PRMSA utilized a marketing survey approach with adjustments for major plant openings and closings in its targeted markets. The

²⁸ This would eliminate the .5% financial risk premium for this carrier included in the rate of return found appropriate by Mr. Copan.

²⁹ See footnote 28.

³⁰ Because neither Sea-Land nor PRMSA were awarded any financial risk premium, no change in their rates of return would result.

³¹ 46 C.F.R. 512.6(d)(1); Docket No. 78-46, *supra*.

³² The fixed charges coverage ratio is designed to evaluate the carriers' ability to cover all fixed charges and ability to take on additional debt. Copan Testimony at 27, 32. The times interest earned ratio also presented by Hearing Counsel is a simpler form of the fixed charges coverage ratio, see Copan Testimony at 33, but is not recognized as a test of reasonableness in G.O 11.

³³ Although noted as an issue in the Order of Investigation there was virtually no disagreement with the carriers' projected labor costs, these being determined by negotiated contracts. I.D. at 71.

Presiding Officer rejected as too speculative the proposed modifications to these figures which the carrier had estimated would result from the effects of the Federal budget cuts on the economy of Puerto Rico.

PRMSA also requested that its original projections be modified to reflect the effects of the late delivery of one of its vessels, the PONCE. The Presiding Officer held that although modifications to the carrier's original projections based upon actual operating results obtained during the course of a rate proceeding are not normally allowed, where subsequent events render those projections unreasonable and the modifications are not subject to reasonable dispute, they would be allowed. Accordingly, he accepted the reduction in projected tonnage resulting from the delay in the delivery of the PONCE.

A major dispute arose between PRMSA and GVI/PRMA as to the inflation factor to be applied to cost projections, other than for labor and fuel, which is the subject of a separate dispute. All parties submitted their own inflation factor calculations and the Presiding Officer found that the one proposed by Hearing Counsel was the most reliable. Hearing Counsel proposed a 10.4% annual inflation factor, utilizing the Producer Price Index For Industrial Commodities Less Fuels and Related Products and Power, as forecasted by Data Resources, Inc., a major independent forecasting service. Although no other party used this index it was held to be the most reliable because it was the one that came the closest to the "ideal" index that should be used for ocean carriers, *i.e.* the Producer Price Index for Finished Goods Less Food and Fuels, which is not published. Although PRMSA used a different index, its results closely approximated Hearing Counsel's and its inflation adjustment was accepted. GVI/PRMA's analysis which resulted in an inflation factor of 7.2% was rejected because it relied primarily on a subjective trend line analysis held to be overly simplistic.

PRMSA's fuel cost projections were based upon a forecast of Average Refiners Acquisition Domestic (ARAD) prices by Data Resources, Inc., the same independent forecasting service relied upon by Hearing Counsel in computing the inflation factor. GVI/PRMA challenge this projection on the basis that current events indicate that data used by PRMSA in its projections are no longer valid and that revised forecasts published since the proceeding was instituted should be utilized. The Presiding Officer found that GVI/PRMA's calculations were unreliable because they resulted from a combination of faulty techniques and an overreliance on the long-term effects of the recent "oil glut" and OPEC policies. The Presiding Officer held that although recent events indicate the risks inherent in making any attempt to accurately predict the cost of fuel for carriers, those proposed by PRMSA appeared reasonable and had not been successfully challenged by Protestants.

The Presiding Officer found that the results of PRMSA's revenue and expense projections indicated that if the late delivery of the

PONCE were to be considered it would realize a 16.95% rate of return with adjustments and a 17.41% rate of return without adjustments for the late delivery of that vessel. Either of these rate of return figures were held to be within the zone of reasonableness established by the upward adjustment of Hearing Counsel's figures.

Sea-Land's cargo projections were based upon an internal marketing staff report which in turn was adjusted by management to account for specific company marketing goals. The Presiding Officer accepted this methodology as reasonably reliable but rejected a projection of a loss of 2,723 containers in the North Atlantic segment of the trade. This tonnage reduction was attacked by both Hearing Counsel and GVI/PRMA on the ground that it presumed that an increase in available carrying capacity of its competitors would result in a loss of tonnage for Sea-Land. This presumption was held by the Presiding Officer to be unsupported on the record and accordingly the 2,723 containers were included in Sea-Land's projections. With this adjustment, Sea-Land's rate of return was determined to be 16.28%.

The Presiding Officer also found, however, that Sea-Land had underestimated its inflation factor, utilizing a 9.3% annualized rate. Upon the suggestion of Hearing Counsel, this was raised to 9.9%. Utilizing this inflation factor in computing Sea-Land's expenses, the Presiding Officer concluded that Sea-Land's rate of return would be 16.04%, again within the zone of reasonableness.

TMT and GCML utilized the same basic methodology in predicting cargo for the test year, a straight trend line analysis adjusted for anticipated unusual changes in its targeted markets. No party took issue with GCML's prediction of a drastic reduction in tonnage due to an overall reduction in its services. Although no formal findings were made as to GCML's rate of return, the Presiding Officer apparently adopted its projected 16.1% rate of return and found this to be within the zone of reasonableness.

With regard to the projections of TMT, the Presiding Officer found that in the absence of further explanations, it had not satisfied its burden of proof as to the reasonableness of those projections and its rate increases. The essential issue concerned the amount of GCML cargo that TMT would capture in the trade. The Presiding Officer found that although it appeared that GCML would lose 120,000 tons of cargo in the test year, it was not clear whether TMT would pick up 80,000 or 100,000 tons of this amount. Because this would make a difference of \$1.2 million in TMT's revenue, it was determined to be significant enough to require further elucidation. The Presiding Officer advised that TMT would have an opportunity to clarify this matter on exceptions to the Commission.

TMT applied a straight 10% annualized inflation factor in projecting its expenses which was found to be reasonable and there was no

challenge to its fuel cost estimates. However, the Presiding Officer found that TMT had not adequately explained what appeared to be a double counting for management commissions and supervision fees to Crowley Maritime Corporation (CMC), TMT's parent company. Also, it was noted that GVI/PRMA's contentions concerning the application of inflation factor to unidentified expense items and a \$7.4 million overestimate of rate base were not adequately explained. No findings of TMT's rate of return were made in light of these deficiencies.

Position of the Parties

Exceptions

GVI/PRMA excepted to the refusal of the Presiding Officer to allow revisions to the submissions of PRMSA based upon actual operating results obtained since the institution of the proceeding. It argues that it is inconsistent to allow the carriers to amend their submissions when it is in their interests, citing the late delivery of the PONCE, but refuse to allow consideration of current events when it undermines some of the carriers' projections. Also, it is argued that PRMSA's methodology in using a market survey which indicates a general market decline and then reducing this forecast even further with specific plant closings results in a double counting of the market decline.

GVI/PRMA also challenge the use of the various inflation factor indexes selected by the Presiding Officer and the carriers because they all to some degree include the increases in the price of food and fuel which were recognized to result in upward distortions of the indexes. Moreover, the index for fuel costs used in the Initial Decision allegedly does not account for the recent drastic and unforeseen developments in the world oil market. It is noted that even the independent service relied upon in the Initial Decision has recently amended its forecast data and these data indicate that fuel costs could not possibly increase to the level predicted by the carriers.

GVI/PRMA maintain that TMT should not only have been found to have failed to carry its burden of proof but that it should not have been given the opportunity to supplement its case on exception to the Commission. It is argued that this procedure is contrary to the intent of P.L. 95-475, inconsistent with the Administrative Procedure Act and Commission regulations, and most important, violates Protestants' due process rights. Finally, GVI/PRMA submit that it was error for the Presiding Officer to fail to reduce Sea-Land's expenses by the amount of brokerage payments which are not provided for in its tariffs, such payments allegedly being illegal.

DTPTC excepts to PRMSA's amendment of its submissions to account for the late delivery of the PONCE. It also argues that it is unfair and inconsistent to refuse to amend the carrier's fuel cost projec-

tions in light of the indisputable change in circumstances in the world oil market and forecasted prices for the test year.

TMT excepts to the Presiding Officer's finding that it failed to fulfil its burden of proof. It is argued that simply because it did not rebut each and every assertion of Protestants does not mean that it has failed to submit sufficient evidence to prove the reasonableness of its rates. TMT maintains that the Presiding Officer erred in not examining the record to find this evidence. TMT argues that the record of the proceeding includes adequate explanations rebutting every allegation of the Protestants and that excerpts of its workpapers which it appended to its Exceptions reveal that it has sustained its burden of proof in this proceeding. TMT argues that the amount of cargo it obtained from the reduction of GCML's service is shown to be 80,000 tons and that the 100,000 ton figure originally stated was erroneous and was adequately explained by both its witnesses and Hearing Counsel's witness. Even with the additional 20,000 tons, TMT explains that its rate of return would only be 14.43%, which is reasonable. TMT also takes issue with the finding of double counting of payments to its parent corporation. It explains that the figures do not reflect payments but merely an allocation of expenses, one being an allocation of CMC's Caribbean Division office expenses and the other being an allocation of CMC's home office expenses. As to the impact of the double counting error on its rate base, TMT states that its only mistake was detected early in the proceeding and corrected, and, that in any event, because its rate base figures were not expressly made an issue in the proceeding, its rates may not now be found to be unreasonable on this basis.

Sea-Land excepts to the rejection of its projected decline in tonnage in the North Atlantic segment of the trade, arguing that it is entirely reasonable for it to project a loss of tonnage when new and competitive vessels of its chief competitor, PRMSA, will be coming on line during the test year.

Replies

GVI/PRMA do not believe that the information provided in TMT's Exceptions rehabilitate its case and therefore maintains that TMT has still failed to sustain its burden of proof in the proceeding. The "error" in its cargo forecast has allegedly not been sufficiently explained and what explanation was provided is seen as self-serving. GVI/PRMA submit that TMT's supervision fees/management commission allocation argument does not refute the apparent double counting of expenses. GVI/PRMA argue that even if TMT's rate base was not expressly put at issue in this proceeding, the significant discrepancy in its submissions reveals the inherent unreliability of all of the carrier's projections and justification of its rates. The inflation factor application explanations of TMT are alleged to be insufficient and inconsistent. Finally, GVI/

PRMA maintain that TMT's workpapers do not contain all of the information cited in TMT's Exceptions and that the additional information cannot now be considered by the Commission.

TMT argues that contrary to the assertions of the Protestants, it has met its burden of proof on the basis of the existing record. It submits that its tonnage figures were adequately explained in its Exceptions, using the record developed, and that in any event the error is inconsequential. TMT also repeats its argument that the supervision fees and management commissions are separate expenses and are not payments to its parent corporation. Protestants' attempts to require reductions of fuel costs and general inflation factors on the basis of events subsequent to the institution of the proceeding are argued to be impermissible hindsight contentions which were properly rejected by the Presiding Officer.

PRMSA argues that the evidentiary ruling of the Presiding Officer preventing the consideration of events subsequent to the institution of the proceeding was proper and did not violate the due process rights of the Protestants. PRMSA also insists that there was no double count of plant closings in its cargo forecasts because its market survey took this into account. PRMSA views Protestants' trend line analysis, to arrive at an inflation factor, as unreliable and subjective. The independent service used in the Initial Decision is supported as being both objective and historically reliable. PRMSA opposes the Protestants' attempt to submit evidence as to fuel cost projections after the institution of the proceeding on the basis that P.L. 95-475 requires that there be some limitation on the submission of testimony and evidence in order to expeditiously dispose of rate proceedings.

Finally, PRMSA supports TMT on the burden of proof issue. It argues that TMT has in fact adequately clarified the record. PRMSA would also have the Commission keep in mind the impact that a rollback of TMT's rates would have on PRMSA, who is said to have clearly justified its rate increase.

Sea-Land submits that its brokerage expense was a sales commission to its Puerto Rican subsidiary and is a lawful and proper expense. The problem with the payment allegedly was not as to its accuracy or propriety, but rather its classification.

Hearing Counsel's Replies to Exceptions are intended to clarify its position on the issues now before the Commission. The "rule of reason" standard, for the use of actual operational data advanced in the Initial Decision, does not go as far as Hearing Counsel originally desired, but is deemed acceptable for the purpose of expediting rate proceedings. Hearing Counsel admit that in applying this standard the Presiding Officer was correct in allowing PRMSA to adjust its projections due to the late delivery of the PONCE and refusing to allow the Protestants to reduce the carriers' fuel cost projections on the basis of the recent

OPEC oil price freeze. Hearing Counsel believe that the Presiding Officer was correct in rejecting Sea-Land's projected decline in tonnage in the North Atlantic segment of its service because this reduction is inconsistent with gains projected in other segments of the trade.

Conclusion

Before contentions concerning the individual revenue and expense projections of the carriers can be addressed, certain general matters affecting all of the carriers projections must first be discussed. These are: (a) the acceptance or rejection of actual operating results obtained after the commencement of the proceeding; (b) the appropriate methodology to be applied to arrive at an inflation factor for all non-labor and non-fuel expenses; and (c) the appropriate methodology to be applied to arrive at a predicted average cost of fuel for the test year.

The Commission finds that actual operating results should not be accepted unless they are based upon changes in circumstances so significant and certain as to render the original projections substantially unreliable.³⁴ This standard approximates the Presiding Officer's "rule of reason."

It is particularly important that parties not be permitted to supplement their cases after the close of the record and after an Initial Decision is issued, as both Hearing Counsel and TMT were urged to do by the Presiding Officer. The procedure suggested by the Presiding Officer is of questionable validity under the Administrative Procedure Act, the Commission's regulations, and the strict procedural requirements of P.L. 95-475. And, as was noted in the Commission's Order Denying Petition to Reopen the Record, issued August 14, 1981, aside from all other questions of the legality of such a procedure, it is practically inappropriate under the time limitations of P.L. 95-475.

The methodology proposed by Hearing Counsel to determine an appropriate inflation factor to be applied to non-labor and non-fuel expenses, and adopted by the Presiding Officer, appears to be the most reliable method presently available. A close relationship was established between the index selected, Producer Price Index for Industrial Commodities Less Fuel and Related Products, and the types of costs incurred by the carriers. The index is published by a recognized independent forecasting service and provides a sufficiently reliable as a check on the propriety of the carrier's projections.

As for fuel cost projections under current economic conditions, the Presiding Officer may be correct in noting that no one, not even

³⁴ See, *TMT Corp. - General Increase in Rates*, 18 S.R.R. 1374, 1375, n. 4 (1978); Docket No. 75-57, *Matson Navigation Company - Rate Increases*, 21 F.M.C. 538, 539 (1978). This standard has also been applied in cases arising after the enactment of P.L. 95-475. See *Matson Navigation Company - Bunker Surcharge*, 22 F.M.C. 276, 278 (1979). See also *Villages of Chatham and Riverton, Illinois v. F.E.R.C.*, No. 80-1826, Slip Op. at 11 (D.C. Cir. August 11, 1981).

respected independent forecasting services, can predict the cost of fuel over the next year with any precision or certainty. However, in comparison with PRMSA, which forecasted very substantial increases in its average fuel cost for the test year, all the other carrier parties to the proceeding entered relatively conservative estimates of fuel cost increases.³⁵ Although the ARAD forecasts used by PRMSA may have been based upon the most reliable information available at the time they were published, dramatic changes in world oil markets have caused these forecasts to change substantially since the initiation of the proceeding. Also, valid criticisms as to the appropriateness of the method by which PRMSA has applied these forecasts have been offered by Protestants.

The point is made that if subsequent events justify allowing PRMSA to alter its data on the basis of the late delivery of the PONCE, the same treatment should be given fuel costs which have a much more significant impact on the carrier's projections. Theoretically, therefore, updated projections based upon the ARAD forecasts should be included in the carrier's cost projections. However, there are no reliable applications of the data to be found in the record. The methodology of GVI/PRMA was successfully shown to be unacceptable.³⁶ PRMSA's methodology is also very tenuous.

If PRMSA had established a direct relationship between its costs and ARAD forecasts, its data might be acceptable. However, only a theoretical statistical correlation has been shown. As explained by PRMSA's witness, Dr. Vasquez, the relationship is based upon a correlation coefficient which in turn is not based upon actual PRMSA prices but an extrapolation (linear least square fit) of only 1980 PRMSA fuel costs. The reason given for the use of extrapolated figures as opposed to actual figures before 1980 is that "there was a change in the pattern of bunker fuel versus ARAD." Essentially what this means is that the pre-1980 actual data was not used because it did not fit PRMSA's model. This undermines the efficacy of PRMSA's forecast technique. These deficiencies (a questionable correlation, the marked changes in circumstances, and the inconsistency with the other carriers' projections) would ordinarily warrant disapproval of PRMSA's forecast. However, in this case there is simply no alternative forecast data which

³⁵ Sea-Land predicts an average cost of fuel for the test year of \$29.69 per barrel. Zito Testimony at 7. TMT and GCML predict its prices to range from \$.85/gallon to \$1.02/gallon for an average cost of fuel for the test year of \$.935/gallon or \$29.45 per barrel. Farmer Testimony at 7, Andic Testimony at 26, n. 5. PRMSA predicts an average cost of fuel for the test year of \$35.98 per barrel. Vasques Testimony at 5.

³⁶ GVI/PRMA's witness on this issue, Dr. Andic, essentially used a straight trend line analysis in her calculations based upon the updated ARAD forecast data then available. Andic Rebuttal Testimony at 20, 23-24. However, PRMSA's rebuttal testimony indicates that neither its fuel costs nor the ARAD data follow any clear trend line. Vasquez Rebuttal Testimony at Exhibit C. This exhibit, however, also points out PRMSA's extenuated forecast technique.

can be applied to PRMSA. Therefore, the Commission basically has three options: (1) adopt the Presiding Officer's findings due to a lack of an alternative forecast; (2) find that PRMSA has not sustained its burden of proof and deny its proposed rate increase; or (3) utilize the last known price level actually paid by PRMSA throughout the test year. It is clear that the particular circumstances of this proceeding require a pragmatic adjustment of the carrier's projections. *Permian Basin Area Rate Cases, supra*, at 800. The last alternative is the most acceptable for two reasons: (1) PRMSA's last known fuel cost approximates the test year projections of the other carriers, and (2) all of the petroleum "trade intelligence" entered into the record in this proceeding support the conclusion that petroleum prices are likely to level off the remainder of 1981. If this figure proves to be too low, PRMSA can utilize the Commission's present policy of allowing cost-pass-through rate increases as the need arises.³⁷ On the other hand, if PRMSA is permitted to recover excess revenues based upon what is clearly an excessive fuel cost figure, shippers are left with no adequate remedy.

This leads us to the overall evaluation of PRMSA's revenue and expense projections. The findings of the Presiding Officer as to PRMSA's cargo and revenue projections will be adopted applying his evidentiary "rule of reason." The basic methodology used by PRMSA in making its cargo projections, a market survey adjusted for known plant closings, appears reasonable. These plant closings have been properly adjusted in the market survey.³⁸ However, the additional adjustments proposed by PRMSA due to the expected effects of Federal budget cuts on the economy of Puerto Rico were properly rejected by the Presiding Officer, such effects being clearly speculative. The adjustments made for the late delivery of the PONCE, however, appear to be reliable.³⁹

PRMSA's cost projections in all areas except fuel costs appear to be reliable and the Presiding Officer's findings in these respects will be adopted. The inflation factor applied to these costs closely approximates that resulting from Hearing Counsel's independent forecast technique.

Accordingly, the Commission will allow the adjustment for the PONCE but require that the fuel cost projections for the test year be held to the latest available data. Based upon these determinations,

³⁷ Although the Presiding Officer correctly recognized that the Commission's bunker fuel cost increase pass-through policy had been terminated as it applies to bunker surcharges, he failed to note that fuel cost increases may be accommodated by permitting carriers to file overall rate increases with alternative abbreviated data. *Bunker Surcharges in the Domestic Offshore Trades*, 20 S.R.R. 401, 402 (1980).

³⁸ Huresky Rebuttal Testimony at 3.

³⁹ Vasquez Rebuttal Testimony at 18-19, Exhibits F-J.

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PRMSA's rate of return will be 20.69%.⁴⁰ This figure exceeds PRMSA's maximum reasonable rate of return of 17% and PRMSA's rate increases are therefore found to be unjust and unreasonable to the extent that they exceed an average of 14.5%.⁴¹

The Presiding Officer's basic findings concerning Sea-Land's cargo and revenue projections should be adopted. The method by which its projections were made, a marketing study adjusted for company goals, appears to be reasonable with the exception of the projected decline in tonnage in the North Atlantic segment of the trade. As was correctly pointed out by the Presiding Officer, the fact that a competitor is increasing its deployment in a particular area does not automatically mean that the carrier will lose cargo to that competitor. If Sea-Land had supported its projection with a consistent competitive impact analysis it may have been acceptable. However, this was not done. Sea-Land's competitors have the highest concentration of lift capabilities in other segments in the trade where Sea-Land does not project a loss of cargo.⁴² Absent some distinguishing competitive factors, this inconsistency effectively undermines the reliability of Sea-Land's projected decline in tonnage.

The inflation factor applied by Sea-Land was alleged to be too low by Hearing Counsel and was revised upward to more accurately reflect the factor obtained from the index used by Hearing Counsel and found appropriate by the Presiding Officer. Because this adjustment is solely one of methodology and does not go to the reliability of the underlying data, the Commission believes that it is not inappropriate in this proceeding.

Although the Presiding Officer indicated that "brokerage" payments made by Sea-Land to its Puerto Rico subsidiary raise a question as to

⁴⁰ The last available fuel cost data for PRMSA in the record is the average price of \$31.14 for the 20 days of March, 1981. Vasquez Surrebuttal Testimony at 12. PRMSA estimates fuel consumption for the test year at 1,521,442 barrels. Vasquez Surrebuttal Testimony at 13, n. 9. This computes to a total fuel expense of \$47,377,704, approximately \$7,383,000 less than PRMSA's estimate of \$54,761,000. PRMSA Schedule B-II(1) - Transclass Case. Applying this reduction in costs to PRMSA's figures allowing for the PONCE adjustment but not the Federal Budget cuts results in a Total Net Income and Interest Expense of \$40,858,000 over a rate base of \$197,494,000 for a rate of return of 20.69%. See PRMSA Reply Brief, Appendix A. It should be noted that a decrease in expenses would ordinarily require a reduction in the working capital portion of the carrier's rate base. However, because rate base was not noted as an issue in this proceeding, this adjustment was not made for any of the carriers. If made, this adjustment would have further increased the rate of return.

⁴¹ See PRMSA Reply Brief, Appendix A. Utilizing a rate base of \$197,494,000, a 17% rate of return would yield net income plus interest of \$33,574,000. Interest expense is constant at \$23,651,000 and net income must be limited to \$9,923,000. With a reduced Vessel Expense of \$220,657,000, revenues must therefore be reduced \$7,284,000 to \$305,675,000. PRMSA's 17.2% average rate increase would have produced \$45,929,000 and therefore must be reduced to \$38,645,000 or an average rate increase of 14.5%. Because the carrier's rate structure was not made an issue in this proceeding, PRMSA will be allowed to apportion this average rate increase among the tariff items in its Tariff FMC-F No. 7 to achieve the same rate relationships it originally proposed.

⁴² See, I.D. at 53; Rozynski Testimony at 9-10.

their lawfulness, he found that because this was not expressly included as an issue in this proceeding and because Sea-Land was not put on notice of any allegation of such unlawful activity, it cannot be addressed in this proceeding. While there is some question as to the correct label to be placed on these payments,⁴³ there is no dispute that the payments do reflect expenses incurred in the trade. Nor has it been demonstrated that these payments were in fact unlawful under the Shipping Act, 1916. These payments will therefore be considered as expenses in this proceeding.

When Sea-Land's cargo volume projections are modified pursuant to the foregoing discussion, and Hearing Counsel's inflation factor is applied, Sea-Land's rate of return computes to 16.04%⁴⁴ This result closely approximates the 16.0% rate of return Sea-Land should be allowed, and, accordingly, its rate increases are found to be just and reasonable.⁴⁵

As was noted by the Presiding Officer, GCML's proposed increases went virtually unchallenged in this proceeding. Although no specific findings were made as to its revenues and expenses, a review of the record reveals that it engaged in basically the same type of methodologies as its related corporation, TMT. It projected a substantial cutback in service with a resulting reduction in its cargo projections. While there was disagreement as to whom this cargo would go, there was no dispute that GCML would lose it.⁴⁶ GCML's projected operating costs were proportionately reduced to reflect its reduced service and its estimates were not contested by any other party. It applied a 10% annualized inflation factor to its projected costs which was held to be consistent with the test index established in the proceeding. As a result of these calculations GCML's rate of return computes to 16.10%.⁴⁷ This is below the 16.5% maximum reasonable rate of return it is allowed, and accordingly its rate increases are found to be just and reasonable.

Questions were raised as to whether TMT met its burden of proof in this proceeding. Its methodology in forecasting cargo projections and revenues, a trend analysis adjusted for extraordinaires, was found to be reasonable. However, one of the extraordinaires it claimed, *i.e.* cargo gained due to GCML's reduction of service was disputed, due to

⁴³ Sea-Land paid a total of \$607,547 to Sea-Land Puerto Rico, Inc. and itemized this payment as *Freight Brokerage*, although it later alleged it to be a sales expense. Zito Rebuttal Testimony at 2.

⁴⁴ Hearing Counsel Opening Brief, Appendix A.

⁴⁵ It should also be noted that Sea-Land cancelled the increases proposed to Tariff FMC-F No. 53 but did not make a corresponding decrease in its revenue forecast. If this had been done, Sea-Land would have arrived at a rate of return below the 16.04% found here.

⁴⁶ GCML projected a decline of 100,000 tons of cargo in the trade. Baci Testimony at 5.

⁴⁷ This data is reflected in GCML's original submissions filed with the Commission pursuant to Rule 67(a)(2) of the Commission's Rules of Practice and Procedure (46 C.F.R. 502.67(a)(2)).

ambiguities in TMT's original projections and its failure to adequately clarify these ambiguities and its subsequent adjustment of projections. The Presiding Officer held that TMT had not justified its final projections. While the Presiding Officer suggested that TMT might, by way of Exceptions to the Initial Decision, correct these deficiencies, it chose not to supplement the record but rather to simply highlight evidence of record which it alleged supports its final figures. As noted above, TMT has shown that GCML will lose 100,000 tons of cargo and not 120,000 tons. Accordingly, the corrected figure of 80,000 tons of additional cargo for TMT which is based upon a loss of 100,000 tons by GCML will be accepted.

The initial methodology used by TMT in arriving at its operating cost projections appears acceptable. Like GCML, it used the annualized 10% inflation factor approved by the Presiding Officer. However, questions arose as to whether this factor was properly applied to costs, and as to the legitimacy of its claimed expenses as it applied to "commissions" and "fees" assigned to its parent corporation. While TMT has adequately explained the application of its annualized 10% inflation factor,⁴⁸ it has not totally rebutted the allegation of double counting of supervision fees and management commissions. Its explanation is that CMC, its parent, supervised and managed both TMT and GCML through its Caribbean Division and that the \$7 million "supervision" expense is TMT's allocable portion of the Caribbean Division's administrative and general expenses.⁴⁹ While this appears to be a satisfactory explanation of the "supervision" expenses, it completely fails to address "management commissions."

TMT's explanation of its claimed "management commissions" is that CMC incurs expenses in managing all its operating units, including the Caribbean Division, of which \$3.013 million were allocated to TMT operations in this trade. This does not explain, however, whether part of CMC's home office expenses include an allocable portion of the Caribbean Division expenses. CMC's overall operating expenses are not itemized in the record.⁵⁰ TMT has therefore failed to sustain its burden of proof on this issue, and accordingly the \$3.013 million in "management commissions" will be disallowed as an expense.⁵¹

TMT adjusted its rate base downward due to a double counting of vessel improvements in response to protests to its original projections. During the proceeding, it was alleged that an additional \$7 million of rate base was overstated.⁵² TMT's response to this allegation has been

⁴⁸ See Farmer Testimony 4-7; TMT Exceptions at 18-19.

⁴⁹ See Farmer Testimony, Exhibit F, p. 1; TMT Exceptions at 10-11.

⁵⁰ See Farmer Testimony, Exhibit G.

⁵¹ Administrative and general expenses were specifically included as an issue in this proceeding in the Order of Investigation and TMT bears the burden of proof on these issues.

⁵² I.D. at 70.

that its projections are accurate and that, in any event, it is not an issue set forth in the Order of Investigation. TMT is correct in this latter contention, based on the Commission's interpretation of P.L. 95-475 which excludes any consideration of issues not noted in the Order of Investigation.⁵³ TMT's original calculations adjusted for its prior admission of rate base overestimate will therefore be accepted.

Based upon the above determinations, TMT's rate of return will be 15.33%, below the 15.5% maximum reasonable rate of return permitted. Accordingly TMT's rate increases are found to be just and reasonable.

ECONOMIC HARDSHIP

The Initial Decision

The Presiding Officer essentially found that Protestants had failed to establish that a particular economic hardship would result from the general rate increases proposed by the carriers. He reviewed the testimony of witnesses on this issue and found that it addressed only individual commodity rates and that these are irrelevant in a general rate proceeding. The Presiding Officer was also apparently of the opinion that even if economic hardship had been shown on the record, there is no relief available in a general rate increase investigation. It is his belief that the Commission may only grant specific relief on individual commodity rates based on specific transportation factors.

It is the Presiding Officer's opinion that the consideration of economic hardship in a general rate increase investigation would result in the imposition of confiscatory rates. The testimony of witnesses is seen as sincere and in some cases compelling but as simply not addressing the issues relevant to the proceeding. The Presiding Officer noted that while this testimony does indicate that the economic interests of Puerto Rico and the Virgin Islands are suffering from a number of inflationary factors, it does not isolate the impact of ocean freight rates.

Position of the Parties

Exceptions

GVI/PRMA take exception to the findings of the Presiding Officer as to the lack of a showing of economic hardship resulting from the rate increases of the carriers. They submit that the record in this proceeding is replete with compelling testimony of both specific and general economic harm flowing from these specific rate increases. Allegedly, this economic impact is relevant to the public interest and must be considered in determining a reasonable rate of return for the carriers in this trade. GVI/PRMA further submit that the facts and circumstances surrounding these rate increases indicate price collusion on the

⁵³ See Docket No. 79-48 - TMT - Proposed General Increases in Rates 22 F.M.C. 175, 178 (1979).

part of the carriers in violation of the antitrust laws, and that this should be considered by the Commission in deciding the existence and extent of the economic impact.

PRMSA believes that the Presiding Officer erred in giving any consideration at all to the economic impact testimony advanced by GVI/PRMA. It argues that this is unfair to the carriers because GVI/PRMA refused to comply with discovery requests concerning its contemplated testimony and thereby precluded the carriers from adequately preparing for cross-examination of its witnesses.

Replies

GVI/PRMA contend that the economic impact testimony and evidence was properly admitted into the record of this proceeding and cannot now be excluded.

TMT, PRMSA and Sea-Land argue that no adverse economic impact resulting from the rate increases has been shown on the record of this proceeding. A general revenue investigation allegedly does not focus on the adverse impacts on individual shippers and their objections are said to be best left to complaint cases where the transportation factors can be more carefully analyzed. TMT also submits that it is improper for GVI/PRMA to attempt to argue price collusion by the carriers at this stage of the proceeding.

Hearing Counsel disagree with the Presiding Officer's opinion that economic hardship cannot be considered in a general rate investigation. It submits that economic impact is a valid rate of return consideration. Shipper testimony is argued to be relevant to this determination if sufficient shippers come forward to enable the Commission to deduce the general economic impact of the rate increases. Hearing Counsel maintains, however, that the evidence in this case does not indicate sufficient economic dislocation to justify an adjustment to what is otherwise a reasonable rate of return for each carrier.

Conclusion

The economic impact of rate increases is relevant to a determination of their reasonableness⁵⁴ and must be considered as a relevant public interest factor in making these determinations.⁵⁵ The economic condition of the domestic offshore economies and the particular economic interests represented by Protestants are certainly relevant public interests whose welfare should be balanced against the revenue needs of the carriers. The manner in which the economic impact of rate increases may best be factored into rate of return decisions is by considering it in connection with the award of risk premiums. The Commission cannot

⁵⁴ *Alaska Rate Investigation*, 1 U.S.S.B. 1, 7 (1919).

⁵⁵ *Permian Basin Area Rate Cases*, *supra*, at 791.

impose a confiscatory rate of return upon a carrier because of economic hardship considerations.⁵⁶ However, in determining the amount of additional revenues that will be necessary for a carrier to attract capital and compensate its investors for the risks they have assumed, it is appropriate that the Commission consider, in balancing carrier interests against shipper and other affected interests, the economic impact that a rate increase can be expected to have on a trade.⁵⁷

Whenever a business entity is in a positive rate of return situation (in excess of imbedded debt costs) there is some degree of ability to attract capital and compensate investors for risk. The question becomes what is a "fair" rate of return. The comparative earnings test uses the average earnings of U.S. businesses as a benchmark by which such "fairness" can be measured.⁵⁸ Imposing a rate of return below the U.S. average would require a finding that the particular entity has less risk than average. While economic hardship could be factored into in such considerations, if risks are shown to be above average it is highly unlikely that even a showing of extreme hardship would justify a rate of return below average. The relevant inquiry is when business risks above the national average are shown, to what extent can economic hardship act as a moderating factor. In this regard attention should be focused upon the criteria used to award "risk premiums." To reduce business "risk premiums" on the basis of economic hardship would require a showing of extreme economic dislocation resulting directly from a carrier's rate increases.⁵⁹

In terms of a common carrier serving an insular domestic offshore jurisdiction, the best evidence of possible economic hardship is a showing that the costs of goods and services in the general offshore economy have increased as a direct result of increased ocean transportation costs at a greater rate than those on the U.S. mainland. By such a showing some inferences can be drawn as to the comparative burden on consumers and the comparative competitive disadvantages imposed on business interests in the offshore economy. Also relevant here would be an analysis of the general state of the offshore economy. This would enable the Commission to ascertain the economic impact imposed by the rate increases.

Evidence relating to specific impacts of a general rate increase on single commodity shippers and their ultimate consumers could also be relevant in an economic impact inquiry. While not as comprehensive as general comparative analysis, a fair sampling of the impact upon major

⁵⁶ *Baltimore & Ohio Railroad Co. v. United States*, 345 U.S. 146, 150 (1953).

⁵⁷ See *Permian Basin Area Rate Cases*, *supra*, at 812.

⁵⁸ *F.P.C. v. Hope Natural Gas Co.*, *supra*, at 603.

⁵⁹ This would require a finding that risks assumed by carrier investors due to the overall volatility of the trade are outweighed by considerations such as business failures, resulting unemployment and the inability of the average consumer to obtain the basic necessities.

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commodities moving in the trade is a sufficient basis upon which inferences may be drawn as to the overall impact of a general rate increase.⁶⁰ At what point such inferences can be drawn is a question which must be answered on an *ad hoc* basis. A trade-wide rate investigation probably presents the best vehicle for considering both general and specific impacts.

The question then becomes what, if any, economic hardship has been established in this case and how does it impact upon the reasonable limit of the carriers' rates of return. Protestants should not be estopped from alleging economic hardship due to a failure to comply with discovery requests of PRMSA. It is questionable whether Protestants in fact *failed* to comply with discovery requests⁶¹ and whether the carrier has suffered any significant prejudice as a result of any such failure.⁶² Therefore, the imposition of sanctions has not been shown to be warranted under the circumstances, particularly given the expedited nature of the proceeding.⁶³ Accordingly, the Commission will consider the evidence of economic hardship entered into the record of this proceeding.

The Protestants did submit substantial evidence of general and specific economic adverse impacts resulting from ocean freight rates on the interests they represent. They satisfactorily established that ocean freight rate increases have a clear adverse impact upon the costs of basic commodities,⁶⁴ the competitive position of business interests in relation to the mainland U.S.,⁶⁵ and the basic economic welfare of the

⁶⁰ Clearly, if 100% of the commodities moved by carriers in the trade to and from an insular economy are examined, a general comparative analysis can be directly derived from such evidence. Also, if only a few minor commodities are surveyed, it is doubtful that any general inferences can be established. The major commodities, if sufficiently analyzed, can form the basis of general inferences as they comprise the majority of the carriers' cargo as well as the vital trade of the insular economy.

⁶¹ Protestants allegedly did not comply with discovery requests asking the witnesses in the hearings in St. Thomas and San Juan to bring with them financial data as to their individual businesses. At least one witness complied with this request. I.D. at 88. Also, other discovery requests may have been complied with. See GVI/PRMA Reply Brief at 108-110.

⁶² Certainly, any such failure did not significantly prejudice PRMSA's ability to cross-examine these witnesses. PRMSA Reply to Exceptions at 103-105. I.D. at 88, n. 34. Further, no formal discovery orders were issued in this proceeding and only a general discussion of discovery requirements was given by the Presiding Officer. See Summary of Ruling Made at Second Formal Prehearing Conference and Notice of Schedule Established, issued March 26, 1981.

⁶³ Rule 210 of the Commission's Rules (46 C.F.R. 502.210) contemplates that such sanctions are to be imposed by the presiding officer. The Presiding Officer here refused to impose such sanctions and the Commission is not prepared to question that determination.

⁶⁴ Due to the low profit margins of food retailers, the major impact of the rate increases will be passed on to consumers. Caparros Testimony at 2-3. This was corroborated by other testimony. Transcript of May 4, 1981 Hearing at 95, 1933. Housing costs will also be substantially impacted. Testimony of Murray at 3. Motor vehicle costs will also be increased and fewer vehicles will be available. Transcript of May 4, 1981 Hearing at 50-54.

⁶⁵ The apparel industry will be put at a distinct competitive disadvantage compared to U.S. mainland firms. Transcript of May 6, 1981 Hearing at 332, 344. At least one commodity whose shipping costs are a significant determinate of its ability to move, rags, has stopped moving due to the costs of

Continued

offshore economy in relation to the U.S. mainland.⁶⁶ However, all of this evidence relates to the general trend in ocean freight rates in recent years and was not specifically tied to these particular rate increases. Accordingly, a specific extreme dislocation resulting from these specific rate increases was not established. Therefore, no adjustment of the carriers' rates of return based solely on this consideration is warranted.

Finally, whatever its merits, the question of price collusion cannot now be considered in this proceeding. It was not included as an issue in the Order of Investigation. The tactic here of having it considered under the economic hardship issue on the basis of a presumption of economic injury due to a *per se* violation of the antitrust laws is tenuous. First, it would require a finding of a violation of antitrust law, which, in the context of this proceeding is beyond the Commission's statutory authority. Second, this allegation is subject to the same if not more serious notice and due process impediments as is the issue of Sea-Land's brokerage payments.⁶⁷ Third, it would be contrary to the Commission's prior holdings on the exclusionary effects of an Order of Investigation under P.L. 95-475⁶⁸ and it is now too late for the Commission to amend the investigative scope of this proceeding in light of the statutory requirement that the Commission issue its final decision by September 26, 1981.⁶⁹ For all the above reasons, the Commission will not consider Protestants' allegations of price collusion in this proceeding.

THEREFORE, IT IS ORDERED, That the proposed rate increases to Tariffs FMC-F No. 34 and 53 of Sea-Land Service, Inc. are found to be just and reasonable; and

IT IS FURTHER ORDERED, That the proposed rate increases to Tariff FMC-F No. 5 of Trailer Marine Transport Corporation are found to be just and reasonable; and

IT IS FURTHER ORDERED, That the proposed rate increases to Tariff FMC-F No. 2 of Gulf Caribbean Marine Lines, Inc. are found to be just and reasonable; and

transportation. Transcript of May 6, 1981 Hearing at 282-283, 291-295. The tourism industry will indirectly suffer. Transcript of May 4, 1981 Hearing at 192-193. The liquor industry will lose business to mainland suppliers. Paiewonsky Testimony at 2-3.

⁶⁶ The economies of the Virgin Islands and Puerto Rico are dependant upon ocean transportation. Francis Testimony at 5-6; Castillo Testimony at 7. Increases in the costs of transportation, therefore, will have a clear impact on major segments of these economies in the manufacturing sector, Castillo Testimony at 7, agricultural products, and textiles, *Id* at 8-11. While these interests recognize that rate increases cannot be avoided, they are of the opinion that the impacts of the rate increases should be considered in establishing a reasonable profit for the carriers. Castillo Testimony at 16; Transcript of May 6, 1981 Hearing at 352-353.

⁶⁷ See I.D. at 62, n. 27.

⁶⁸ See footnote 69.

⁶⁹ On June 5, 1981, in response to the request of the Presiding Officer, the Commission issued an order extending the time period for this proceeding by 60 days pursuant to section 3(b) of the Intercoastal Shipping Act, 1933, as amended (46 U.S.C. 845(b)) to September 26, 1981.

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IT IS FURTHER ORDERED, That the proposed rate increases to Tariff FMC-F No. 7 of Puerto Rico Maritime Shipping Authority are found to be unjust and unreasonable to the extent they exceed an average of 14.5%; and

IT IS FURTHER ORDERED, That the Puerto Rico Maritime Shipping Authority refund to any person who was charged on the basis of its unsuspended proposed rate increases an amount equal to that portion thereof found to be not just and reasonable plus interest in accordance with section 3(c)(2) of the Intercoastal Shipping Act, 1933, as amended (46 U.S.C. 845(c)(2)); and

IT IS FURTHER ORDERED, That the Puerto Rico Maritime Shipping Authority file with the Commission within thirty (30) days from the service date of this Order amendments to its Tariff FMC-F No. 7 cancelling its rate increases of February 27, 1981 and implementing a 14.5% average general rate increase which will become effective immediately upon filing; and

IT IS FURTHER ORDERED, That the Puerto Rico Maritime Shipping Authority file with the Commission's Secretary within sixty (60) days from the service date of this Order a full accounting of all refund payments made pursuant to this Order; and

IT IS FURTHER ORDERED, That this proceeding is discontinued.

By the Commission.*

(S) JOSEPH C. POLKING
Assistant Secretary

* Vice Chairman Moakley's concurring opinion and Commissioner Daschbach's separate opinion are attached.

Vice Chairman Moakley, concurring:

I concur with the ultimate conclusions reached by the majority in this proceeding but differ in the manner in which two related issues were resolved.

First, I disagree that a logical discussion of the pros and cons of financial risk premiums, such as that set forth in the majority opinion, is a sufficient basis on which to disregard the testimony of expert witnesses and to overturn the Administrative Law Judge's conclusions on this subject. It is particularly troublesome that the majority would adopt this approach, not upon any particular exceptions to the initial decision on the financial risk issue, but, rather, upon its own motion. General Order 11 speaks only in general terms on risk premiums. It states in pertinent part, that

“. . . the average rate of return earned by U.S. corporations is computed and, where appropriate, adjusted for current trends in rates of return, the cost of money and *relative risk*.” (Emphasis supplied). 46 C.F.R. 512.6(d)(2)(ii).

The staff economic witness on this issue, Mr. Jay Copan, was one of the authors of that provision in General Order 11. The majority would rely on his expert testimony in this proceeding because, among other reasons, his methodology comports with G.O. 11, but would disregard his opinion on whether financial risk premiums fall within the meaning of “relative risks” as set forth in that rule.

While the logic used by the majority is appealing, the issue of whether financial risk premiums should, as a general matter, be considered, is one which should be addressed in a rulemaking proceeding. The mandate of P.L. 95-475 to resolve methodology questions by rule and not in general rate proceedings is certainly clear.

The second area in which I depart from the majority opinion is its evaluation of the testimony relating to economic hardship. The majority concluded that protestants satisfactorily established that ocean rate increases have a clear adverse impact upon:

- (1) the costs of basic commodities;
- (2) the competitive position of business interests in relation to the mainland U.S.; and
- (3) the basic economic welfare of the offshore economy in relation to the U.S. mainland.

However, this evidence is not found persuasive in this proceeding because it “was not specifically tied to these particular rate increases.”

It certainly challenges the imagination to understand how the protestants could have more specifically tied the economic hardship evidence to these particular rate increases. The increases were just beginning to take effect at the time that the shipper witnesses were testifying. In all

proceedings under P.L. 95-475, hearings must be completed within 60 days of the Order of Investigation which, in turn, must be issued before the increases take effect. This criticism of the protestants' evidence becomes even more severe in connection with other rate increases that the Commission may choose to suspend. Evidence of the impact would never be available during proceedings involving suspended increases because the rates would not be in effect and adherence to the majority's position would thus render all shipper input irrelevant.

I would find that the economic impact demonstrated on this record by protestants is relevant to these particular increases and that the award of financial risk premiums to TMT and GCML should be deleted because of this impact, and *not* because, as a general rule, it is inappropriate to consider financial risk.

In this respect, I would agree with the distinctions made by the majority opinion between the nature of business risk and that of financial risk. Financial "leveraging" is essentially speculative and any benefits to the public interest obtained by allowing carriers to obtain the rewards of such leveraging are here outweighed by the hardship which will be imposed upon these insular economies by the instant rate increases. In short, I believe that it is necessary to balance the equities here in favor of the consumer.

SEPARATE OPINION OF COMMISSIONER RICHARD J.
DASCHBACH

Judge Kline's July 20, 1981 Initial Decision is fully dispositive of the five issues delineated in the Commission's January 29, 1981 Order of Investigation and Hearing (see headnotes at pp. 1-2 of Initial Decision) and I adopt its findings that the rate increases of Sea-Land, the Puerto Rico Maritime Shipping Authority, and Gulf Caribbean Maritime Shipping Lines are just and reasonable. I further find that TMT's rate increase is just and reasonable.

In view of the Initial Decision's thorough treatment of the salient issues in this proceeding, the Commission's extensive re-examination of them is, in my judgement, unnecessary and duplicative.

FEDERAL MARITIME COMMISSION

DOCKET NO. 81-10

SEA-LAND SERVICE, INC., TRAILER MARINE TRANSPORT CORPORATION, AND GULF CARIBBEAN MARINE LINES, INC. PROPOSED GENERAL RATE INCREASES IN THE PUERTO RICO AND VIRGIN ISLAND TRADES

This is the first trade-wide general-revenue investigation under Public Law 95-475, which imposes strict time limits. It investigates general-rate increases of 16 to 18 percent filed by four carriers, PRMSA, Sea-Land, TMT and GCML. The huge scope of the proceeding compressed within strict time limits presented severe problems which were met by adopting modern procedures which largely abandon the old-fashioned, trial-type oral hearing. Additional problems arose because the pertinent regulation, G.O. 11, does not clarify certain critical matters and because it was not always clear from reading the Commission's Orders what were its intentions regarding the scope of the issues being litigated. Protestants were given ample opportunity to show whether the carriers had carried their burdens of proof by a preponderance of the evidence, recognizing that in rate cases only reasonable approximations are required. The record shows that with one possible exception (TMT) the carriers have adequately explained their methodologies and justified their rate increases. More specifically I find:

- (1) An exact rate of return cannot be fixed with assurance on this record because of deficiencies in all of the expert witnesses' testimony. However, the closest approximation is provided by BIE witness Copan and confirmed by others to show that 16 to 17 percent up to about 18 percent for PRMSA, primarily, represents a zone of reasonableness. Witness Copan's recommendations would have been followed more closely but for a significant omission, which he and BIE should cure on exceptions. This omission refers to an estimate of 7 percent for interest which he made when deriving a benchmark rate of return from a group of industries. For PRMSA, consideration of the fixed charges coverage ratio is necessary as a check but, as Mr. Copan shows, the ratio justifies PRMSA's rate increases.
- (2) All respondents except possibly for TMT have generally provided adequate explanations showing that their revenue and cargo volume methodologies are reasonable. Protestants' alternative methodologies are not found to be persuasive or more reliable but seem to have been improvised and based on questionable techniques.
- (3) The carriers' calculations of fuel and increases in other costs are reasonable under the circumstances. Protestants' alternative calculations are found to be deficient, largely improvised, and based upon doubtful methodologies and expedient adjustments.
- (4) Economic hardship cannot be measured with assurance in a general-revenue case and the evidence in this case is inconclusive. Essentially individual shipper testimony is relevant in an individual commodity rate case, not a general-revenue proceeding. Individual shippers with particular rate problems who testified in this proceeding should be steered to proper negotiations or relevant proceedings to seek relief.
- (5) Protestants' criticisms of certain aspects of the carriers' cases are found to be valid. These refer to certain projections of Sea-Land, add-ons to rate of return because of bad past years, the effects of budget cuts, PRMSA's use of a "surrogate" G.O. 11

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formula, and to some extent, its attempt to compensate for its tax-exempt status. These criticisms, however, after corrections, do not alter the finding that the rate increases are justified. However, protestants' criticism of TMT's curious change in its prediction from that originally presented to the Commission, and certain other matters not adequately explained, warrant a finding that TMT has not proven its projections to be reasonable, absent satisfactory explanation on exceptions to the Commission.

- (6) Certain critical recommendations are made for the sake of efficiency in future rate cases. These concern the need to clarify G.O. 11 regarding the formula and data to be used, the need for Commission Orders to specify the scope of the issues; the need to formulate a rule governing admissibility of later evidence; and the need to encourage shippers and carriers to seek solutions to individual rate problems in other than general revenue proceedings.

Amy Loeserman Klein and T. Scott Gilligan, for respondent PRMSA.

Donald J. Brunner, for respondent Sea-Land Service, Inc.

Michael Joseph, for respondents TMT/GCML.

Edward J. Sheppard, George J. Weiner, and April C. Lucas, for protestants GVI/PRMA.

Daniel J. Sweeney and Steven J. Kalish, for protestant DTPTC.

Walter R. Fournier, for protestant Chamber of Commerce of Puerto Rico.

John Robert Ewers, Alan J. Jacobson and Charles C. Hunter, for Bureau of Investigation and Enforcement.

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

Partially Adopted September 25, 1981

This proceeding is the first general trade-wide investigation of general rate increases filed in the United States Atlantic and Gulf-Puerto Rico and U.S. Virgin Islands trades in approximately seven years, the last such investigation (Docket Nos. 71-30, 71-42, 71-43) having concluded in 1974.² It began after general rate increases were filed by the Puerto Rico Maritime Shipping Authority, Sea-Land Service, Inc., Trailer Marine Transport Corporation, and Gulf Caribbean Marine Lines (PRMSA, Sea-Land, TMT, and GCML). The proceeding was instituted by the Commission's Order of Investigation, served January 29, 1981, originally confined to the three carriers other than PRMSA, but on February 27, 1981, the Commission added PRMSA to the case.

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

² The last such trade-wide investigation was Docket Nos. 71-30, 71-42, 71-43, *Transamerican Trailer Transport, Inc., Sea-Land Service, Inc., Seatrain Lines, Inc. - General Increases in Rates, etc.*, 14 S.R.R. 645 (1974). These were the three main carriers operating in the trade at that time. Of course, there have been numerous investigations of general rate increases filed by individual carriers since that time involving PRMSA, Sea-Land, and TMT, but until the present proceeding, the Commission had not decided to conduct a simultaneous investigation of all four major carriers now operating in the trade.

The rate increases were all filed between November 26, 1980, and December 5, 1980, and were designed to become effective for Sea-Land on January 25, 1981, for TMT/GCML on January 29, 1981, and for PRMSA, on February 3, 1981. However, for various reasons, only GCML's rates went into effect as scheduled, the others being deferred so that ultimately PRMSA's and Sea-Land's rates became effective on February 27, 1981, and TMT's on March 3, 1981.³ The rate increases subject to investigation were 18 percent for Sea-Land, 16 percent for TMT/GCML, and a weighted composite increase of 17.2 percent for PRMSA consisting of an 18 percent increase in the North Atlantic ports and 16 percent in the South Atlantic and Gulf ports. The rates were not suspended but were made the subject of investigation under section 18(a) of the Shipping Act, 1916, and sections 3 and 4 of the Intercoastal Shipping Act, 1933. These rate increases were published in supplements to two of Sea-Land's tariffs (FMC-F No. 34 and No. 53); one of TMT's (FMC-F No. 5), one of GCML's (FMC-F No. 2) and PRMSA's tariff FMC-F No. 7. Interestingly, Sea-Land's Tariff No. 53 is an intermodal tariff applying between Canadian ports and San Juan, Puerto Rico, a tariff which the Commission has decided is a domestic rather than foreign tariff. See Special Docket No. 556, *Pan American Industries, Inc. v. Sea-Land Service, Inc.*, 18 S.R.R. 1697 (1979); but cf. Special Docket No. 695, *Application of Sea-Land for the Benefit of the Otto Gerdau Co.*, 19 S.R.R. 1424 (I.D. 1980, F.M.C., April 7, 1980). In any event the rate increases in the Canadian tariff were ultimately canceled by Sea-Land and never went into effect.

Protests to the proposed rate increases were filed by the Government of the Virgin Islands (GVI), the Puerto Rico Manufacturers Association (PRMA), the Chamber of Commerce of Puerto Rico, and The Drug and Toilet Preparation Traffic Conference, Inc. (DTPTC). The combined protestants contended that the rate increases would have a serious adverse economic impact on Puerto Rico and the Virgin Islands⁴ and challenged the carriers' supporting materials filed with the rate increases as being speculative, inaccurate, and unreliable especially as regards proper allocation of rate base and expenses, reasonableness of projections of cargo volume and revenue and the reasonableness of the rate of return.

³ There appears to be some confusion about the effective date of Sea-Land's increases probably caused by so many postponements and special-permission applications which affected the various dates of the rate increases. BIE states that Sea-Land's changes became effective on March 3, 1981 (BIE opening brief, p. 1), together with TMT's. However, the Commission's tariff records indicate that Sea-Land's increases in its tariff FMC-F No. 34 went into effect on February 27, 1981. (See Supplement No. 26 to cited tariff.)

⁴ Protestant DTPTC has not contended the issue of economic impact in litigating this case but has joined other protestants in the other issues.

The three carriers originally named as respondents replied to the protests in defense of their rate increases, citing Commission case law and regulations in support of their financial exhibits and asserting the need for increased revenue so that the islands could enjoy the benefits of reliable service by financially healthy carriers. PRMSA also defended its supporting materials filed with its financial case but encountered a problem with its submissions relating to projections based upon the assumption that it would acquire the *ATLANTIC BEAR*, an acquisition which did not occur. After PRMSA had filed replies to the protests on January 15, 1981, in which it attempted to show that deployment of the two Transclass vessels in the Gulf would not significantly alter PRMSA's pro forma year results, the Commission found that these submissions contained new factual assertions which should have been presented back in December with the original case. The Commission therefore rejected PRMSA's tariff filings for failure to comply with Rule 67. See Order, 23 F.M.C. 681 (1981). However, the Commission later permitted PRMSA's rate increase to become effective on February 27, 1981, on special permission.

THE REASONS FOR THE HEARING

In ordering a hearing the Commission recited a number of facts which apparently convinced them of the need for such a proceeding. The Commission cited the protestants' contentions generally regarding the carriers' speculative and unreliable financial submissions and specified that protestants had challenged the carriers' projected labor costs, fuel costs, vessel maintenance costs and administrative and general expenses. The Commission stated that "these matters will be made an issue in this proceeding to provide Protestants opportunity to sustain their objections." (Order, p. 6.) Furthermore, the Commission noted that "in some extreme situations" concentration on a strict comparative analysis of a carrier's rate of return with other U.S. corporations may fail to take into account other important public interests such as economic hardships that rate increases "may impose on the affected domestic offshore economies and commercial interests." Therefore, when consideration is given to allowing a higher than average rate of return because of particular risks which carriers face in serving a trade, the Commission stated that "such considerations must be balanced" against the possible economic hardships. (Order, p. 6.)

Having recited the above facts, the Commission then stated: Accordingly, a hearing is necessary to resolve the issues specified below in order to determine whether the general rate increases here are unjust, unreasonable, or otherwise unlawful under section 18(a) of the Shipping Act, 1916 and sections 3 and 4 of the Intercoastal Shipping Act, 1933. Order, p. 6.

The Commission thereafter set forth the issues to be determined in addition to the ultimate issue of the justness and reasonableness of the rate increases. The Commission specified five issues, the first relating to an appropriate rate of return; the second and third relating to the sufficiency of the carriers' revenue and cargo volume projections as to methodology employed and accuracy; the fourth relating to the propriety of the carriers' calculations of projected labor, fuel, vessel maintenance and administrative and general expenses; and the fifth relating to the question of possible economic hardship on the affected interests represented by protestants and, if such were shown, how it should be treated when determining a reasonable rate of return. (Order, pp. 8-9.)

The exact language employed by the Commission in framing the above five issues is as follows (Order, pp. 8-9):

- (1) What is an appropriate rate of return for the carriers named as Respondents? In addressing this question consideration should be given to the average rate of return earned by other U.S. corporations and the inherent risks, if any, in operating in the affected trades.
- (2) Is the methodology used by Respondents in making revenue and cargo volume projections appropriate?
- (3) Are Respondents' revenue and cargo volume projections sufficiently accurate, and, if not, what are the appropriate projections?
- (4) Have Respondents properly calculated their cost projections covering labor, fuel, vessel maintenance and administrative and general expenses, and, if not, what are the proper calculations?
- (5) Do the proposed rate increases impose an economic hardship on the affected interests represented by Protestants and Inter-venors, and, if so, to what extent should this factor be considered in determining a reasonable rate of return for the carriers? Order of Investigation, pp. 8-9.

In addition to the above explanations, the Commission provided comments on the nature of the inquiry into the question of the carriers' reasonable rate of return. The Commission stated:

In any investigation into the reasonableness of a general rate increase, consideration must be given to what constitutes a just and reasonable rate of return for the carrier. In addressing this issue, the Commission generally takes into account: (a) the average rate of return earned by U.S. corporations, and (b) the risks faced by the individual carrier that may warrant a different rate of return. This analysis must also necessarily consider the group of U.S. corporations that should be used to derive an average, the time span examined in this regard and the criteria to be applied in determining whether a risk factor

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adjustment should be made, and, if so, the degree of such an adjustment. Such an inquiry will be made in this case. (Order, p. 5.)

As mentioned above, the Commission added PRMSA as a respondent to this case by Order of February 27, 1981. PRMSA has by far the largest share of the trade. The Commission incorporated the issues previously set forth in its first Order, discussed above, for application to PRMSA. The Commission also noted:

Accordingly, because of this similarity of issues, particularly the rate parity considerations prevailing in this trade, PRMSA's proposed rate increases will be permitted to go into effect as scheduled but will be included in this investigation, and PRMSA will be made a respondent in the proceeding. (Order, February 27, 1981, p. 2.)

However, the Commission added another matter applicable only to PRMSA, namely, consideration of the "fixed charge coverage ratio standard." Thus, the Commission stated (Order, February 27, 1981, p. 3):

In addition, because of the peculiar capital structure of PRMSA, the fixed charge coverage ratio standard of reasonableness stated in 46 C.F.R. 512.6 (d)(3) will also be considered in determining the reasonableness of PRMSA's proposed rate increases.

* * *

IT IS FURTHER ORDERED, That all issues stated in the said Order of Investigation be considered in determining the reasonableness of PRMSA's proposed rate increases and that in addition consideration be given to the fixed charge coverage ratio standard of reasonableness as set forth in 46 C.F.R. 512.6 (d)(3) in making such determination; . . .

PROBLEMS ENCOUNTERED IN LITIGATING THIS CASE UNDER THE GOVERNING STATUTE, P.L. 95-475

Having issued its two Orders of Investigation, discussed above, the Commission launched this massive investigation. At the outset it was clear that the parties were facing enormous difficulties caused by the huge scope of the proceeding, the number of parties, and the pressures imposed by the time prescriptions erected in the governing statute, P.L. 95-475, which amended the Intercoastal Shipping Act, 1933, to ensure that rate cases would be decided by the Commission within 180 days, or, if necessary, 240 days after effective date of the rate increases. Because this appears to be the first trade-wide general rate investigation under the new statute, the Commission has not had the experience of conducting such a proceeding under the new law. I deem it my duty to point out to the Commission possible means to alleviate the huge

burdens and expenses which every party has undergone in this proceeding in future proceedings, consistent with the reforms contemplated by P.L. 95-475.

There are two major areas the Commission should consider when initiating future rate cases. First, the Commission should, whenever possible, provide specific guidance to the parties as to the problems which the Commission believes require a hearing, as P.L. 95-475 requires. Second, again as P.L. 95-475 envisions, the Commission should amplify and clarify its General Order 11 so that parties need not continually litigate the same type of issues concerning rate of return methodology, cost escalation factors, or means of projecting carriers' cargo and revenue in pro forma years.

P.L. 95-475, 92 Stat. 1494, became effective on January 16, 1979. It had two main purposes.⁵ The first, not relevant to the particular discussion here, concerns the Commission's power to suspend rates and to grant refunds to shippers if general rate increases are found to have been excessive. The second, highly relevant here, concerns reforms enacted to expedite the Commission's decisionmaking process. (See Senate Report, cited above, p. 1.) In reaction to the fact that Commission general rate cases had consumed years of litigation time, Congress enacted strict time periods, requiring end of hearings within 60 days, Initial Decisions, if any, within another 60 days, and Commission's final decision within 60 days thereafter (unless extended for compelling reasons another 60 days).

Enactment of such short time periods to determine a multitude of critical matters in general revenue cases was recognized as requiring corresponding procedural reforms. Procedural techniques which would assist in moving cases forward expeditiously were specifically contemplated and written into the statute or the Commission's implementing regulation, Rule 67. For example, the carriers are required to file their direct written case with the tariff filing 60 days before the effective date of the rate change, the case is to be developed by written rather than oral evidence and without cross-examination to the extent possible consistent with due process, the Commission is required to explain in detail its reasons for instituting a hearing, and the Commission is supposed to promulgate guidelines periodically for determining reasonable rates of return or profit. (See Senate Report, p. 2.) To a considerable extent the massive record in this case was developed by written rather than oral testimony and cross-examination was held to a minimum. However, it is apparent that this case consumed much more time and required expenditure of much more money in litigation expense because the parties were required to litigate numerous issues which had not

⁵ For a good discussion of this law and its purposes, see Senate Report No. 95-1240, 95th Cong., 2d Sess., September 26, 1978.

been laid to rest in *General Order 11* and furthermore were not advised by the Commission in greater detail concerning the specific problems which the Commission had found with the materials which had been submitted by the carriers before the case was formally instituted. For example, because *General Order 11* does not describe the "comparable earnings" test for rate of return in any detail, yet requires that rate cases be determined by that test as do the Commission's Orders in this case, we have a half dozen or so expert witnesses each selecting his or her own group of companies for comparison and adding extra points for risk or other reasons. Obviously it will save litigants a great deal of time and money in future submissions if G.O. 11 is revised to specify how the comparable earnings test should be employed by the carrier, for example, what reference group should be selected over what time span, and what further adjustments should be made for what types of risk or current trends and by what measuring techniques. It would also be helpful if G.O. 11 would select other uniform formulae such as which inflation escalation factor should be employed in projecting future costs so that we would not have a medley of inflation factors submitted, e.g., GNP Implicit Price Deflator, Producer Price Index for Finished Goods, PPI for finished goods less food and fuel, Consumer Price Index, etc., all of which have been put forth by various expert witnesses in this case. Other problems, such as whether one can use current data rather than data submitted originally with the rate filing, should be considered as well, whether in G.O. 11 or in Rule 67. This problem has been a serious one in this case and has occurred in previous cases as well. As mentioned, P.L. 95-475 specifically contemplated revisions to G.O. 11 which would help narrow issues in future rate cases. As the statute states in regard to the Commission's issuance of regulations providing guidelines:

After the regulations referred to in the preceding sentence are initially prescribed, the Commission shall from time to time thereafter review such regulations and make such amendments thereto as may be appropriate. Section 3 (a), *Intercoastal Shipping Act, 1933*, last sentence.

The legislative history to P.L. 95-475 makes clear that Congress believed that continual issuance of guidelines by the Commission was critically important. The Senate Report, for example, cited one witness's testimony as follows:

It is tragic that after 40 years of being subject to the *Intercoastal Shipping Act* in the noncontiguous trades, the carriers are completely unaware of what would constitute a guideline for just and reasonable rates of return and consequently that issue must be litigated in each case. (Senate Report, cited above, p. 13.)

The Senate Report explained the purpose of the requirement that the Commission issue guidelines, stating (*Id.*, p. 13):

This should help assure that the same complicated and lengthy arguments will not have to be made every time a hearing is held.

I call the Commission's attention to the "same complicated and lengthy arguments" in this case regarding what is an acceptable rate of return, what reference group of companies should be compared, what adjustments should be made, etc.

Finally, I call the Commission's attention to Commissioner Moakley's testimony to Congress emphasizing the need for the Commission to issue substantive guidelines regarding methodology so as to curtail repetitive hearings, a problem of the past and one that has continued into the present case. Commissioner Moakley stated:

Second, the methodology prescribed by the Commission for the determination of what constitutes a just and reasonable profit would have to be given substantive effect and be followed rigidly throughout each rate proceeding, unless otherwise ordered by the Commission. *Much of the time now consumed by rate proceedings is spent on arguments relating to methodology and the introduction of evidence in support of those arguments.* . . . The Chairman has already directed the staff to prepare recommended rule changes which will resolve many of the questions of methodology which have plagued our rate proceedings in the past. Hearing Before the Senate Subcommittee on Merchant Marine and Tourism, 95th Cong., 2d Sess., August 29, 1978, p. 17. (Emphasis added.)

The Commission has also stated that the procedural rules under which rate cases proceed would also be revised from time to time as follows:

We anticipate that the procedural rules will evolve, based on our experience in processing general rate changes under these procedures. Docket No. 78-47, promulgating original Rule 67, February 14, 1979, p. 10.

I strongly recommend, therefore, that the Commission reopen proceedings to amend and clarify both General Order 11 and Rule 67 in keeping with the statutory mandate to provide guidance so that continual relitigation of essentially similar issues can be prevented.

As to the guidance that the parties would welcome in a particular case, it also became apparent that much time and expense could have been saved in this case had the Commission explained in greater detail why a hearing was necessary on so many issues and, if so, what particular areas the parties should scrutinize. Although the Commission had had the carriers' materials for analysis at least 60 days before this case was docketed, the Commission specified numerous issues without

indicating anything other than that protestants had alleged the carriers' materials to be "speculative" or "unreliable" or something similar. Had the Commission indicated with further specificity exactly what portions of the carriers' materials were to be scrutinized and why they might be unreliable, much time might have been saved in the ensuing litigation. In this regard, the legislative history to P.L. 95-475 indicates that Congress believed that the Commission should show the need for a hearing in detail after having analyzed the carriers' evidence during the 60 days before instituting a formal proceeding. The Commission, having the benefit of advance analysis of data and evidence, was supposed to explain in detail why a hearing was necessary. (See Senate Report, cited above, pp. 12-13.) In this case one can infer from the Commission's Order that a hearing is necessary to test the various contentions of protestants regarding the quality of the carriers' evidence. (Order, p. 6.) However, this is the same sort of practice which caused so many delays in the past. For many years the Commission's orders instituting rate cases merely recited the claims of protestants and the replies of the carriers and then set everything down for hearing without narrowing issues. The results were that every litigating party felt free to dump into the case evidence on every contention and every issue that the party wished to litigate having any connection with the ultimate question of the carrier's need for more revenue. That explains to some extent why so much time was consumed in rate cases and why there were so many continued hearings to which the legislative history of P.L. 95-475 makes reference. (See, e.g., Hearing, cited above, pp. 43-45, documenting delays and continued hearings.) In the present case the Commission's Order somewhat resembles the old orders which caused so much delay in that the present Order recites numerous issues encompassing most of the issues that used to be litigated in the old cases, states protestants' contentions and that a hearing is necessary. If protestants raise specific questions about the carriers' submissions, I am not saying that the Commission need not investigate such matters. I am suggesting, however, that the Commission could assist the parties in fashioning their cases for formal litigation efficiently by telling the parties exactly what the Commission's analysis during the 60-day period had indicated and exactly what was wrong or suspect as regards the materials submitted so that the litigating parties could focus on the areas so identified. Otherwise, with so many issues specified for determination in a multi-carrier general rate case, the Commission may be inadvertently continuing the old practices which P.L. 95-475 was supposed to eliminate.⁶

⁶ By case law the Commission has emphasized that it will not only narrow issues but will read its Orders narrowly to make sure that unintended, extraneous issues are not litigated, however important

Continued

In order to assist all parties in holding down costs of litigation and meeting the strict statutory time limits in future rate cases, experience in this case demonstrates that the Commission ought to clarify G.O. 11 and its Rule 67 and ought to provide more guidance to put to rest continually reappearing issues of methodology and arguments about whether current data can be used rather than data originally submitted by the carriers with the rate filings. Moreover, the Commission, after having analyzed the carriers' data for 60 days, can help the parties immeasurably by advising them what was wrong with the original evidence so that all litigating parties can focus on specific evidentiary problem areas rather than having to mount full-blown cases in the dark under issues which merely allege that the carrier's materials were "unreliable" or "speculative."

Whatever the outcome of this particular case, I deem it to be of critical importance to call the Commission's attention to these problems both because such problems have been reappearing in Commission rate cases even since enactment of P.L. 95-475 which was supposed to eliminate such problems and because I have observed in this case that, because of its huge size, the problems have become onerous causing great expense and probable exhaustion on all litigating parties. I now turn to the specific means employed to deal with the problems in this case.

MODERN PROCEDURAL TECHNIQUES EMPLOYED TO MEET THE PROBLEMS POSED BY THE SIZE OF THIS CASE AND THE GOVERNING STATUTE

At the outset it was apparent that because of the many issues and parties in this trade-wide investigation every modern administrative technique conducive to rapid development of an evidentiary record would have to be employed. The basic problem, of course, is that P.L. 95-475 requires completion of the "hearing" within 60 days. Considering that there were four carriers and three protestants and the Commission's Bureau of Investigation and Enforcement (BIE) who wished to present their cases within such a short time period and that allowance had to be made for rebuttal evidence and for some discovery so that each party could obtain facts to develop rebuttal testimony on so many issues, I early decided that the old-fashioned trial-type hearing well suited for non-technical accident or murder cases in jury trials could not be followed. As I noted in a number of procedural rulings, modern administrative law encourages development of the record by written rather than oral means and strongly encourages abandonment of cross-

the issues may appear to be. See *Trailer Marine Transport Corp.—Proposed General Increase in Rates*, 22 F.M.C. 175, 177-178 (1979), affirmed without opinion by the D.C. Circuit Court of Appeals *sub. nom. Government of the Virgin Islands v. F.M.C.*, January 30, 1981 (unreported).

examination when expert witnesses are involved and credibility or sense perception are not really relevant. I cited numerous authorities in two rulings, served February 9, 1981 (p. 5 n. 4) and March 3, 1981 (p. 3 n. 2).⁷ Moreover, I noted that the legislative history to P.L. 95-475 emphasized the need to utilize written testimony and eliminate cross-examination to the fullest extent possible.

One advantage of such a technique is that the record was developed almost entirely in written form and in gradual states. This enabled myself and the parties to grasp the technical issues on an ongoing basis and to understand the evidentiary record while it was being compiled. The advantage to such a procedure is that the presiding judge can utilize the post-hearing briefs much more rapidly than is possible in the traditional oral, trial-type system of hearings when all too often a baffled judge must await the post-hearing briefs to begin to understand what he had been listening to from a medley of experts spewing forth a barrage of technical mumbo jumbo. In a highly complex and technical rate case in which time is of the essence, as in this case, I found such a technique to be absolutely essential especially considering the fact that my Initial Decision was originally scheduled to be issued only 15 days after the filing of the last post-hearing brief (since extended 19 days by the Commission in response to my memorandum of May 18) and the fact that I have no law clerks or technical staff advisors assigned to me, in other words, the fact that I must read the record and briefs, digest them, and write my decision entirely on my own. These various benefits derived from the use of written evidence in lieu of trial-type, oral testimony and cross-examination in technical cases has been summarized in McCormick, *Evidence* (2d Ed. 1972) pp. 856, 857. He concludes by stating:

Properly handled, written procedures should result in a more adequate record being produced in a shorter space of time. McCormick, cited above, p. 857.

Accordingly, the record in this proceeding was developed essentially by having each party present its direct written case on March 10, rebuttal written case on April 10, and written surrebuttal on April 23. Interspersed were four formal prehearing conferences and one informal conference at which time discovery or other pressing matters had to be

⁷ There are too many cases and authorities establishing that trial-type hearings are not always necessary in administrative proceedings and need not be employed in technical cases or unless there are specific issues of adjudicative fact which can only be resolved by means of oral testimony and cross-examination. Many of them are set forth in the footnote references cited in the text of this decision. For a quick reference however, the reader may wish to consult *American Public Gas Ass'n v. Federal Power Commission*, 498 F. 2d 718, 722-723 (D.C. Cir. 1974); 3 Davis, *Administrative Law Treatise* (2d Ed. 1980) §§ 14.1-14.5; Senate Report to P.L. 95-475, pp. 2, 9, 14-15; *United States v. Florida East Coast Railway Co.*, 410 U.S. 224 (1973); Prettyman, *Trial by Agency*, *The Va. Law Review Assoc.* (1959) pp. 30-35.

resolved. At the final conference, it was decided that some limited cross-examination of one expert witness (Mr. Copan, BIE's first expert) would be warranted. Such limited cross-examination conducted by counsel for PRMSA was held on April 29. Thereafter, to accommodate small business persons who could not present written statements or who wished to be heard orally on the islands, oral hearings were held in St. Thomas, U.S. Virgin Islands, on May 4, and in San Juan, Puerto Rico, on May 6, 1981. Nine witnesses appeared in St. Thomas while three testified in San Juan.⁸ The formal hearing phase was thence concluded.

THE EVIDENTIARY RECORD AND POST-HEARING BRIEFS

The evidentiary record that was developed by the techniques described above is massive. It consists of the direct, rebuttal, and surrebuttal written testimony of more than 30 witnesses, mostly experts in their respective fields and amounts to several hundreds of pages in the aggregate. In addition there are three volumes of transcript covering cross-examination of witness Copan and the examination of the witnesses testifying in St. Thomas and San Juan. Incidental exhibits and documents of one type or another were also admitted into evidence. For ready reference, an outline showing these various exhibits and testimony has been compiled and printed as an appendix entitled "Exhibit A" to PRMSA's opening brief, June 1, 1981. The outline comprises seven pages. Following the close of the evidentiary record, six opening and reply briefs were filed many of which were huge. In the aggregate these twelve briefs total many hundreds of pages.

FUNDAMENTAL PRINCIPLES OF LAW GOVERNING ADMINISTRATIVE RATE CASES

Because this case involves controversy among so many expert witnesses which I must attempt to resolve although I am without personal technical or legal assistance as I have mentioned and because P.L. 95-475 imposes strict time constraints which disable me from explaining my findings in detail or recalculating financial exhibits consistent with my findings on methodology, I must resort to fundamental principles of law as an aid in determining the many technical issues. These principles establish that rate cases are technically akin to rulemaking proceedings, that it is impossible to make precise findings in rate cases, that the burden of proof is merely a preponderance of the evidence rather than

⁸ There was a certain amount of difficulty in scheduling these oral hearings on the islands because of pressing time constraints imposed by the statute and because of the attempts, not completely successful, to submit questions to witnesses in advance of the hearings for their preparation for cross-examination. Moreover, the fact that the first two witnesses who testified in St. Thomas were the Governor and a Senator rather than small business persons generated some degree of controversy as did the introduction of evidence by PRMSA on the last day of hearing. Appropriate rulings dealing with these problems have been issued. (See PRMSA's Motion to Strike Certain Portions of Testimony of Governor Luis and Senator Williams Denied in Part, and other rulings, June 10, 1981.)

a clear and convincing showing, and that expert witnesses, like all other witnesses, must base their testimony upon reliable source data and reasonable, logical thinking if their testimony is to be followed.

Technically, under the Administrative Procedure Act, a rate case is rulemaking rather than adjudication. See APA, 5 U.S.C. 551 (4); *Alaska S. Co. v. F.M.C.*, 356 F.2d 59 (9th Cir. 1966); 2 Davis, *Administrative Law* (2d Ed. 1979) pp. 5, 322-323. Although modern case law seems to recognize that cases such as the present one may not be pure rulemaking since there is a possibility of retroactive refund on a finding of unjustness and unreasonableness and the old rule permitting ex parte discussions in such cases is not quite free of doubt, nevertheless there are many elements of rulemaking in the present case. I mention this fact because it is obvious that the methodology issues in the case could have been resolved by means of rulemaking, specifically by a proceeding amending G.O. 11 when the Commission would have the benefit of adequate time to consider the many comments on the matters in question rather than having to hurry through to decision in the midst of vigorous adversariness under P.L. 95-475. I have, however, previously recommended that G.O. 11 be revised and clarified.

Of greater immediate significance to any judge trying to decide the many technical issues are other principles of law that recognize that it is impossible to make precise findings in rate cases and that all that is expected of any party attempting to justify its position is to show the validity of that position by a preponderance of the evidence. As many parties have continually shown by citation of many cases, "ratemaking is not an exact science," and only a reasonable approximation is required. Among the many cases in which this basic principle has been recognized are the following: *Increased Rates on Sugar*, 7 F.M.C. 404, 411 (1962); *Alcoa Steamship Company - General Increase in Rates in the Atlantic Gulf Puerto Rico Trade*, 9 F.M.C. 220, 231 (1966); *Investigation of Increased Sugar Rates*, 9 F.M.C. 326, 330 (1966); *Sea-Land Services, Inc. - Increase in Rates in the U.S. Pacific Coast/Puerto Rico Trade*, 15 F.M.C. 4, 9-10 (1971); *TMT Corp. - Rates*, 21 F.M.C. 998, 1008-1009, 187-188 (I.D. 1979); *FMC* May 16, 1979; *Matson Navigation Co. - Bunker Surcharge*, 22 F.M.C. 276 (1979). The Supreme Court has also recognized that pinpointing is not feasible in ratemaking and therefore a "zone of reasonableness" should be employed, stating:

Statutory reasonableness is an abstract quality represented by an area rather than a pinpoint. It allows a substantial spread between what is unreasonable because too low and what is unreasonable because too high. *FPC v. Conway Corp.*, 426 U.S. 271, 278 (1976), cited in *Communications Satellite Corp. v. F.C.C.*, 611 F.2d 883, 892 (D.C. Cir. 1977).

In a similar vein the Supreme Court has stated:

What will constitute a fair return in a given case is not capable of exact mathematical demonstration . . . *United Railways & Elec. Co. v. West*, 280 U.S. 234, 249, 251 (1930).

Moreover, the courts have been tolerant when agencies have employed methodologies that admittedly contain infirmities, stating that "it is the result reached not the method employed which is controlling" and "[i]t is not theory but the impact of the rate order which counts" and "[t]he fact that the method employed to reach that result may contain infirmities is not then important." *FPC v. Hope Natural Gas Co.*, 320 U.S. 591, 602 (1944).⁹

A further indication that precision cannot be attained in rate cases is shown by the comments of protestant DTPTC in its opening brief. This protestant has made an earnest appeal to me and to the Commission to amend its regulation in various ways by developing formulae to determine cost escalations, by defining reference groups and time periods for use in the comparable earnings test, and by abandoning the continual *ad hoc* guesstimates of revenue and cargo projections that haunt every Commission rate case, etc. (See DTPTC Opening Brief, pp. 2-6.) Protestant does not agree with respondent PRMSA's evidence on rate of return or revenue projections in this case. However, protestant realistically acknowledged when urging procedural reforms for future cases:¹⁰

First, it is clearly impossible for any carrier regulated by the Commission, or any other business for that matter, to predict its future revenues and volumes precisely. There are simply too many unknowns and none of us has a crystal ball. (DTPTC opening brief, p. 2.)

The next principle of law that I find relevant to my decision concerns the fact that a party having the burden of proof in an administrative proceeding need only prove its case by a preponderance of the evidence and is not required to prove its case by making a clear and convincing showing. The lesser standard of proof has been the normal standard employed in administrative proceedings for years. Recently, however, the Supreme Court has confirmed its use even in fraud-type cases involving regulated licensed brokers. See *Steadman v. S.E.C.*, 450 U.S. 91 (February 25, 1981); *Sea Island Broadcasting Corp. v. F.C.C.*,

⁹ The *Hope* case is a leading case constantly cited on rate of return questions. The quotations, of course, refer to a court's review standards as to what satisfies a reviewing court when reading an agency's decision. The quotation, however, seems to me to involve circular reasoning. How can one judge the reasonableness of a method by its "total effect" or "results" if those results or effects are determined reasonable by the very method employed? By what independent means can we know if the results or the method is reasonable?

¹⁰ This quotation is not used to demean protestant's case or to prejudice its position in which it has very emphatically disagreed with PRMSA's projections and presented its own evidence and arguments most forcefully. The quotation shows concern for future cases and conforms with my own views in that regard.

627 F.2d 240, 243 (D.C. Cir. 1980); McCormick, *Evidence*, cited above (2d Ed. 1972), p. 853. This principle is important since the respondent carriers have the statutory burden of proof on most of the issues set forth in the Commission's Orders and I must determine whether their estimates and projections are reasonable and valid under such standard. This does not mean, however, that carriers can sustain their burden by a preponderance of speculative and unreliable evidence. As the Commission has stated in another type of crystal ball-gazing case involving predictions of the future effects of an anticompetitive agreement under section 15 of the Shipping Act, the Commission is "only able to decide cases on the evidence of existing facts and the reasonable deductions to be drawn therefrom and not on 'speculative possibilities.'" *Alcoa S.S. Co. Inc. v. Cia. Anonima Venezolana*, 7 F.M.C. 345, 361 (1962), citing *West Coast Line, Inc. et al. v. Grace Line, Inc. et al.*, 3. F.M.B. 586, 595 (1961). (In the cited case, the Commission refused to find the contentions of protestants to be valid notwithstanding protestants' arguments that there was a "reasonable possibility" of harmful effects if the agreements in question were approved. *Id.*)

Finally, since the present case involves the conflicting testimony of many expert witnesses, all well qualified in their respective fields, it is well to consider the principle that their testimony, like that of lay witnesses, is subject to scrutiny and must show that it is based on reliable data, is reasonable and logical in its reasoning, and is not riddled with errors or inconsistencies. See the enlightening discussion of Judge Biunno in *United States v. R. J. Reynolds Tobacco Company, et al.*, 416 F. Supp. 316, 323-325 (D.N.J. 1976). In that case the court rejected the Government's major expert witness's testimony, finding it based on unproven assumptions and unreliable methodology, factual ignorance of the subject matter, use of wrong figures, and other errors. The Court concluded that "[t]his sort of evidence from an expert witness carries such a large risk of misleading the finder of fact as to require that it be rejected as unreliable and hence not credible. See, for example, 'How to Lie with Statistics,' by Darrel Huff (W.W. Norton & Co., Inc., 1954). . . ." *Id.* The Court further opined that "[o]pinions are valueless as evidence without exploration of the underlying facts and rationale showing the path from the facts to the opinion." *Id.* (Interestingly, however, the Court makes mention of the fact that it utilized Federal Rule 706 to name an independent expert witness on whom the Court relied, a device which I wish had been available to me.)¹¹

¹¹ McCormick, *Evidence*, cited above, pp. 37-41, has an interesting discussion on ways in which the courts can deal with the "battle of experts," for example, by having the experts meet in conferences to seek agreement, use of impartial experts to assist the court, etc. Compare Federal Rule 706 authorizing the court to appoint its own expert. In this case, lacking such authority and lacking a personal techni-

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In *United States et al. v. F.C.C.*, D.C. Cir. Nos. 77-1249, 77-1252, 77-1253, decided *en banc*, March 7, 1980, 652 F.2d 72, the Court expressed opinions on the use of expert witnesses in speculative areas and also recognized that agencies must be free to utilize some degree of expertise when making predictions in industries they regulate even when hard facts are difficult to obtain. The Court refused to require the F.C.C. to hold evidentiary hearings to hear the testimony of experts which would involve speculation in a constantly changing industry. The Court stated:

But the FCC's decision cannot be based on competitive conditions "at any given time;" it must be based on a reasonable prediction of future conditions. The FCC has concluded that the attempt to resolve these speculative matters through adversary proceedings would be futile. We believe that conclusion is reasonable. Slip opinion, p. 45.

The opinion in the cited case is well worth studying since it provides much guidance for a case such as the present one, especially concerning the practical difficulties of making predictions in a volatile industrial environment (e.g., the cost of fuel during the carriers' pro forma projected years), the need for the agency to rely on its own experience if hard facts are unobtainable, and the unsuitability of adversary proceedings in what is essentially crystal ball-gazing.

THE SPECIFIC ISSUES ORDERED TO BE DETERMINED

Armed with all of the above ammunition, I am now prepared to embark upon the hazardous course of trying to resolve the many technical issues. Having read the hundreds of pages of briefs which demonstrate zealous advocacy by capable counsel, I believe that anyone entering into this maelstrom runs the risk of enduring not only attack but even perhaps name-calling. Since it is impossible, furthermore, to find hard facts and to make precise predictions or findings in rate cases, as I have explained above, anyone's findings or predictions are open to second guessing, including this judge's. I have no technical staff assisting me, as I have explained, nor even a law clerk. However, I have studied the record and the massive briefs and am guided by the basic legal principles recited above. Furthermore, to the extent possible, I rely upon what little Commission precedent is available from an unclear G.O. 11 and previous decisions and, if the BIE staff experts' testimony passes scrutiny, I tend to turn to it first since these witnesses, in theory at least, should be free from any tendency to favor one side

cal assistant or law clerk, the discussion by McCormick regarding practical difficulties affecting judges in technical cases is especially meaningful to me. To some extent, as I discuss below, I have turned to the staff experts who have testified in this proceeding on the theory that they should be relatively free from bias although, of course, staff expert testimony must also be carefully scrutinized for errors, faulty reasoning, etc., as Judge Biunno stated.

or the other, i.e., free from bias. (This reliance on staff experts, however, is limited because, as protestants have noted, the BIE essentially limited its contribution to certain issues, e.g., rate of return, inflation factor to be employed, and use of current or more recent data.)¹²

Because of the massive size of the record and the briefs and the strict time constraints imposed on me by P.L. 95-475, which, thanks to the Commission's response to my memorandum of May 18, 1981, gives me 35 calendar days to read, analyze, write, and have typed and printed, my decision without assistance except for the briefs, I have allocated much time to study of the briefs and record to enable me to understand the complex technical issues. Accordingly, I have not had the luxury of ample time to write such explanations as I would normally have done in a case of this size absent time restrictions and have had to rely on adopting portions of briefs which I have found persuasive where such is possible as a time-saving device. There is nothing in the Administrative Procedure Act, of which I am aware, however, which requires me to rewrite every proposed finding or argument or even to make findings on every argument presented. *See, e.g., Adel International Development Inc. v. PRMSA*, 23 F.M.C. 477, 480-481 (1980),¹³ Moreover, even summary findings of fact and conclusions may suffice if the path being followed can be discerned and the findings are not vague or obscure. *See, e.g., Colorado Interstate Gas Co. v. Federal Power Commission*, 324 U.S. 581 (1945); *Minneapolis & St. Louis Ry. Co. v. United States*, 361 U.S. 173 (1959) (I.C.C. had not made express findings but its opinion showed that it had considered and discussed the issues intelligibly); *Borak Motor Sales, Inc. v. NLRB*, 425 F.2d 677 (7th Cir. 1970) (similar); *Gilbertville Trucking Co. v. United States*, 196 F. Supp. 351, 359 (D. Mass. 1961) modified on other grounds, 371 U.S. 115 (1962) (need to furnish the parties with a sufficiently clear basis for understanding the premises used by the tribunal in preparing its conclusion of law, adjudications, and orders).

¹² As I will mention, I find that the staff experts' testimony to be of high quality and generally reliable when the staff had the witnesses to testify. However, the staff gave limited evidence on operational issues and confined themselves in several instances to verifying whether the carrier complied with G.O. 11. (See GVI/PRMA Opening Brief, p. 17 n. 8.) I sorely missed staff testimony on the other issues and hope that the Commission will provide the staff with the facilities to offer substantive testimony on all issues, not merely those relating to accounting and statistics. This would be consistent with the Commission's direction in Docket No. 75-38, *PRMSA - General Increase in Rates*, 18 S.R.R. 469, 476 (1978), where the Commission defined Hearing Counsel's (BIE's predecessor) role as one in which they would furnish evidence on all the issues. Since I have no technical staff, the furnishing of more complete evidence on all issues by staff expert witnesses would have been of great value to me.

¹³ As the Commission stated in the case cited:

It is not necessary to make findings of fact upon all items of evidence submitted nor even necessarily to answer each and every contention made by the contestants to the hearing but rather to make findings which are sufficient to resolve the material issues. 23 F.M.C. at pp. 480-481.

THE RATE OF RETURN ISSUE

The first issue framed by the Commission's Order of January 29, 1981, is:

- (1) What is an appropriate rate of return for the carriers named as Respondents? In addressing this question consideration should be given to the average rate of return earned by other U.S. corporations and the inherent risks, if any, in operating in the affected trades.

This type of issue would have been a perfect subject for rulemaking, specifically, a rulemaking proceeding to amend G.O. 11. Because G.O. 11 is itself not fully informative and because the comparable earnings standard itself has deficiencies and uncertainties, the record contains different opinions by a half dozen expert witnesses on this question.

Effective March 28, 1980, the Commission promulgated its revised G.O. 11. See Docket No. 78-46, General Order 11, Revised, slip opinion, January 14, 1980, 19 S.R.R. 1283. Among other things, the Commission adopted the so-called "comparable earnings" test to determine reasonableness of carriers' rates of return. The Commission stated:

[t]he Commission intends to continue to test the reasonableness of a carrier's rates based on a "comparable earnings analysis" which will utilize as its benchmark the rate of return on total capital earned by comparable U.S. corporations. The Commission will not limit the comparable earnings analysis to firms in the same geographic region. There will be some cases in which the Commission will consider a predetermined hypothetical capital structure to determine financial risk. Slip opinion, p. 65.

After rejecting alternative tests such as "opportunity cost," the Commission stated:

Therefore, the Commission has determined to retain the comparable earnings test in its final rules so as to account for, *inter alia*, various sources of financing and differences in risk in judging the reasonableness of a carrier's rates. *Id.*, p. 67.

This is, of course, not the place to challenge the Commission's choice of the comparable earnings test. As some authorities have pointed out, however, this test is considered secondary while a cost of capital or capital attraction test has been preferred. See James C. Bonbright, *Principles of Public Utility Rates* (Columbia University Press, 1981), p. 257, Phillips, *The Economics of Regulation* (Richard D. Irwin, Inc. 1965), p. 298.

I do not have the time to write a treatise on the two tests, how they developed, or how the courts deal with them. I can only define them briefly and refer the reader to the authorities cited for a complete discussion.

Briefly, for ready reference, one authority defines the two tests as follows:

First, the "cost of capital" standard, under which the rate of return should enable a company to attract capital on terms that will (a) maintain its credit standing, (b) protect its financial soundness, and (c) maintain the integrity of its existing investment. Second, the "comparability of earnings" standard, under which the rate of return to equity owners "should be commensurate with returns on investments in other enterprises having corresponding risks." Phillips, cited above, p. 268.

Another authority defines the two tests as follows:

Two tests of a fair rate of return have been mentioned in court decisions. These are the "comparable earnings" test and the "attraction of capital" or "maintenance of credit" test. Both of these were stated by the Supreme Court of the United States in the Bluefields case. The "comparable earnings" test was indicated in the following language: "A public utility is entitled to such rates as will permit it to earn a return on the value of the property which it employs for the convenience of the public equal to that generally being made at the same time and in the same general part of the country on investments in other business undertakings which are attended by corresponding risks and uncertainties; but it has no constitutional right to profits such as are realized or anticipated in highly profitable enterprises or speculative ventures." The "attraction of capital" test found expression as follows: "The return should be reasonably sufficient to assure confidence in the financial soundness of the utility and should be adequate, under efficient and economical management, to maintain and support its credit and enable it to raise the money necessary for the proper discharge of its public duties." Both of these tests require further comment.¹⁴

Protestants GVI/PRMA have concisely shown how the test has been formulated and how it is one of the two basic tests and how the courts have employed both, although the cost of capital test is perhaps considered the primary test. To quote from their Reply Brief, pp. 31-32:

The formulation as set out in the universally-cited genesis of the comparable earnings test is the following passage from the *Bluefield Waterworks* decision, 262 U.S. 679, 692-693 (1923):

A public utility is entitled to such rates as will permit it to earn a return on the value of the property which it employs for the convenience of the public equal to that generally being made at the same time and in the same general part of

¹⁴ Locklin, *Economics of Transportation* (Richard D. Irwin, Inc. 1972, 7th Ed.) p. 394. (Footnote citations in the quoted passage omitted.)

the country on investments in other business undertakings which are attended by corresponding risks and uncertainties; but it has no constitutional right to profits such as are realized or anticipated in highly profitable enterprises or speculative ventures. The return should be reasonably sufficient to assure confidence in the financial soundness of the utility and should be adequate, under efficient and economical management, to maintain and support its credit and enable it to raise the money necessary for the proper discharge of its public duties. A rate of return may be reasonable at one time and become too high or too low by changes affecting opportunities for investment, the money market and business conditions generally.

As Bonbright notes in his discussion of the Court's formulation of the comparable earnings standard in *Bluefield* and, later *Hope Natural Gas* [J. Bonbright, *Principles of Public Utility Rates*, 257-58 (1961) (emphasis added)]:

Here as in the *Hope* case, are suggested not just one standard of a fair rate of return but two. In the first place, the rate must be equal to that currently earned on 'investments' in other equally risky business enterprises. But, in the second place, it must also suffice to maintain the credit and the capital-attracting ability of the very company whose case is at bar. And the question arises what should be done in the likely event that the rate indicated by the one test is higher or lower than the rate indicated by the other. A severely literal construction of the *Bluefield* opinion would seem to require the acceptance of whichever rate of return happens to be higher in any given case. But this interpretation would run so contrary to common sense that it has not won acceptance.

Faced with this problem of judicial interpretation, my own preferred interpretation has been that the courts have not intended to set up two conflicting standards of reasonable utility rates. *Instead, the credit-maintenance or capital-attraction standard is primary, while the comparable-risk standard is secondary and ancillary. That is to say, the fair rate of return is a rate, the allowance of which will permit the company in question to support its credit and to raise required supplies of new equity capital on terms fair to the old investors; but this rate is necessarily related to the rates of return that investors, while still free to commit their capital on the competitive market, could expect to secure on investments in enterprises of comparable reputed risk.*

As I have discussed above, Congress intended that the Commission issue substantive guidelines for determining rate of return questions and intended, furthermore, that the Commission revise these guidelines from

time to time. It is extremely important, however, to understand that these guidelines (present in G.O. 11 revised) are intended to have substantive, i.e., precedential effect, and are not merely suggestions. Otherwise the same issues keep getting litigated in case after case. G.O. 11, of course, has not selected the first test, i.e., "cost of capital," "capital attraction" or sometimes called the "maintenance of credit" test.

It is important to bear in mind that the Commission has chosen "comparable earnings" rather than the other test and that the choice must be followed unless or until G.O. 11 is revised by the Commission. This is important because, in my opinion, a good deal of certain experts' evidence seems irrelevant to the "comparable earnings" test or interprets that test to mean that no upward adjustment may be made in consideration of peculiar risks of respondent carriers.

Having made the choice of the "comparable earnings" test, we must now live with it in this case and deal as best we can with its deficiencies. (I might add that the other test, i.e., cost of capital, has also been criticized for several reasons, e.g., use of earnings-price ratios, circular reasoning, reliance on investors' anticipation. See Locklin, cited above, pp. 397-398.) The authorities recognize problems with the "comparable earnings" test, problems which have become terribly obvious in this case. The main problems concern the selection of the reference group of "comparable" industries, the time period utilized in the selection, and how one is to determine whether there is an adjustment necessary for risk, current trends, or other such factors. See, e.g., Locklin, *Economics of Transportation*, cited above, p. 394; Phillips, *The Economics of Regulation*, cited above, pp. 297-303; Welch, *Cases and Text on Public Utility Regulation* (Public Utilities Reports, Inc. 1968, rev. ed.), pp. 488-489. In previous Commission decisions which I have had time to read, it appears that different source materials have been used showing different companies or industries, that adjustments were made for risks and other factors, and that a period of time over one year was selected for the comparison. As a guide to the problems in this case, the following table will show at a glance how the various expert witnesses differed in their final recommendations, how they selected different groups of industries for comparison purposes, how they used different time periods, how they made adjustments, and for what factors such adjustments were made. It will be seen that, not surprisingly, the range of recommended or allowable rates of return runs from a low of 13.5 percent from witness Ileo testifying on behalf of protestant DTPTC to a high of 23.5 percent as an allowable target proposed by witness Nadel on behalf of respondent carriers Sea-Land and TMT/GCML. It will also be seen that at least four different reference groups of companies or industries were used, namely Federal Trade Commission Quarterly Financial Reports (FTC-QFR) used by three expert witnesses, Standard & Poor's

400 Industrials, Value Line, and a special selected group of utilities and motor carriers used by one witness. Time periods for comparison vary from less than one year to six or more years in the past. Upward adjustments to benchmark figures derived from the reference group vary also, some experts making adjustments for current trends, business and financial risks, while others limited adjustments to embedded costs differentials or other factors.

The table illustrates a few basic points which I have previously mentioned. First, that the uncertainty of G.O. 11 and the "comparable earnings" test permit wide disagreement among well qualified experts. Second, that a precise mathematical determination of a single reasonable rate of return is not feasible. As Dr. Germane, one of TMT/GCML's experts, stated (Surrebuttal-Germane, p. 9):

None of the methodologies used by any of the parties to this proceeding are likely to provide the single "appropriate" rate of return. They are all based on assumptions and judgments with respect to risk, capital costs and other critical determinants of an appropriate return.

I also agree with Dr. Nadel, another expert sponsored by Sea-Land and TMT/GCML, who stated:

In summary, I agree with Dr. Germane, as apparently does Mr. Copan, that the "question of comparability can never be resolved clearly." (Surrebuttal-Nadel, p. 7).

Because of these views and those I have discussed earlier in this decision regarding impossibility of precision in cases of this type, the imperfect nature of measuring techniques, and unclear Commission precedent, I believe that the most reasonable approximation of a fair rate of return would be a zone of reasonableness rather than a single fixed number, provided that the record would furnish sufficiently reliable and probative evidence so that a zone could be determined. However, after studying the recommendations of the six expert witnesses who all reach different conclusions, as summarized in the table below, it is apparent that there is neither a single number that I can rely upon nor is there anything but a vague range that I can presently ascertain. Unfortunately once again time constraints do not permit me to discuss the many problems that the record presents in the detail that such problems deserve and I can only touch upon the highlights. As will become apparent, however, the incomplete guidance provided by General Order 11, the extremely difficult problem of dealing with PRMSA, a tax-exempt company, and the fact that the various expert witnesses were compelled to turn to a variety of published financial sources which do not tabulate their information to suit the terminology of General Order 11, all play significant roles in disabling the experts or myself from singling out any one number with assurance as the one-and-only reasonable rate of return. As will become further apparent, all

of the expert witnesses' testimony contained flaws of one type or another, some so serious that I have to reject their recommendations almost summarily. Furthermore, even in the case of the more moderate recommendations which fall in the center of the table below (such as Mr. Copan's 16-17 percent, Dr. Nadel's 18.5 percent before markups, and Dr. Silberman's 19-20 percent for PRMSA) each of them have infirmities which I will briefly describe. However, unless the Commission seeks a degree of precision that the law does not expect in rate cases, somewhere among these witnesses a reasonable range or approximation must be deduced. Otherwise all of the testimony would have to be rejected and the Commission would have no answer to its first question, i.e., "what is an appropriate rate of return. . . ." As I indicate below, the best approximation that I believe the present record can offer is somewhere above the 16-17 percent recommended by Mr. Copan to somewhere around 18 percent, the latter figure more relevant to PRMSA than to the other three respondent carriers. (Since various calculations and corrections to pro forma exhibits performed by the carriers and BIE show that they fall under or within the range per carrier, respondent carriers except, in certain respects, TMT, as I later discuss, have shown that the general rate increases under investigation are not excessive.) If, however, the Commission believes that a single-number rate of return must be picked despite the imprecision of the rate-of-return measuring techniques, I would have recommended those numbers put forth by BIE's witness, Copan, but for a significant omission in one of the critical elements in his formula, which should be explained on exceptions. Before discussing the various recommendations, I present the following table summarizing the expert witnesses' methodologies:

TABLE OF RECOMMENDED ALLOWABLE RATES OF RETURN

PRMSA	13.5 OR 13.2% (Ileo)	15% (Brennan)	17% (Copan)	19-20% (Silberman)	21.29% (Germane)	23.5% (Nadel)
SL		16%	16%	20.26	23.5%	23.5%
TMT		16%	16%	17.14%	17.14%	23.5%
GCML		17%	17%			

Methodology-Reference Groups Plus Add-ons for Risk, etc.

Ilio	Brennan	Copan	Silberman	Germane	Nadel
FTC-QFR (mfg.) 1980 - 3 qtrs. 1980-est. 4th qtr.	S & P 400 diversified industrials 1975-9	FTC-QFR (mfg.) 1974-9	FTC-QFR (mining, retailing) 1978-80	Selected group (elec. utilities & motor carriers)	Value Line (36 industries; 717 companies) median in 1979)

A very good objective description of the methods used by each of these expert witnesses is provided by protestants GVI/PRMA in their opening brief, pp. 140-182. For the primary source, of course, the reader should consult the briefs of the party that sponsored the witness. However, protestants' counsel has done a commendable job in summarizing the various experts' testimony, saving me much time.¹⁵

At the outset I find that the extremes represented by Dr. Ileo (13.5 or 13.2 percent, as revised in his rebuttal testimony), the 23.5 percent by Dr. Nadel and 21.2 percent (for PRMSA) by Dr. Germane to be just that, extremes, which I do not find persuasive in comparison with the other more central and moderate studies. Dr. Ileo, testifying on behalf of protestant DTPTC would understandably be recommending a lower rate of return but his low points seem off the scale of reasonableness. However, I do not find them unpersuasive merely because they are so low. As other parties have cogently shown (see PRMSA's opening brief, pp. 57-62) Dr. Ileo's methodology is faulty. Essentially he relies on a relatively brief period of time for comparison (less than one year), uses a bad business year for a basis of comparison (1980), makes an adjustment for PRMSA's risk based on embedded cost differentials from unlocatable sources and fails to consider tax consequences, thereby understating PRMSA's risk differential. His results allow PRMSA only a very thin margin over PRMSA's huge debt (\$24 million in interest annually).

On the other end, I find Dr. Nadel's target rate of return of 23.5 percent to be based on faulty and unprecedented methodology because he wants to award premiums to offset past bad years and past inability of carriers to reach allowable rates of return. A good summary of Dr. Nadel's faults is contained in protestant GVI/PRMA's opening brief, pp. 219-227. While I do not agree with much of protestants' criticisms of Dr. Nadel in other respects, I do agree that Dr. Nadel's adjustment upward in the amount of 2 percent and another 3 percent to offset bad business years since the 1960s and past shortfalls in revenue are unprecedented and contrary to case law.¹⁶ I find his net rate of return (18.5

¹⁵ Although I obviously am disagreeing with counsel on many issues, I must take this opportunity to commend counsel for the high quality of briefwriting generally and the tremendous efforts put into the opening and reply briefs. Counsel for GVI/PRMA wrote 262 pages on opening brief and 122 pages on reply brief in a very short space of time. Counsel for PRMSA wrote 177 pages on opening brief and 111 on reply. Other counsel generally contributed sizeable briefs, also well crafted and argued, and some almost as long, e.g., BIE's opening brief was 88 pages. I do not mean to encourage mammoth briefs since they are obviously burdensome but I understand, in an expedited proceeding, how they arose and I commend counsel for their diligence even though I fully realize that I may be blasted on exceptions. Length, however, does not necessarily connote quality.

¹⁶ See *Galveston Elec. Co. v. Galveston*, 258 U.S. 388, 395 (1922); *FPC v. Tennessee Gas Transmission Co.*, 371 U.S. 145, 153 (1962); *Government of Guam v. F.M.C.*, 365 F.2d 515, 519 (D.C. Cir. 1966), cited in protestants GVI/PRMA opening brief, p. 226 n. 70. See also *Communications Satellite Corp. v. F.C.C.*, 611 F.2d 883, 894 (D.C. Cir. 1977).

percent) to be a reasonable alternative to the BIE's witness Copan if one considers that he attempted to derive a true comparable group of companies and eliminate the need for upward adjustments to benchmark figures for risks. I will return to Dr. Nadel later. (He also makes note of the fact that carriers in the Puerto Rican trade just do not make much profit, showing that during the period 1975-1979 their aggregate returns were, as weighted, an average of 3.52 percent, and, most recently, only 7.1 percent (D-Nadel, p. 29).) It is tempting to stop right here and stop pretending that a rate of return of 16 to 18.5 percent is realistically possible and drop what appears to be an academic exercise not related to the real world. Not only do the carriers in the trade not seem to be doing very well, and even protestants do not generally resist some rate increase as being reasonable for them, but they almost never seem to have. Cf. the last general trade-wide investigation in Docket No. 71-30, etc., cited above, 14 S.R.R. 645 (1974), when it was shown by the G.O. 11 filings that the carriers lost an aggregate of \$14 million. For similar evaluation, see Dr. Germane's testimony (D-Germane, p. 13).

Getting closer to the center of the table, I find Dr. Germane's recommendations of 21.2 percent for PRMSA and 20.26 percent for Sea-Land to be too high and even though his other two recommendations (17.14 percent for TMT/GCML) are within a zone of reasonableness, I find Dr. Germane's methodology to be less persuasive and reliable than that of BIE's witness Copan or Dr. Nadel once the latter's two premium factors are disregarded. Although impressive in certain areas, my main problem with Dr. Germane is his use of the cost-of-capital test to determine benchmark rates of return before applying his various risk factors. Although stressing more risk factors than may be necessary, Dr. Germane's quantitative tests for risk do not appear to be invalid in theory. The real problem, however, is that he utilized a test that the Commission has not selected when ascertaining a benchmark rate of return, namely, cost-of-capital. Secondly, he relied upon a narrow, selective reference group (regulated motor carriers and utilities). See GVI/PRMA opening brief, pp. 153-156; 216-219. BIE also argues correctly that Dr. Germane (and another witness not shown on the table, Mr. Haesemeyer, sponsored by TMT/GGML) utilized the cost-of-capital test rather than comparable earnings to determine the benchmark rate of return before adding risk factors. BIE reply brief, pp. 2-5. BIE correctly points out that the Commission deliberately avoided the cost-of-capital approach as seen by the Commission's discussion of the problems in determining debt-equity ratios, a typical problem with the cost-of-capital approach. See Docket No. 78-46, 19 S.R.R. at 1308-1309.

Interestingly, as BIE notes in their reply brief (p. 2) TMT/GCML seem to have acknowledged that BIE witness Copan correctly followed

G.O. 11 methodology most closely although they suggested that their approach was a useful alternative. Of course, the Commission has already decided against such an alternative in the cited rulemaking proceeding.

The major battle in this hectic case has been that between PRMSA, the leading carrier and its witness, Dr. Silberman, and GVI/PRMA and its leading witness, Mr. Joseph F. Brennan. I have serious problems with Mr. Brennan's approach, namely, his heavy orientation toward utilities, money market, and cost-of-capital tests rather than ocean common carriers and comparable earnings, the idea that his reference group may have already included "premiums" so that no separate risk adjustment is necessary, and the idea espoused by GVI/PRMA that the "comparable earnings" test is supposed to be a maximum without upward adjustment for any risk. I have equally difficult problems with Dr. Silberman's work.

Previous Commission decisions, Docket No. 78-46, and the Order in this case seem clearly to contemplate that once a benchmark rate of return is determined from a reference group, an upward adjustment for peculiar risks to the carriers should be made. True, G.O. 11 states that an adjustment for risk shall be made "where appropriate." See 46 C.F.R. 512.6(d), Docket No. 78-46, slip opinion, p. 26, rules section. However, the authorities cited above associate comparable earnings with determination of risk factors. As Phillips states (Phillips, *The Economics of Regulation*), cited above, p. 297: "The crucial element in the 'comparable earnings' standard is the measurement of risk." See also Welch, *Cases and Text on Public Utility Regulation*, cited above, pp. 488-489. The definition of the "comparable earnings" test as seen in the *Bluefield* case, cited above, contemplated a comparison with "other business undertakings which are attended by corresponding risks." 262 U.S. at 692-693. One could infer that ideally a group of comparable industries was supposed to be selected that was so comparable to the regulated company that no adjustment for risk would be necessary. However, the Commission has continually adjusted for risk as have other agencies because the reference group that is so comparable is very difficult to find. Thus, in Docket No. 78-46, the Commission specifically stated that in retaining the "comparable earnings" test, the Commission would account for, among other things, "differences in risk in judging the reasonableness of a carrier's rates." Docket No. 78-46, slip opinion, p. 67. Compare also the fact that regulatory commissions normally utilize wide varieties of reference groups for comparison purposes, e.g., broad groups of industrials, utilities, railroads. See Phillips,

cited above, p. 299 n. 128.¹⁷ In previous Commission rate cases, comparisons with broad groups has been sanctioned. In *TMT Corp. - General Increase in Rates*, cited above, 22 F.M.C. at 189, a large group of non-financial companies reported by Citibank was used. In Docket No. 79-47, *Sea-Land Service, Inc. - Proposed Five Percent GRI in Six P.R. and V.I. Trades*, 22 F.M.C. 114 (1979) (I.D.; F.M.C. Sept. 19, 1979), comparison with industries analyzed by Standard and Poors, including airlines, common carrier trucking, and total transportation, was used. See also *PRMSA - General Increase in Rates*, 21 F.M.C. 439, 444-445 (I.D. 1978); *Matson Navigation Co. - Rate Increases*, 21 F.M.C. 532, 534 (1978); 21 F.M.C. 538, 540-541 (1978). In the Order instituting this case, the Commission stated:

In addressing this issue [i.e. rate of return] the Commission generally takes into account: (a) the average rate of return earned by U.S. corporations, and (b) the risks faced by the individual carrier that may warrant a different rate of return. This analysis must also necessarily consider the group of U.S. corporations that should be used to derive an average, the time span examined in this regard and the criteria to be applied in determining whether a risk factor adjustment should be made, and, if so, the degree of such an adjustment. Such an inquiry will be made in this case. Order, p. 5.

Elsewhere, the Commission specifically recognized that there may be risk adjustments necessary under the "comparable earnings" test, stating:

While carriers are as a general matter entitled to the average rate of return earned by U.S. corporations, when, as in this case, consideration is given to allowing rates of return exceeding a national average because of the particular risks facing the carriers in serving a trade. . . . Order, p. 6.

In short, the practice of making adjustments for risk and in this Commission, upward adjustments after reference group benchmarks have been ascertained, seems firmly embedded. Mr. Brennan, however, would make no such adjustments. He would not do so because he or his counsel apparently believes that his group of Standard and Poors 400 industrials have already been given a premium for risk and because, as his counsel argues on brief, in a new rationale not previously discussed by Mr. Brennan, the "comparable earnings" test was originated in 1923 when the utilities were a less risky group than the reference group. Therefore, the test is a maximum, i.e., when the reference group's average return is determined, there can be no upward adjust-

¹⁷ As this reference shows, in the leading case, *FPC v. Hope*, broad groups were used for comparison purposes. Also, even though the reference group is supposed to be "truly comparable," adjustment for individual risk is apparently still allowed.

ment for risk for the regulated company since the reference group is already more risky by definition. Even if reference groups are or were at one time more risky than a regulated company in 1923, according to GVI/PRMA's contentions, the evidence in this case strongly suggests that the four carriers are riskier than reference groups today. Witnesses Copan, Silberman, and Germane have made various risk findings and adjustments upward to account for greater risk which these carriers are running. Indeed, even when Mr. Brennan attempted to point out several factors which convinced him that the carriers were less risky compared with utilities, Mr. Copan showed that the factors pointed to the opposite conclusion. (See Brennan's rebuttal testimony, pp. 20-21 compared with Copan's surrebuttal testimony, pp. 22-25.)¹⁸ In previous rate cases before this Commission risk adjustments have customarily been made. See, e.g., *TMT Corp. - General Increase in Rates*, 22 F.M.C. at 190. Nevertheless witness Brennan makes no risk adjustments at all. (Sea-Land's and TMT/GCCL's witness, Dr. Nadel, also made no risk adjustment but did so because he selected a reference group that, in his opinion, would be truly comparable based on several enumerated criteria.)

The reason why Mr. Brennan will make no upward adjustment to his benchmark rate of return of 15 percent relates apparently to his fundamental grounding in utility, money market and cost-of-capital principles. Mr. Brennan is presenting ideas to this Commission which were not presented in the proceeding leading to the formulation of General Order 11 (Docket No. 78-46) as far as I can determine, nor does that regulation or any Commission rate case of which I am aware find his theories relevant. Even if I did not agree that, as PRMSA pointed out, Mr. Brennan has taken what appears to be an inconsistent position in certain respects in a Pennsylvania utility rate case, I find that there are good and sufficient reasons to find that Mr. Brennan's approach is unacceptable in this proceeding. These reasons are well presented in BIE's reply brief, pp. 28-31, in Mr. Copan's rebuttal testimony, pp. 72-75, in Dr. Germane's surrebuttal testimony, pp. 25-33, and in PRMSA's reply brief, pp. 18-24. I have no time to discuss the many points made by these parties and witnesses. Very briefly, however, they show that Mr. Brennan's concern over how the marketplace has already given reference group companies some type of premium to maintain the market value of the companies' assets above book values is irrelevant in Commission rate cases conducted under the comparable-earnings test. Mr. Copan cites several authorities which demonstrate that a market-to-

¹⁸ GVI/PRMA's attempts to persuade me that utilities such as AT&T are more risky than PRMSA seem very strained and the argument is very hard to swallow. As the court stated in *Communications Satellite Corp. v. F.C.C.*, 611 F.2d at 910: "As for the Present [1977] it is a truism that AT&T generally is not a risky investment. . . ."

book value analysis is not only irrelevant to this Commission's rate regulation principles but it is dangerous anyway for any regulatory agency to attempt to consider such factors. (See Copan's rebuttal testimony, p. 74, citing Bonbright.) On brief, GVI/PRMA strive valiantly to persuade that there is a fundamental principle in ratemaking that supports Mr. Brennan's irrelevant market-to-book value analysis and that is that a regulatory agency starts from the basic proposition that a regulated company is only entitled to earn a sufficient return to maintain the integrity of its assets, i.e., "to maintain the integrity of its original-cost rate base." (GVI/PRMA reply brief, p. 18.) This sounds appealing as do so many skillful arguments raised by GVI/PRMA in their post-hearing briefs (after all, shouldn't any carrier be able to maintain the integrity of its assets?), but again they do not withstand the particular rebuttal evidence and arguments. As PRMSA, for one, shows (PRMSA's reply brief, pp. 18-24) this whole market-to-book idea is a technique that belongs in a cost-of-equity-capital study, Mr. Brennan continually uses cost-of-capital theories and methods, ultimately shows that he is really disagreeing with the Commission's comparable-earnings test, and the theory appears on brief for a new purpose, namely, to show that no risk adjustments should be made above Mr. Brennan's reference group benchmark rate of return. As noted in the reference cited above, BIE and Mr. Copan generally agree that Mr. Brennan's theories are irrelevant to the Commission's comparable-earnings test. Furthermore, as PRMSA points out on brief, the theory was advanced to justify Mr. Brennan's refusal to award any factors for risk to PRMSA above that of Mr. Brennan's reference group but that there is no showing of a logical connection between the market-to-book value theory and the determination of risk for a particular carrier. Despite the ingenuity and skill with which GVI/PRMA argue the relevancy of Mr. Brennan's approach and his refusal to award any factors for risk peculiar to PRMSA, I find that Mr. Brennan, for all his novel analyses, seems basically unwilling to live with the Commission's comparable-earnings test nor with the evidence that shows that PRMSA and the other carriers are operating at higher risks than companies in reference groups. I find myself rather in agreement with Dr. Silberman, Mr. Copan, and Dr. Germane that PRMSA's and other carriers' risks are measurably higher than those of the reference groups and that the Commission has indeed recognized the techniques employed in this case to measure risk, especially business risk. See cases cited in PRMSA's reply brief, pp. 10-11, and the discussion refuting Mr. Brennan on the risk issue in PRMSA's reply brief, pp. 3-11. Nor do I agree with GVI/PRMA's arguments on brief criticizing expert witnesses other than their own Mr. Brennan for subjectivity in evaluating risk factors. I think it is clear that every witness is guilty of some degree of subjectivity, including Mr. Brennan. See PRMSA's reply brief, pp. 25-26. Accordingly, I

find Mr. Brennan's recommendation of a 15 percent rate of return to be unacceptable.

Having found that the more extreme witnesses on the edge of the table have not been persuasive, I now turn to the more moderate witnesses nearer to the center of the table to determine if one of them has made a reasonable approximation of a reasonable rate of return. I find again, however, that there is no single perfect exercise performed by any of these witnesses and must recall that the courts permit one to accept a methodology even with infirmities in rate cases since precision is not possible. There are three candidates in the center of the table, Mr. Copan (16 to 17 percent varying with the carrier), Dr. Nadel (as to his 18.5 percent recommendation before his unprecedented markups) and Dr. Silberman (19-20 percent for PRMSA). Of the three I would by far prefer to rely upon Mr. Copan's recommendations (16 percent for Sea-Land and TMT, 17 percent for PRMSA and GCML). If the omission that I mentioned above and will explain can be corrected on exceptions with reliable evidence and if the Commission believes that a single number only should be found to be "appropriate," I would recommend that it adopt Mr. Copan's figures. However, if not adequately explained or if the explanation still leaves some room for flexibility, I would adopt Mr. Copan's recommendations as a minimum with allowance for a range to approximately 18 percent. The reason for this conclusion is briefly as follows:

Mr. Copan, as the Chief of the Commission's Office of Economic Analysis, is free of any suggestion of bias, considering the position he holds. One would also expect that he would know and understand what kind of comparable earnings study the Commission's General Order 11 envisions. It appears to me that he followed that regulation as closely as one can, given its ambiguities and silence on so many critical points. He made certain subjective adjustments for certain kinds of risk and for the selection of his reference group and time period, but so did everyone else. The main flaw, however, which PRMSA has also noted in connection with Dr. Ileo's testimony, is that Mr. Copan had to estimate a critical figure in the formula which he applied to the FTC-QFR reference group, namely the amount of interest which these FTC companies had to pay, since FTC-QFR reports do not show any such figure. The record does not show how Mr. Copan derived his figure of 7 percent, which appears to be low. (See PRMSA's opening brief, pp. 38-39.) (Dr. Ileo had estimated 9.5 percent. using the FTC-QFR data, and PRMSA's interest cost is estimated at 11.7 percent for its pro forma year.) Mr. Copan apparently estimated that interest would amount to 7 percent of long-term liabilities, the latter figure published in the FTC-QFR reports. (See surrebuttal testimony of Dr. Silberman, p. 23, and Copan's rebuttal testimony, Schedule 3.) Moreover, Mr. Copan apparently estimated 7 percent of long-term debt as interest and apparently

used the period 1968-1979. This number is exceedingly important because Mr. Copan's formula (which is also the General Order 11 formula) applied to the FTC reference group is: net income after taxes plus interest divided by long-term debt and stockholders' equity. Obviously, the rate of return derived from the FTC reference group will be too high or too low if the estimate for interest is also too high or too low. If the Commission believes that it should select one rate of return figure per carrier, then I would recommend consideration of Mr. Copan's 16 and 17 percent figures for the various carriers, provided, however, that on exceptions BIE can furnish a satisfactory explanation and evidence which will support the estimated 7 percent figure. Such evidence should indicate the source of the figure, the time period it covers, the comparability of the borrowing institution, company or companies in terms of risk and other relevant factors, and whether the interest figure is depressed or representative of the time period, which should be a relevant period. In other words BIE and Mr. Copan should explain how a secondary figure not published in the FTC-QFR data can reasonably be plugged into the FTC data he used and matched with such data to produce a reliable rate-of-return benchmark figure before making adjustments for risks peculiar to the four respondent carriers. Even if so explained and justified, that 7 percent figure must remain a "plug-in," therefore introducing an additional element of imprecision into Mr. Copan's work and undermining any contention that any single rate-of-return number is the be-all and end-all above which refunds at 20 percent or so of interest must be ordered to be paid by the carriers. This further illustrates my point that selection of a single-number rate of return is probably unwarranted given the imprecise state of the art of ratemaking. (See *TMT Corp. - Proposed General Increase in Rates*, cited above, 22 F.M.C. 175 (1979) (F.M.C.); 22 F.M.C. 180 (I.D.), where the Commission allowed TMT a rate of return of 16.15 percent although finding that the record showed a reasonable rate of return to be only 15.8 percent, i.e., .35 percent below what was actually allowed, considering the fact that some allowance has to be made for imprecise rate-of-return measurement techniques. See also *Matson Navigation Co.*, 20 F.M.C. 822, 826 n. 6 (1978), regarding a "zone of reasonableness" approach.)¹⁹

¹⁹ Furthermore, it seems rather drastic to fix on a single number such as 17 percent as the one and only maximum allowable rate of return so that if PRMSA were to exceed that figure by less than one percent (i.e., if PRMSA were to reach 17.44 percent as BIE believe could happen under BIE's unadjusted calculations (not allowing for delayed redelivery of the *PONCE*, etc.) PRMSA would be ordered to make refunds at something like 20 percent interest as required by P.L. 95-475. This would be quite a blow to a carrier which apparently has not made reasonable earnings in its history, has lost \$1,800,000 in its most recent fiscal year ending June 29, 1980, and admittedly needs some rate increase even if only the 11.2 percent increase that GVI/PRMA advocate. We are not dealing here with carriers which have enjoyed fat profits and could absorb such a refund order out of such profits. Rather, as

Continued

Considering what has happened to the cost of borrowing money in the past five or more years, Mr. Copan's estimate of 7 percent for interest seems too low. Therefore, unless adequately explained, I would find that his 16 to 17 percent rate of return to be a minimum and allow some slight flexibility upward to account for his apparently low or imprecise estimate of interest. As I will discuss later in connection with Dr. Silberman, this range of 16 to 17 percent can perhaps be raised to 17 or 18 percent for PRMSA, after adjustments are made to Dr. Silberman's recommendations (19-20 percent) which reflect Mr. Copan's criticisms. I believe these adjustments will justify a range up to 17 or 18 percent for PRMSA and that no more reliable range can be determined on this record, even though the adjustment of Dr. Silberman's recommendations itself is not free of problems. However, before I get into the extremely complicated problems raised by Dr. Silberman, I will mention at this juncture that there is an alternative approach that indicates that a range of 16 to 18 percent or thereabouts might be reasonable, and that approach is given by Dr. Nadel, whose alternative methodology provides a yardstick of sorts to those expert witnesses who made adjustments for risk factors to their reference groups.

Dr. Nadel, like all the other experts, is not free of error. I have mentioned earlier his erroneous awards of premiums for bad business years and past shortfalls in revenues which would elevate his net rate-of-return of 18.5 percent to 23.5 percent. But if we put aside this five percent award and concentrate on Dr. Nadel's net recommendation of 18.5 percent, we can explore whether that is a reasonable yardstick. Of course, as BIE and GVI/PRMA have noted, Dr. Nadel focused on one year, 1979, a high year compared to the previous years that he studied, and he also adjusted his median rate of return (13.93 percent) upward on the basis of his belief that a correlation existed between rates of return and increasing rates of interest or, more accurately, yields. (See Sea-Land's opening brief, pp. 4-23 for a good explanation.) He has been criticized for his adjustment and his time period as well as his selection of 717 companies from 36 industry groups as a reference group drawn from Value Line, although one would think that a comparable group could be selected from such a large number. However, the important consideration is that unlike the other experts except for Mr. Brennan, Dr. Nadel made no adjustment for risks. He did this because he believed that he had selected a truly comparable group of companies based upon his several enumerated criteria. It is interesting that he is attacked for doing this when the classic comparable earnings test, as stated in the case, is supposed to rely upon a comparable group, i.e.,

Dr. Nadel testified, the carriers' last G.O. 11 reports showed only an aggregate of 7.1 percent rate of return and historically these carriers have earned returns that were actually 6 percent below FMC-approved rates of return.

companies having corresponding risks.²⁰ In any event, under his approach Dr. Nadel made no adjustments for risk and arrived at the figure of 18.5 percent. This figure, slightly above the range of 16 to 18 percent, might be somewhat high because it begins from a median of 13.93 percent for the year 1979, a high year, as I have noted although the median figure is lower than the weighted average of 14.87, which he found for his reference group. Nevertheless it provides an interesting alternative, if one accepts Dr. Nadel's selection of truly comparable companies based on the several criteria which he enumerated. (See Sea-Land's opening brief, pp. 10-11, for a list of these criteria.)

An even more fascinating exercise which might illustrate that the range of 16 to 18 percent is roughly reasonable can be performed by adjusting Mr. Brennan's recommendation of 15 percent upward to account for the risk factors that he refused to recognize. Of course, as I have discussed, Mr. Brennan believes that his reference group drawn from Standard & Poor's 400 Industrials requires no upward adjustment for any risk since the marketplace has already determined what return was necessary and has awarded a factor to keep market value of assets above book value, etc. However, a preponderance of expert testimony shows that the respondent carriers suffer from higher than average risk and merit adjustments to benchmark rates of return drawn from reference groups. See the testimony of Dr. Silberman who utilized three different tests to show that PRMSA stood at the high level for business risk and of Mr. Copan who showed that the factors which Mr. Brennan cited to show low risk for PRMSA actually demonstrated the reverse for the four carriers. Dr. Germane also found high risk. (See PRMSA's reply brief, p. 25, citing Brennan's rebuttal testimony, pp. 20-21, and

²⁰ Dr. Nadel's attempt to select truly comparable companies was opposed by BIE who believed that his group of 717 companies drawn from 36 industries was too narrow. This presents a curious situation. Theoretically, the classic comparable earnings test was supposed to select comparable companies with similar risk and the *Bluefield* and *Hope* decisions define the comparable group in those terms. If so, then Dr. Nadel was on the right track since he selected comparable companies under specifically enumerated criteria and then made no adjustment for risks. Almost all other expert witnesses, however, including Mr. Copan, selected companies for comparison but then added factors for peculiar risk affecting the four respondent carriers. BIE seems to be arguing that it is not possible or feasible to find a comparable group having similar risk and that one must always adjust for peculiar risk, although G.O. 11 does not expressly forbid selection of a truly comparable group of companies and does not state that an adjustment for risk is always required. One wonders why 717 companies represents too narrow a group for comparison, as BIE contends. Moreover, to illustrate further the lack of clarity in G.O. 11 concerning the proper reference group, BIE also contends that PRMSA's reference group, which includes mining and retailing companies as well as manufacturing companies, is too broad. BIE's exclusion of these companies is well argued. However, it is difficult and perhaps unfair to find against any particular party who has made a particular selection of companies for comparison for the reason that the party's reference group is not comparable or is too broad or too narrow when the Commission's own regulation is so unclear on this point as are previous Commission decisions. Cf. *Mediterranean Pools Investigation*, 9 F.M.C. 264, 304 (1966). It would obviously be helpful if the Commission would clarify G.O. 11, and it would be my recommendation, based upon the factors explained by Mr. Copan, to select the manufacturing sector of U.S. industries, as did Mr. Copan, for use in the future.

Copan's surrebuttal testimony, pp. 22-25.) Thus, if one adds a minimal factor to Mr. Brennan's 15 percent, we would once again end up somewhere in the zone of reasonableness described. For example, if we add Dr. Silberman's factors for business risk only, as regards PRMSA, namely 2.32-3.32 points, this brings the 15 percent up to 17.32-18.32. Or, if we add Mr. Copan's 2.5 percent figure for business risk only for PRMSA, we would arrive at 17.5 percent. For Sea-Land and TMT, it would rise to 16.5% after adding Mr. Copan's 1.5% risk factor.

It becomes increasingly clear that a range of 16 or so to around 18 might be the most reasonable zone that can be determined on the present state of the record. This conclusion, however, must reckon with the work of Dr. Silberman and leads to the most complicated and brainbreaking controversy in the entire case. I would need much more time than I now have to unravel the complexities surrounding the work of Dr. Silberman, especially with regard to the effort to compensate for PRMSA's tax-exempt status. I can only deal with the matter briefly and conclude that Dr. Silberman's work, as highly skilled and impressive as it is, must be adjusted for the reasons put forth by BIE and GVI/PRMA because of its departure from the literal requirements of General Order 11 and because of the practical impossibility of resolving the matter of adjusting for PRMSA's tax-exempt status satisfactorily in this hasty, time-impelled proceeding. Furthermore, because of the practical difficulties of trying to perform a rate-of-return study for application to a unique, tax-exempt, totally debt capitalized carrier such as PRMSA, I agree with BIE that one should consider measuring PRMSA's needs by using the fixed charges coverage ratio, although I would consider it as a necessary check and not eliminate a rate of return study totally from consideration.

This brings me to what will have to be a brief discussion of the massive work performed by Dr. Silberman for PRMSA and a brief description of the problems which I have found with it. As seen from the table above, Dr. Silberman recommended a range of rates of return for PRMSA of 19-20 percent. He also used FTC-QFR data but selected manufacturing, mining, and trading sectors, not merely manufacturing as had Mr. Copan (and Dr. Ileo). He used a narrower time period (1978-1980) than Mr. Copan's period of 1974-1979. He found a benchmark rate of return before taxes (because of PRMSA's tax-exempt status) for the reference group to be 16.68 percent and then added 2.32-3.32 percentage points for business risk factors, based upon three different statistical measures. (Dr. Silberman did not add on a factor for financial risk, nor did Mr. Copan who also awarded PRMSA a risk factor of 2.5%. However, GVI/PRMA attack PRMSA and Dr. Silberman because of PRMSA's lopsided financial structure, i.e., total debt capitalization, under a misapplication of the "prudent investment" theory, although neither PRMSA nor Dr. Silberman seek any factor for

financial risk, which such a capitalization structure might otherwise warrant in theory.) A good general defense of Dr. Silberman's work is provided in PRMSA's reply brief, pp. 2-39, although I do not agree with all of it as will be seen.

There are two main problem areas that appear from Dr. Silberman's work, the first relatively easy to handle, the second, more complex. They both relate, however, to the fact that General Order 11 has established certain accounting procedures which do not always follow non-regulatory accounting practices, do not have a provision for tax-exempt companies with huge interest costs such as PRMSA, and make no provision for the fact that the reference group mixes all of its capital and assets without regard to operating or nonoperating functions.

Just as I had problems with Mr. Brennan who seemed unable to accept the Commission's comparable-earnings test or, if he did, injected novel theories into it which General Order 11 never considered nor mentions, I have problems because Dr. Silberman chose not to employ the General Order 11 formula (net income plus interest divided by total capital) to the reference group. Instead, Dr. Silberman used a "surrogate" formula (operating income divided by net fixed assets plus working capital). Both Dr. Silberman and PRMSA on brief try to give reasons for this "surrogate" formula. (See PRMSA's opening brief, pp. 30-45.)²¹ But as BIE and GVI/PRMA have correctly demonstrated, this formula simply does not follow the requirements of General Order 11. Rather than discuss the details of this departure from General Order 11 which would serve little purpose since I cannot alter General Order 11 in this proceeding, I will mention only that BIE's witness Copan has revised Dr. Silberman's table to accommodate it to General Order 11

²¹ PRMSA struggles mightily to persuade that the Commission intended to allow something like Dr. Silberman's "surrogate" rate base formula as applied to reference groups when it issued General Order 11. (PRMSA's opening brief, pp. 30-35.) The portion of its brief cited is not convincing, however. True, the Commission abandoned return-on-equity in favor of return-on-rate base, as the quoted portions of Docket No. 78-46 cited in PRMSA's brief, show. But I do not read the Commission's decision adopting the return-on-rate base method to authorize a formula for application to a reference group that is something other than total invested capital, or "total capital" as the regulation liberally reads. Furthermore, in the particular regulation in question (46 C.F.R. 512.6(d)(2)(ii)), the Commission distinguishes between "return on rate base" (for the carrier) with "return on total capital" (for the reference group of "comparable U.S. corporations"). Mr. Copan and BIE have cited authorities including even Dr. Silberman who recognize that return on invested capital is a proper formula. Dr. Silberman's comments in Docket No. 78-46 do indeed seem to show that he was using total invested capital interchangeably with rate base but that does not mean that the Commission also did so. Furthermore, these comments did not call the Commission's attention to the distortion problems caused by use of total capital applied to the reference group, which PRMSA does in this proceeding. Therefore there was no reason for the Commission in Docket No. 78-46 to worry about application of a "total-capital" formula to reference groups. All that the Commission really did was abandon the return-on-equity formula which was complicated by debt/equity ratio problems. But the Commission did not say that the "total capital" formula as applied to the reference group of "comparable U.S. corporations" could be a "surrogate" collection of assets and working capital. If PRMSA wants to use Dr. Silberman's "surrogate" formula, it should petition the Commission to revise G.O. 11 in a separate rulemaking proceeding.

and to Mr. Copan's views as to a more appropriate reference group (limited to manufacturing companies) and time period (fiscal years 1975-1980 rather than 1978-1980). The results are shown in Mr. Copan's Schedule 6, attached to his rebuttal testimony, as discussed in that testimony on pp. 13-14. They show that with the adjustments, the benchmark before interest before tax figure, which Dr. Silberman calculated as 16.68 percent for the reference group, is reduced to 14.70 percent. Thus, if the business risk factor is added to this figure, we arrive at an adjusted rate of return recommendation of 17.02 to 18.02 percent if Dr. Silberman's range of business risk factors are added on and to 17.20 percent if Mr. Copan's business risk factor (2.5 percent) is added on. This exercise would tend to confirm that a reasonable rate of return for PRMSA is in the 17 to 18 percent range. However, life is not so simple as this case illustrates for a number of reasons. First, as PRMSA has shown, the use of General Order 11 without regard to separation of operating and nonoperating assets and income when deriving a benchmark rate of return from the FTC-QFR reference group can lead to overstating or understating depending on the mix of assets and the returns on each income produced by each. PRMSA explains the distortions well in its opening brief, pp. 39-47. In some instances the General Order 11 formula applied without such separation could lead to a recommendation for a higher return for a carrier than would be justified when nonoperating assets of both carrier and reference group were producing higher rates than the operating assets. At other times the recommended rate of return would be lower for the carrier than that earned by the reference group. (See PRMSA's opening brief, pp. 41-43, and hearing exhibit 7.) PRMSA argues that because of this failure of General Order 11, "there can be no true comparability between a carrier and the reference group in a comparable earnings study unless the reference group's data is [sic] adjusted to reflect a return comparable to the return on rate base. If it is not, either the carrier or the public is penalized by the exclusion from G.O. 11, of nonoperating assets and nonoperating income." PRMSA's opening brief, p. 46. Mr. Copan and BIE have answered this criticism of General Order 11 on the grounds that companies are competing for capital on a total capital basis and that investors are not seeking to separate one type of asset or income from another. (See BIE's opening brief, pp. 34-35.) Whatever the merits of PRMSA's argument, however, the fact remains that this is not the proceeding to amend General Order 11. Moreover, as far as I can determine, the record does not show what kind of distortion was produced by application of the General Order 11 formula to the reference group. Therefore, I must find that General Order 11 simply does not authorize a formula for application to a reference group in which the denominator consists not of total capital but of "net fixed assets and

working capital.”²² Both BIE and GVI/PRMA have convincingly demonstrated this and have also shown how Dr. Silberman’s own selection of assets and working capital are not reliable (e.g., his definition of working capital is not that of General Order 11 and Dr. Silberman’s selection of assets is somewhat unclear). (See GVI/PRMA’s reply brief, pp. 9-15, and BIE’s reply brief, pp. 20-24.)

THE TAX-EXEMPTION ISSUE

The final, brainbreaking problem, which also stems from General Order 11 rate-of-return methodology as applied to reference groups, concerns the problem of PRMSA’s tax-exempt status and its huge interest costs. This is a problem which offers no easy solution if rate of return is used as the sole test and because it offers no easy answer under that test, suggests strongly that BIE is correct in recommending that consideration be given to measuring PRMSA’s rate increases by the fixed charges coverage ratio. This topic which deserves a treatise by itself and a separate rulemaking proceeding for full contemplation does not lead itself to a solution in this hectic, time-constricted, multi-issue proceeding. The battle here is waged primarily between GVI/PRMA and PRMSA with BIE, although apparently agreeing somewhat with GVI/PRMA, suggesting a solution, namely, to junk the rate-of-return approach as far as PRMSA is concerned and turn to the fixed charges coverage ratio. For a discussion of the battle by the parties, see GVI/PRMA’s reply brief, pp. 25-30; GVI/PRMA’s opening brief, pp. 249-252; PRMSA’s reply brief, pp. 31-38; PRMSA’s opening brief, pp. 19-20; BIE’s reply brief, pp. 26-27.

The battle stems from Dr. Silberman’s attempts to adjust the General Order 11 methodology (as he viewed it using his “surrogate” rate-base formula) for the fact that PRMSA is a tax-exempt company with a huge interest expense, i.e., unlike any company in the FTC-QFR reference group. Dr. Silberman made such an adjustment, arriving at a benchmark figure of 16.68 percent as an equivalent rate of return for a reference group company before interest and, of course, before taxes. All other witnesses using the comparable-earnings method, however, made no such adjustment, instead deriving after-tax benchmark figures.

²² I have only a brief moment to comment further on this dispute between BIE and PRMSA as to the meaning of “total capital.” BIE argues (reply brief, pp. 21-23) that “total capital” is a very simple term and simply means “total.” Therefore, Dr. Silberman’s formula is incorrect. Although I agree with BIE that Dr. Silberman’s formula does not comply with G.O. 11, BIE’s argument in this particular regard is too quick. The G.O. 11 formula uses “total capital” as the denominator without further definition but, as Mr. Copan’s testimony and BIE elsewhere demonstrates, this really means “total invested capital,” or long-term liabilities plus equity. But such a definition omits current liabilities from the balance sheet. So “total” is not really “total.” See an explanation in Anthony and Reece, *Management Accounting Principles* (Richard D. Irwin, Inc. 3d ed. 1975), pp. 239-241. See also at least five different types of “total capital” reported by Value Line, as shown in Sea-Land’s reply brief, Attachment A, p. 2.

Thus, at the outset, Dr. Silberman's benchmark rate of return is higher, as GVI/PRMA note. (As I discussed above, Mr. Copan reworked Dr. Silberman's table to conform it to the General Order 11 formula and made other corrections, reducing the before-tax benchmark from 16.68 percent to 14.70 percent. This exercise did not eliminate the tax-exemption and high interest problems affecting PRMSA, however.)

PRMSA and Dr. Silberman believe that the before-tax, before-interest benchmark of 16.68 percent is proper and shows what a tax-exempt company like PRMSA would have to earn on its rate base to earn the same amount that would be earned by a taxable company achieving a before-tax return of 20.67 percent, which is the weighted average return which Dr. Silberman found to have been experienced by his reference group (under his methodology) (PRMSA's opening brief, p. 19). PRMSA furthermore believes that by allowing PRMSA a benchmark (i.e., before markups for risk factors) return of 16.68 percent, before interest, before taxes. PRMSA passes on to the public the entire tax savings generated by its tax-exempt status. Both BIE's witness Copan and GVI/PRMA see another side to this claim, however, because they see a distortion produced by PRMSA's huge interest costs (projected as \$24 million in the pro forma year, or approximately 12 percent of PRMSA's total capitalization). Mr. Copan explains that this huge interest expense borne by PRMSA makes Dr. Silberman's adjustments for tax exemptions "hazardous." (Copan-rebuttal testimony, pp. 6-7.) As Mr. Copan explains, Dr. Silberman's adjustments are subject to overstatement of the rate of return and are heavily dependent on the amount of interest. For example, reducing PRMSA's interest expense from \$24 million to \$20 million would reduce PRMSA's benchmark rate of return, derived from the reference group, from 16.68 percent to 15.77 percent. Mr. Copan states that "through usage of a \$24 million interest expense figure for a hypothetical tax paying firm, one is basically understating taxable income for the tax paying entity, which translates into a lower amount of taxes that need not be paid by PRMSA, and thus a higher equivalent rate of return for PRMSA." (Copan-rebuttal testimony, p. 7.) Mr. Copan states the dilemma that if one calculates a comparable before-tax rate of return for PRMSA, this would entail allowance of a greater than necessary rate of return but if reliance is placed on a comparable after-tax rate of return, one must compare PRMSA with firms that, unlike PRMSA, do incur a tax liability. (Copan-surrebuttal testimony, p. 6.) Mr. Copan suggests a refinement of Dr. Silberman's calculations adjusted to consider PRMSA's capital structure as well as its massive interest payments. (Id.) PRMSA, however, disagrees with Mr. Copan because by adjusting PRMSA's rate of return by reducing its interest obligations, PRMSA would be forced to pass along to rate payers more in tax savings than PRMSA actually experienced. (PRMSA's opening brief, p.

47 n. 22.) Mr. Copan recommends that we escape this tax dilemma by considering the fixed charges coverage ratio.

This, unfortunately for the reader, is only the beginning of the controversy. GVI/PRMA are much more vehement in their opposition to Dr. Silberman's claim that he has passed on to the consumer the entire tax savings generated by PRMSA's tax-exempt status. GVI/PRMA see this calculation of Dr. Silberman to be an illusion. According to them, Dr. Silberman is imputing to the reference group PRMSA's massive interest costs, thereby overstating the rate of return, and Dr. Silberman is not deriving an actual rate of return from the reference group of companies but rather hypothetical returns based on the assumption that the reference group had the same massive interest costs as PRMSA. (GVI/PRMA's reply brief, p. 26.) GVI/PRMA show in a table (reply brief, p. 27) that if one compares PRMSA to a true reference group company, i.e., one with a much lower interest (estimated through Mr. Copan's work to be about 2 percent of the reference group companies' total capital as opposed to PRMSA's nearly 12 percent), the before-interest, before-tax benchmark rate of return derived from the reference group would drop to 12.16 percent from Dr. Silberman's 16.68 percent. But once again, as they did to Mr. Copan, PRMSA argues that one cannot simply "wish away" PRMSA's high interest costs. GVI/PRMA reply to that argument by stating that General Order 11 methodology simply mandates that the reference group be a true reference group, not one to which is imputed PRMSA's peculiar high interest costs. As GVI/PRMA state: "This, however, is not the 'wish' of GVI/PRMA but the *mandate* of G.O. 11 in recognition of the proper regulatory treatment of interest expense." (GVI/PRMA reply brief, p. 28.)

In its reply brief, PRMSA does a fantastic job of trying to justify acceptance of what it calls a "package deal," i.e., that PRMSA's highly leveraged (total debt capitalization) structure "has certain consequences to the ratepayers and its tax exempt status has other consequences to the ratepayers." (PRMSA's reply brief, p. 34.) PRMSA produces a set of hypothetical tables with various companies having certain debt/equity structures compared to a non-taxable company with a 100-percent debt structure like PRMSA. These tables do show that PRMSA wants me to conclude, namely, that the GVI/PRMA and Brennan approach require PRMSA to pass on to the ratepayers tax savings never experienced by the non-taxable company, in effect "penalizing" PRMSA for its tax-exempt status. (Furthermore, using the tables and another adjustment, PRMSA shows that a non-taxable company like PRMSA needs to earn a return of 18.08 percent to be equivalent to a 22.8 percent before-tax return of the reference group, derived from PRMSA's hypothetical tables. (PRMSA's reply brief, p. 37.)

All of this justification is fascinating and I commend it to lovers of dilemmas. It does show what PRMSA argues. However, as GVI/PRMA have pointed out by way of a warning in their reply brief, no matter how many tables PRMSA may present in its final brief, PRMSA cannot escape certain facts. First, PRMSA is obviously struggling because of the General Order 11 dilemma which does not account for totally debt-financed, tax-exempt companies like PRMSA and does not expressly allow such a company to adjust actual reference companies' data to attribute to those companies PRMSA's peculiar financial structure. This means, as PRMSA has shown, that PRMSA will have to pass along tax savings which it does not realize if PRMSA is forced to start from a benchmark rate of return figure drawn from the reference group which is after interest, after taxes. The alternative, as Mr. Copan pointed out, however, is to allow PRMSA a higher rate of return than is necessary based upon a benchmark figure that is before taxes, before interest only because of PRMSA's peculiarly high interest costs. Second, the tables do prove what PRMSA wishes me to conclude about the apparent inadequacies of General Order 11 to deal with its peculiar problems even though the tables themselves are hypotheticals, i.e., they assume several sets of facts, for example, a taxable company with a 30-60 percent debt-equity ratio and another taxable company with 60-40 percent debt-equity ratio. Furthermore, the interest for these hypothetical companies nowhere approaches the proportion of interest to operating income of PRMSA (PRMSA's interest at \$24 million being more than three times its projected income).

PRMSA's exercises are ingenious and appear to justify its adjustments to the application of General Order 11 to the reference group. Nevertheless the price for this adjustment is not only to start from a higher rate-of-return benchmark but to make an adjustment to the normal after-tax benchmark figure drawn from the reference group because PRMSA is a tax-exempt, high-interest company which is not comparable to the companies in the reference group. Furthermore, even if PRMSA were held to the benchmark rate of return drawn from the reference group *after* taxes, as Mr. Copan, Mr. Brennan, and others did (before making upward adjustments) and even if this means that PRMSA is passing on more tax savings than it experiences, the result, according to Mr. Copan, Dr. Nadel, and Mr Brennan, as adjusted by adding risk factors, is to allow PRMSA a rate of return of 17 to 18 percent, above PRMSA's pro forma projections of expected returns. Moreover, PRMSA is given a rate of return that, as GVI/PRMA's table shows, is far above a benchmark return (12.16 percent) that would be derived if the tables were turned and the reference group's actual low interest expenses were attributed to PRMSA. Therefore, the rate

payers are arguably picking up some of the costs of the tax savings which PRMSA never experienced.²³

I conclude that PRMSA has pointed out a serious inadequacy in General Order 11 and one caused possibly by the fact that this problem in its full ramifications was not brought to the Commission's attention in Docket No. 78-46. Or perhaps the problem was realized and that is why that regulation permits usage of the fixed charges coverage ratio when the rate-of-return approach would produce "unreasonable results." (Docket No. 78-46, slip opinion, p. 68.) Much as I appreciate PRMSA's dilemma, the allowable rate of return that I find most reasonable as calculated by Mr. Copan and by Dr. Silberman after adjustments, and as compared to Dr. Nadel's 18.5 percent recommendation, are sufficiently high to permit PRMSA to maintain its 16 to 18 percent general rate increase. Mr. Copan's recommendation, it will be remembered, was for 17 percent, and is probably on the low side due to his estimate of interest at only 7 percent. It was not affected by the above tax problems since he derived a benchmark return from the reference group which was after taxes, not before. Moreover, the fixed charges coverage ratio, which Mr. Copan recommends as the primary test because of such problems as discussed immediately above, confirms the reasonableness of PRMSA's rate increases. Therefore, in the last analysis, resolution of this tax problem is not necessary in this case. However, it should be resolved in a rulemaking proceeding amending General Order 11 instead of being buried in the midst of so many other issues so that sufficient time can be devoted to it.

USE OF THE FIXED CHARGE COVERAGE RATIO

In its Order of February 27, 1981, the Commission stated that "because of the peculiar capital structure of PRMSA, the fixed charge coverage ratio standard of reasonableness stated in 46 C.F.R. 512.6(d)(3) will also be considered in determining the reasonableness of PRMSA's proposed rate increases." Order, pp. 2, 3. In the ordering paragraph, the Commission stated that "in addition consideration be given to the fixed charge coverage ratio standard of reasonableness . . . in making such determination." Order, p. 3.

²³ While one can understand PRMSA's reluctance to pass on to consumers tax savings it never experienced, merely because of its high interest and total debt financial structure, this financial structure is PRMSA's own making. PRMSA has made much of the fact that it is seeking no factor for financial risk (as opposed to business risk) otherwise due to it because of its total debt structure. True enough. But if PRMSA is allowed to start from a before-tax, before-interest benchmark of 16.68 percent drawn from a noncomparable reference group rather than 12 or so percent which Mr. Copan derives after taxes, it more than makes up its willingness to forego points for financial risk. Finally, PRMSA is government-owned. One may wonder what is so terrible if a government-owned carrier passes on to its citizens more tax savings than the carrier experiences and why its citizens should pay a higher rate of return to a publically-owned carrier so that the carrier can show that it is not being "penalized" for its tax-exempt status, although admittedly this would undermine the purposes of conferring tax exemption on PRMSA to some extent.

Various parties' experts have estimated reasonable ratios under this standard (1.2 by GVI/PRMA; 1.6 by DTPTC; 1.8-2.0 by BIE; and 2.02-2.08, at least, by PRMSA). Only BIE urges that this ratio be used as the primary standard instead of rate of return on rate base.

I have no time to discuss this issue at any length. Under any reasonable projection PRMSA will not exceed BIE's estimate of 1.8 - 2.0, which appears to be too low anyway. I do not find, however, that this ratio should be the primary standard. The Commission's Order merely states that "consideration" should be given to it and G.O. 11 establishes that the ratio is a "legitimate secondary evaluation . . . which may be employed when rate of return on rate base produces unreasonable results." Docket No. 78-46, slip opinion, p. 68. Again the Commission stated that "[t]his methodology, it must be remembered, is to be employed only as a secondary tool and any comparison evaluation made on the basis of that ratio will include a variety of entities, not solely public utilities." Docket No. 78-46, slip opinion, p. 69. The ratio has deficiencies, one of them being that it is a bare minimum, not measuring risk, another that it is totally dependent upon the relationship of a debt payment schedule to the useful life of an asset, becoming highly distorted when that schedule is not matched to useful life of the asset. Moreover, use of the TIER ratio, a reduced derivative of the fixed charge coverage ratio may not be fully reliable without a study of comparable TIER ratios. The I.C.C. has specifically rejected the ratio for determining reasonable revenues for railroads. In Ex Parte No. 393, *Standards for Railroad Revenue Adequacy*, March 30, 1981, the I.C.C. had considered establishing a ratio as high as 3.5 but, in rejecting the use of the ratio, stated:

After considering these comments we now believe that using these financial ratios as conditions to a finding of revenue adequacy would be misleading. Financial ratios are intended to provide summary information that, if not interpreted within the proper context, could suggest incorrect conclusions. For example, a firm's fixed charge ratio might be low because of its ability to raise long term debt. That ability could, in turn, be a reflection of its strong financial outlook. Yet the low fixed charge ratio would lead us to conclude the carrier was revenue inadequate. Because of the possible ambiguity, we have decided that these financial ratios should not be used in revenue adequacy determinations. We believe firmly that the rate of return standard is correct, and will base our determinations on it. Ex Parte No. 393, slip opinion, pp. 22-23.

Although I do not find that the fixed charges coverage ratio should be considered to be the primary test, as I have found above, as can be seen from my previous discussion concerning PRMSA's tax exempt status and the practical difficulties of applying the traditional General Order 11 comparable-earnings formula test in PRMSA's case, BIE's

witness Copan recommends consideration of the ratio for good reason. I agree and believe that it serves as a useful check. As General Order 11 states in the portion cited above, the ratio may be employed when "rate of return on rate base produces unreasonable results." One may wonder how one is to determine that the results are unreasonable unless there is some independent yardstick. For instance in this case Mr. Copan's rate of return "results" are 17 percent. That result does not appear to be unreasonable. To avoid the circular reasoning here, a reasonable interpretation is that, as Mr. Copan testified, the ratio should be considered because of the practical difficulties of applying the rate of return method to PRMSA which I so painfully described in the preceding section. This difficulty should be enough to trigger consideration of the ratio and, indeed, the Commission's Order specifically invokes such consideration. It is reasonable to presume that both the regulation and the Commission's Order wanted the ratio used as a check specifically because the Commission recognized the problems associated with PRMSA's peculiar capital structure, as stated in the Commission's Order cited above.

Although there are deficiencies in the ratio in theory and in Mr. Copan's particular testimony, as PRMSA has pointed out (PRMSA's reply brief, pp. 106-110), the deficiencies, if anything, may tend to show that his recommendations (1.8 - 2.0) might be too low. BIE describes why the ratio, even with its admitted weaknesses, is useful in this proceeding for application to PRMSA. (BIE's reply brief, pp. 41-50.) I agree but, as indicated, would apply the ratio as a check on the rate-of-return method. As BIE states, the usage of the ratio helps alleviate a problem that has been continually dogging the Commission, namely, how to apply rate-of-return methodology to a unique carrier like PRMSA, tax-exempt, debt-financed, government-owned. Even an expert witness previously appearing for PRMSA in at least one previous rate case (Docket No. 75-38) has recognized that the rate-of-return method has definite limitations when applied to a carrier like PRMSA. (BIE's reply brief, p. 42.)

As noted, the ratio has recognized deficiencies. However, Mr. Copan's work, in my opinion, is sufficient to act as a check on the rate-of-return methodology and, as such, it survives the various attacks made on it by PRMSA, GVI/PRMA, and DTPTC, none of whom conducted a study of their own. Mr. Copan did his study, as noted, because of the tremendous problems one has in applying the rate of return method to PRMSA. He selected municipally-owned utilities because they are comparable to PRMSA for purposes of this test and made adjustments upward above the minimum levels derived from rate covenants in bond offerings to allow for risk and provide PRMSA with a cushion. (See BIE's opening brief, pp. 24-27.) General Order 11 specifically authorizes use of comparable public utilities such as those

selected by Mr. Copan. (See Docket No. 78-46, slip opinion, p. 27, rules section, 46 C.F.R. 512.6(d)(3)(ii).) The attacks made on the ratio, while possessing some merit, have been satisfactorily answered by BIE and, in any event, seem to me to be efforts to discredit the alternative method because of PRMSA's and GVI/PRMA's belief that their rate-of-return calculations justify their respective positions. I agree, however, with PRMSA that PRMSA would not exceed any reasonable estimate of the ratio under any projection that I have seen and that Mr. Copan's estimate of 1.98 - 2.00 might be too low, if anything.

ISSUES (2) AND (3): CARRIERS' REVENUE AND CARGO VOLUME PROJECTIONS

The Commission's Order frames two issues concerning respondents' revenue and cargo volume projections. These are, as noted earlier:

- (2) Is the methodology used by Respondents in making revenue and cargo volume projections appropriate?
- (3) Are Respondents' revenue and cargo volume projections sufficiently accurate and, if not, what are the appropriate projections?

Although the first of the above two issues questions whether the "methodology" employed by the carriers in forecasting was appropriate, the main contentions of protestants concern not the fact that the carriers used various forecasting techniques such as market surveys, contacts with shippers, projections of categories of traffic, etc., but rather specific errors which protestants claim have rendered the projections unreliable.

It is generally recognized that in the field of forecasting there is no way to make a precise prediction. As protestant DTPTC recognized in its opening brief:

First, it is clearly impossible for any carrier regulated by the Commission, or any other business for that matter, to predict its future revenues and volumes precisely. There are simply too many unknowns and none of us has a crystal ball. DTPTC opening brief, p. 2.

I believe this statement is a truism in the business world so that a variety of different forecasting techniques may be employed. As one book states in regard to financial projections by businesses:

This means that there will be a great deal of difference in the approaches taken by various companies, even within the same industry, and differences will have to be recognized even within the same industry, also within a given company. A growing body of literature on the concept of responsibility accounting has recognized these aspects. Helfert, Erich A., *Techniques of Financial Analysis* (Richard D. Irwin, Inc. fourth ed. 1977) p. 91.

DTPTC suggests that the Commission abandon the system of relying upon "*ad hoc* guestimates" which lead to continual "wrangling" and do not lead to accuracy. (DTPTC opening brief, p. 2.) Instead DTPTC would have the carriers simply assume that their traffic volume would remain constant in the forecasted year so that revenue would change merely because of the rate increases. DTPTC also suggests an easier approach for determination of various expenses other than labor costs (which are easily determined from the labor contracts), namely, by adopting a formula upon which everyone can agree, as has the I.C.C. which utilizes a formula for non-labor expenses for motor carriers.

These suggestions would certainly simplify Commission rate cases. However, until and unless they are considered and adopted by the Commission, we must continue to abide by the current system, however clumsy and difficult it may be. Because we must abide by the present system, furthermore, it is necessary to recognize the basic principle of the system, which is that it is based upon forecasting and upon the principle that that a carrier is expected to use reasonable, responsible techniques at the time it makes its projections. If so, to penalize the carrier by ordering refunds at 20 percent interest because of later events which the carrier could not have reasonably anticipated smacks of an *ex post facto* type decisionmaking. On the other hand, to permit carriers to take advantage of later events to justify their earlier predictions sounds like *post hoc* rationalization. In other words, current Commission rate cases impose a responsibility on carriers to make reasonable projections and try to avoid either *ex post facto* decisionmaking or *post hoc* excuses by the carrier. Furthermore, under this principle of responsible forecasting compounded with the need for expedition, it is not appropriate to introduce later actual data unless there are extraordinary reasons, for example, when something has happened to make the carrier's projections not reasonably possible even as an approximation. The point is to encourage responsible forecast accounting and not to penalize carriers who have employed the best and most reasonable techniques available unless an event occurs which obviously makes the forecast a pretense. I have no time to develop this discussion further and will return to it briefly later in connection with the issue over fuel projections. Suffice it to say that Commission rate cases are based upon forecasting, not after-the-fact accounting.

Having said that, I must briefly discuss the various attacks which protestants have made upon the four carriers' forecasts. PRMSA, as the leading carrier by far, undergoes the most intensive attacks. PRMSA explained its methodology in some detail in its opening brief (pp. 65-72). PRMSA explains that the "basic methodology that PRMSA has utilized here, that is, the marketing survey and the adjustment for plant closings and openings, has been utilized by PRMSA in the past three general rate increases filed with this Commission." PRMSA opening

brief, p. 72. PRMSA also starts that its predictions have been shown to have been extremely accurate when comparing the forecast with actual history. In two of the last rate cases PRMSA actually carried 99 percent and 98.5 percent of what it had forecast. *Id.* Although, as I have said, the basic principle in Commission rate cases is not after-the-fact use of actual data, history bears out that PRMSA's forecasting has been very good and has not been pessimistic. BIE acknowledges this fact.

The argument on PRMSA's projections centers on which figure to use. PRMSA's projection, submitted on March 10, 1981, was for 166,763 trailerloads (Transclass case)²⁴ as adjusted to account for purported effects of President Reagan's budget cuts and late redelivery of the laid-up ship *PONCE*. BIE would hold PRMSA to PRMSA's original forecast submitted to the Commission before the case was docketed in response to the Commission's insistence on a Transclass case projection. If so held, the figure is 171,441 units. Protestants GVI/PRMA insist that these figures are too pessimistic and are unreliable and project their own figure of 174,401 units.

The questions are whether to accept PRMSA's guesses as to the effects of the Reagan budget cuts and calculations as to the increased costs due to late redelivery of the *PONCE* and whether to adopt protestants GVI/PRMA's alternate projection instead of PRMSA's, BIE's, or any derivative of those two. As to the first question, I must quickly decide, having no time to explain further, that protestants' and BIE's arguments on brief are convincing that the effects of President Reagan's budget cuts on decreases in the Puerto Rican trade are extremely speculative and that PRMSA's witness Lopez-Mangual, in effect, realized this when he tried to estimate how many units would be lost (265,000 tons he estimated) as a result of budget cuts. I refer the reader to the very effective arguments in BIE's and GVI/PRMA's briefs. As to the effects of late redelivery of the *PONCE*, I find that they can be considered in adjusting PRMSA's forecasts downward. Unlike the amorphous, preliminary estimates of effects of budget cuts, the late redelivery of the *PONCE* is a verifiable and quantifiable fact. Furthermore, protestants GVI/PRMA themselves specifically asked PRMSA to determine the effects of late redelivery of the *PONCE* although, being a less costly ship to operate than the *BAYAMON* which had operated in its place and for other reasons, adjusting for late redelivery of the *PONCE* would lead to a gloomier forecasted year. Moreover, PRMSA submitted its adjustments for the *PONCE* in time for other parties to challenge them before the record closed. This was not done. BIE objected merely on legal grounds, contending that

²⁴ PRMSA has abandoned its *ATLANTIC BEAR* case since it appears that PRMSA will not acquire that ship, having failed to lure the *BEAR* out of its cave.

PRMSA should be frozen to its original case submitted before this investigation was docketed. Protestants GVI/PRMA, after having asked for the evidence, object to it on various grounds on brief apparently because of inability to verify the accuracy. PRMSA, however, has explained and answered protestants in detail. See PRMSA reply brief, pp. 56-57.

The really significant attack on PRMSA's projections, aside from BIE's contentions that almost no revisions should be allowed once the case is docketed, is based upon GVI/PRMA's alternative projection based upon their witness, Dr. Suphan Andic, a qualified economist, who performed her own projection based upon a historic year ending on February 28, 1981, with certain adjustments. I regret that I have no time to discuss her projection in any detail and that, because of the inexorable pressure of time and the number of other issues remaining, I can only announce that I find Dr. Andic's alternative projections to be belated creations done in the midst of litigation which show no greater reliability than PRMSA's and indeed even less, especially in view of her changes from previous positions, misunderstandings, or other errors.

GVI/PRMA's explanations for its alternative projections and reasons for their rejection of PRMSA's forecast are beautifully explained in their opening brief, pp. 71-99. As well crafted as the brief is, however, I find that I cannot agree that GVI/PRMA's Dr. Andic has come up with a more reliable projection than PRMSA. Although very impressive at first reading, when one re-reads it and considers PRMSA's cogent replies, one sees less and less substance to the contentions. I regret that this discussion must be so brief in such an important area but I have no choice in view of the time pressures imposed upon me.

PRMSA's analysis of Dr. Andic and GVI/PRMA's attacks on its forecasts and of the substitution of a new methodology on surrebuttal by Dr. Andic is set forth very tellingly on pp. 62-70 of PRMSA's reply brief. Very briefly Dr. Andic abandoned her first methodology which had projected 174,401 units based upon PRMSA's historic year (July 1, 1979 - June 28, 1980). On surrebuttal Dr. Andic projects the same figure, this time by taking the most recent actual year ending on February 28, 1981, and making an upward adjustment, again arriving at the same figure, 174,401 units. (As PRMSA points out, moreover, even her counsel on brief abandons her claim that she had earlier made adjustments to PRMSA's market survey rather than to PRMSA's historic year.) In any event, on surrebuttal, Dr. Andic changed her methodology but still arrived at the same number.

Certain key points should be kept in mind in evaluating Dr. Andic's later methodology. As PRMSA shows, she worked from a particular year rather than from PRMSA's market survey. Thus, if PRMSA's forecast is to be rejected in favor of Dr. Andic's, it would be rejected

not because PRMSA's market-survey technique is necessarily wrong but because we should take more recent actual results and use them as the basis for projection. But, as I have noted, the basic principle of Commission rate cases is to require reliable forecasting techniques and not to employ after-the-fact actual data. If the latter principle were to prevail, then any carrier could constantly file new rate increases if later data showed that the carrier's actual earnings were much worse than had been predicted, on the grounds that such actual data forecasted terrible pro forma years.

In any event, Dr. Andic in her last projection, took 171,075 actual units carried in the year ending on February 28, 1981, and adjusted this figure upward to the same 174,101 units that she derived from her earlier methodology, now abandoned. The upward adjustment is derived by Dr. Andic's estimate of some economic growth and use of a 1.8 percent factor which she derived from her evaluation of such growth. However, as PRMSA notes, not only does Dr. Andic's new methodology result in the exact same number as the old but Dr. Andic now makes an upward adjustment whereas in the old methodology she made a downward adjustment from the base year then used. (PRMSA reply brief, pp. 69-70.) Moreover, in so doing, she somehow disregarded her earlier acknowledgement that adjustments for plant closings should be made downward because the effects would fall into the pro forma year²⁵ and that PRMSA would suffer some ill effects from continued use of the old Transclass ships.

I must leave the fascinating discussion of the Andic predictions with the acknowledgment that under different circumstances I would have provided a more detailed explanation of her work and why I find it to

²⁵ I regret that I have so little time to discuss many other contentions by GVI/PRMA, for example, that PRMSA is guilty of double counting the effects of plant closings. First GVI/PRMA contended that PRMSA double counted the effects of plant closings, first by considering the general effects and then by specific accounting plant by plant. PRMSA's witness Huresky rebutted that contention. (See rebuttal testimony of Huresky, p. 9, quoted by GVI/PRMA in their opening brief, p. 87.) After this explanation, GVI/PRMA then contended that most of the plant closings had taken place prior to the start of PRMSA's pro forma year (March 1, 1981 - February 28, 1982). (GVI/PRMA opening brief, pp. 88-89.) I suppose this argument means that PRMSA should have made no allowance for the effects of plant closings on the pro forma year. But even Dr. Andic in her original methodology had recognized that the effects of closings would, to some extent, be felt during the pro forma year. Moreover, under a market survey technique rather than merely comparing historic years with pro forma years I would think that PRMSA would have to account for specific effects of plant closings even if they had mainly occurred before the start of the pro forma year, as indeed PRMSA did so account. In the last analysis, GVI/PRMA attempt to substitute a second forecast made by Dr. Andic based upon the most recent actual carryings of PRMSA in lieu of PRMSA's market survey techniques and criticize PRMSA's forecast by later events or estimates as to the future of the economy in an effort to discredit the PRMSA forecast. Of course, if enough time elapses, anyone's early forecast can be shown not to be exactly right. But as seen, PRMSA's market surveys have been shown to have a good track record. Even if not, GVI/PRMA's massive attempts to substitute Dr. Andic's work for PRMSA's does not ultimately persuade, notwithstanding amazing efforts by counsel on brief. I also find BIE's arguments on brief, supporting PRMSA's forecast in most regards because it accords with trends showing past declines and otherwise appears reliable, to be persuasive. BIE opening brief, pp. 57-59.

be less reliable than PRMSA's, although both have defects. I do note, however, that because of her changes in methodology, the incredible coincidence that both her old and new methodologies end up with exactly the same figure, 174,101 units, the manner in which she decided to make changes, and the generally unsupportable claims made by GVI/PRMA and Dr. Andic regarding supposed concessions by PRMSA which never departed from its view that its market survey technique is basically correct, I cannot find that Dr. Andic is more reliable than PRMSA in determining a fair and reasonable forecast.²⁶ Finally, I see that under a variety of projections ranging from PRMSA's original projection to projections accounting for Reagan budget cuts and delay of the *PONCE*'s return (but not for GVI/PRMA's alternative method), the highest return to PRMSA would be 17.41 percent. This latter figure results if BIE's position of freezing PRMSA to its original pre-docketed unrevised figures is adopted. (See PRMSA's reply brief, table in Appendix A.) As I have noted above, I would accept adjustments for late redelivery of the *PONCE* but not for the speculative effects of the Reagan budget cuts. According to the table, such an adjustment (for the *PONCE*) would result in a return to PRMSA of 16.95 percent. Either result is under what I have earlier found to be a reasonable rate of return for PRMSA (17-18 percent). BIE's figure was 17 percent, but, as noted, it is probably too low and needs further explanation.

SEA-LAND'S REVENUE AND CARGO PROJECTIONS

Very briefly, Sea-Land has projected for the pro forma year a decline from 20,374 containers carried in the historical year to 19,252, a decline of 5 and one-half percent. Both GVI/PRMA and BIE contend that this projection is erroneous and is too pessimistic. GVI/PRMA,

²⁶ I regret that it is impossible for me to discuss other contentions, especially some made by protestant DTPTC, which argues that PRMSA's projections are much too low and are unduly pessimistic. Even if DTPTC's specific points are valid regarding the fact that shippers contacted disagreed with PRMSA's forecast as to them and to Sea-Land's belief that PRMSA would benefit from I.C.C. deregulation of rail/water traffic, however, DTPTC adopts Dr. Andic's first study based on her earlier methodology. In other words, even if DTPTC is correct in certain specifics, I am asked to junk the entire market survey forecast of PRMSA in favor of Dr. Andic who herself dropped the methodology which DTPTC is willing to adopt. However, as to the merits of DTPTC's specific comments, I believe PRMSA has provided satisfactory answers. Specifically, I.C.C. rail/water deregulation will not necessarily benefit PRMSA which has very little intermodal traffic and does not plan to increase intermodal business since it calls at so many ports directly. Second, while it is true that the different views of two shippers out of three contacted throws some doubt on the accuracy of PRMSA's market survey, PRMA, with many members, did not challenge the survey by contacting its own shipper members. Also, an adjustment for the two contacted would lead to a minuscule upward revision of only 89 units out of 3,582. (See PRMSA's reply brief, pp. 67-68.) It would be interesting to contact all shippers whom PRMSA contacted to know whether they all were more optimistic than PRMSA or whether some were more pessimistic. In any event, I cannot reject an entire market survey because two shippers disagree. I can only wonder what would happen had a more complete double-check survey of shippers been performed. This would have been a good area for the Commission's staff investigators to check if the Commission had the available personnel.

however, briefly attack Sea-Land's methodology of forecasting as being "unilluminating" since it is based on Sea-Land's "unspecified goals." (In addition GVI/PRMA attack one of Sea-Land's expense items, "freight brokerage" expense, as being unlawful since no provision for "freight brokerage" appears in Sea-Land's tariff. This issue was not specified in the Commission's Order and I could probably ignore it. However, I believe that the record is inconclusive on the matter anyway.)²⁷

Sea-Land's forecasting technique is described by its witness O'Donnell and is based upon information gathered by its sales force located in the field, which information is given to the marketing staff. The marketing staff reviews the data, broken down by cargo movements under different categories and by port movements. The data is modified in accordance with company goals, so that the forecast becomes in fact the goal. Revenue projections are calculated by adjusting actual revenues generated during the historical year to reflect rate increases and the forecasted cargo volume. (See GVI/PRMA opening brief, pp. 99-100, quoting Sea-Land's witness O'Donnell and BIE's opening brief, p. 60, citing O'Donnell and BIE witness Coleman.) Notwithstanding GVI/PRMA's swipe at this technique, it appears to be another means for a carrier to estimate its future and to make its forecasts, in effect, its goals. Companies may formulate their estimates as goals just as they prepare operating budgets for the forthcoming year which become, in effect, their goals. The real problem is with Sea-Land's pessimistic outlook for the North Atlantic where it projects a loss of 2,723 containers. The main reason why Sea-Land estimated such a loss in the North Atlantic is the fact that PRMSA will re-establish its full service with the return of the *PONCE* and *SAN JUAN* which will operate during the pro forma year (although, as seen, the *PONCE*'s return was delayed by several months). Sea-Land believed that these two ships would divert some traffic from Sea-Land. However reasonable that may have seemed to Sea-Land, GVI/PRMA, as well as BIE, have persuasively

²⁷ Sea-Land's explanation for this expense item amounting to \$607,547 for "freight brokerage" is contained at pp. 12-15 of its reply brief. GVI/PRMA argue most vigorously that this item is unlawful and should be deleted from Sea-Land's pro forma projections. See GVI/PRMA opening brief, pp. 105-106. This matter apparently was raised in the protests before the case was docketed by the Commission. If the Commission wished to determine the issue, it would have so specified as it did fuel, labor costs, etc. Under P.L. 95-475 and Commission case law, I am supposed to narrow issues and strictly rule out litigation of issues not specified in the Commission's Order of Investigation. See *TMT Corp. - General Increase in Rates*, cited above, 22 F.M.C. 175. In any event, Sea-Land claims that the item is a legitimate sales expense paid to its own agent, Sea-Land of Puerto Rico, Inc., and that the problem is only where to place the item in the G.O. 11 accounts, which heretofore have never been criticized by the Commission in this respect. BIE totally ignores the issue. I believe that the item in question may indeed look suspiciously like brokerage but without full litigation on the issue I cannot make a finding which, after all, may mean that Sea-Land had violated law. For such a serious matter, Sea-Land should have been placed on notice by the Commission in its Order. Finally, as Sea-Land notes, even if the questionable item is deleted from Sea-Land's allowable expenses, the results seem to show that its return would only be 16.3 percent, still within an allowable rate of return. See Sea-Land's reply brief, p. 15.

pointed out serious shortcomings. GVI/PRMA argue convincingly that PRMSA's increase in capacity in the North Atlantic does not necessarily mean a decline by Sea-Land there, that even if so, Sea-Land itself is putting a somewhat larger vessel into service there, that its competitors have not been operating at capacity, therefore merely putting new ships into the North Atlantic does not mean that Sea-Land will lose cargo to them, and finally, in the South Atlantic where Sea-Land's competitors TMT and PRMSA deploy the largest increments to vessel capacity, Sea-Land projects a substantial increase of 29.2 percent rather than a decrease, which under its theory, it should have done in the South Atlantic. GVI/PRMA opening brief, pp. 99-105. BIE also effectively shows that Sea-Land's pessimistic forecast for the North Atlantic is unsupported on the record and generally agrees with GVI/PRMA's criticisms. BIE's opening brief, pp. 60-64. I agree with the criticisms. However, as Sea-Land notes, since the dispute centers on the pessimistic estimate of a loss of 2,723 containers, Sea-Land, with the assistance of BIE's witness Coleman has added back the lost containers. The results are shown in a table on pp. 38-39 of Sea-Land's opening brief and as Appendix A to BIE's opening brief. This table shows that under the highest projection and lowest expense estimates, Sea-Land's return would be only 16.28 percent, well under Dr. Nadel's recommendation of 18.5 percent and slightly over BIE's incompletely explained recommendation of 16 percent. However, since BIE believes that Sea-Land has underestimated its fuel and administrative and general expenses, the table also shows that Sea-Land's return would only be 16.04 percent after adding back the 2,723 containers in the North Atlantic and adjusting Sea-Land's understated fuel and other expenses, using BIE's inflation factor of 14.9 percent. If the fact that Sea-Land has permanently canceled the rate increases in the Canadian tariff which had been under investigation is considered, these returns would be lowered further.

I must leave this discussion again because of time pressures to conclude that I find Sea-Land's North Atlantic forecast to have been unduly pessimistic and not sufficiently supportable. However, after appropriate adjustments are made to add back the forecasted loss of 2,723 containers and to adjust for understated expenses, I agree with BIE that Sea-Land's return will not be excessive.

TMT/GCML'S REVENUE AND CARGO PROJECTIONS

No one disputes GCML's projections and indeed no one focuses on GCML at all in this case. BIE supports GCML's methodology and has no dispute with GCML. BIE's opening brief, p. 65. Accordingly, I will pass on to TMT. Only GVI/PRMA attack TMT's projections and do so for limited reasons relating, among other things, to TMT's estimated capture of traffic from GCML, which has reduced its services, and for an alleged overstatement in TMT's rate base.

As for TMT's methodology, i.e., basic techniques employed to make its forecasts, they appear to be as reasonable conceptually as any other carrier's. The technique is explained in detail in TMT/GCML's opening brief, pp. 19-22, and also by BIE (BIE's opening brief, pp. 64-65). Very briefly, since I have no time to discuss it further, TMT based its pro forma year on a forecast of calendar year 1981. TMT reviewed data drawn from the twelve-month period ended September 1980 categorized by types of unit, compared to prior forecasts and adjusted to eliminate the effects of extraordinary occurrences. TMT made further adjustments to reflect assumptions regarding the competitive environment, service considerations, and economic trends through consultation with TMT's marketing and operational staffs. Specific factors considered were drastic service reductions by GCML, redeployment of equipment, and increased availability of specialized equipment. TMT adjusted historical revenue data to reflect a projected increase in cargo volume and the rate increases. TMT projected an increase of 17.39 percent from the cargo volume it transported in the historical year. (See BIE's opening brief, pp. 64-65.) As TMT explains, this methodology is based upon management's budgets prepared in the regular course of business. TMT/GCML's opening brief, p. 19.

BIE has no quarrel with TMT's methodology or results. BIE states that the methodology "appears to be appropriate" and that the projections "appear to be reasonable." BIE, therefore, "does not dispute TMT's or GCML's forecasts. . . ." BIE's opening brief, p. 65. GVI/PRMA, however, have serious problems with TMT's forecast results mainly relating to TMT's estimates of the volume of cargo that it will attract from GCML as a result of GCML's diminished service. I also have serious problems because of inscrutable changes in testimony by TMT's witness Baci and by equally inscrutable and cavalier responses by TMT to serious contentions by GVI/PRMA's witness Rozynski and by GVI/PRMA's opening brief, pp. 107-109. Accordingly I do not find that TMT has adequately explained that it will only attract 80,000 tons from GCML rather than the 100,000 tons, which it originally told the Commission it would attract. Moreover, since I have been given no assistant who can recalculate the effect of another 20,000 tons of cargo for TMT in its pro forma year, an effect which GVI/PRMA claims would add \$1.2 million additional revenue, I cannot find that TMT's increases will fall under an allowable rate of return of 16 or more percent or indeed what its return would be or that its forecast is reliable. Accordingly, what I have done with regard to BIE witness Copan, I will do for TMT. TMT will have to provide detailed explanations to the Commission as to why its later estimate of 80,000 tons should be accepted instead of its original estimate of 100,000 tons which it submitted to the Commission by verified statement of the same Peter Baci who later testified that only 80,000 tons of GCML's former carry-

ings would be attracted to TMT. I now explain briefly why I believe that the present state of the record does not persuade me that TMT's later estimate is reliable and why I find that TMT's response to the contentions of GVI/PRMA has not impressed me as being persuasive or as careful as the seriousness of the GVI/PRMA charges warrant.

GVI/PRMA's problems regarding Mr. Baci's changes of testimony and their inability to understand why the Commission should accept Mr. Baci's later statement that TMT would garner only 80,000 tons from GCML rather than 100,000 tons are clearly and concisely set forth in GVI/PRMA's opening brief, pp. 107-109. I have the same difficulty as do GVI/PRMA.

Although the matter of the change in Mr. Baci's testimony concerns me more than the other matters raised by GVI/PRMA (unexplained application of its cost-escalation factor to certain expense items, payment of management commissions to its parent company followed by management supervision fees), I am also troubled by these other problem areas. Generally, it appears, as GVI/PRMA have noted, that TMT has taken a somewhat relaxed attitude and has not bothered to present rebuttal testimony or to provide adequate explanations in its post-hearing briefs. This does not mean that TMT is required to write a 262-page brief, as did GVI/PRMA, but the abbreviated and rather cursory treatment of the GVI/PRMA charges which are based upon substantial criticisms raised by GVI/PRMA's witness's testimony, in my opinion, is not satisfactory when dealing with proposals by TMT to ask the Commission to allow TMT to assess ratepayers additional millions of dollars. Another basic problem I have with TMT's rather offhanded replies to GVI/PRMA in its briefs is that, unlike other carriers like PRMSA and Sea-Land, TMT's briefs do not even provide me with a table showing its pro forma income statement and rate base. Instead I am supposed to go burrowing through workpapers and exhibits to resolve critical areas of dispute. In a pressure cooker such as I am under, I need more enlightenment than TMT has chosen to provide. Instead of doing this, however, TMT answers two of GVI/PRMA's most important contentions (the 80,000 ton reduction and the double counting of management commissions) in brief footnotes in its opening and reply briefs.

I cannot, therefore, give my imprimatur to TMT and find that on the record as I now see it, TMT has fully survived the criticisms of its case. Very briefly, I call the Commission's attention to pages 103-106 of GVI/PRMA's reply brief and to pp. 56-57 and pp. 107-109 of GVI/PRMA's opening brief. As seen, TMT has not provided full and complete explanations in several important areas, most especially why TMT changed its testimony to reduce its projected tonnage by 20,000 tons and why its management commissions to its parent Crowley Corporation are not excessive because of double counting.

As shown in GVI/PRMA's briefs, TMT, through Mr. Baci, submitted a verified statement to the Commission apparently dated November 26, 1980, which told the Commission that TMT would gather approximately 100,000 tons of cargo from GCML which was reducing its services substantially. In his direct testimony submitted after this case was docketed, however, this figure is reduced to 80,000, a substantial change. The explanations for this important change become confusing and mystifying. In Mr. Baci's direct testimony, he explains that the 80,000 figure derives from an estimated reduction of GMCL's Puerto Rican cargo in the amount of 100,000, of which 80 percent was estimated to go to TMT. See direct, Baci, pp. 4-5, quoted in GVI/PRMA's opening brief, p. 108. No further testimony was offered by Mr. Baci on rebuttal to explain the discrepancy. The answer to this serious question as to why a change was provided by TMT in its opening brief in a footnote, which TMT states later in its reply brief, "fully answered" the GVI/PRMA's charges. See TMT, opening brief, p. 23 n. 7, and reply brief, pp. 4-5. TMT's footnote explanation states that Mr. Baci's first submission to the Commission was in error and gives an explanation as to why the correct figure is 80,000 tons rather than 100,000 tons which even appears to be different from that which Mr. Baci provided in his direct testimony. In the footnote TMT states that the 100,000 tons, of which TMT would attract 80,000, is shown by the difference between 190,573 tons carried by GCML in the year ending September 30, 1980, and the 90,903 tons which GCML projected to carry in 1981. In the post-docketed testimony of Mr. Baci, however, he stated that the 100,000 ton figure was derived by an estimate of the effects of the reduction of GCML's services. See quoted testimony on page 108 of GVI/PRMA's opening brief. As GVI/PRMA point out in their reply brief, however (p. 104), in his pre-docketed statements made to the Commission Mr. Baci made no reference to these GCML tonnage figures mentioned in the footnote in TMT's opening brief. Rather Mr. Baci had referred to specific commodities carried by GCML in its historic year which he considered to be of the type suitable for carriage by TMT. This reference led GVI/PRMA's witness Rozynski to rebut the analysis on the basis of the latter's study of the particular commodities, leading to Mr. Rozynski's conclusion that TMT had understated its revenue by \$1.2 million. (GVI/PRMA's reply brief, pp. 104-105.)

The shift from specific-commodity analysis to general tonnage figures to explain a substantial change in Mr. Baci's testimony is not adequately explained by a brief footnote reference which cavalierly tosses off GVI/PRMA's criticism. Moreover, I am puzzled as to why BIE, which has taken a strict position that a carrier's case should be frozen to its pre-docketed submission, should now have no problem with this very substantial change in TMT's case, which apparently emerged only after the case was docketed. Why does not BIE now insist that TMT

should be held to its pre-docketed case of 100,000 tons? I would welcome BIE's explanations in BIE's exceptions. Perhaps there is an adequate explanation which TMT can provide on some type of obvious-error theory. However, there has been a significant change in numbers and in explanation between the pre-docketed and post-docketed statements of Mr. Baci and the matter is simply too serious to toss off in cavalier footnotes. I, for one, am not prepared to make findings under such circumstances that TMT has adequately carried its burden of proof and leave the matter for the Commission to resolve if TMT can provide an adequate explanation other than in footnotes.

In order to determine whether there was some explanation for BIE's acceptance of the decline from 100,000 to 80,000 tons between the original verified statement of Mr. Baci submitted to the Commission and the direct testimony of Mr. Baci submitted after the case was docketed by the Commission, I consulted the direct testimony of BIE's witness New, a staff accountant with the Commission's Office of Financial Analysis. Rather than clarify the matter, however, the testimony makes it even more confusing. Mr. New, who, like all other staff witnesses, is well qualified and furnished helpful evidence, first stated that he reviewed TMT's workpapers and exhibits submitted before the case was docketed as well as the protests and found that "the aforementioned items included in TMT's financial projection appear to have been appropriately calculated." (New—direct testimony, p. 2.) He also listed five errors found in the TMT papers which had to be corrected. However, he also stated that TMT's data which be renewed were "unverified." (Id.) Of greater significance, however, for this particular problem, is the explanation or lack of it for the 20,000-ton discrepancy. Mr. New testified on this point as follows:

TMT anticipates gaining approximately 80,000 tons of cargo formerly handled by GCML, which is reducing the size of its operations and will discontinue calling at Lake Charles, Louisiana, a port served by TMT. (It should be noted that the statement of Peter Baci (page 2, 3) indicates that TMT expects to gain approximately 100,000 tons of cargo from GCML: However, TMT's financial projection assumes a gain of 80,000 tons from GCML. *TMT has acknowledged that the 80,000 tons figure is correct. Therefore, since this error appeared only in Mr. Baci's statement, the projected revenue calculation has not been adjusted.*) New—direct testimony, p. 3. (Emphasis added.)

Therefore, the only explanation for the discrepancy is that "TMT has acknowledged that the 80,000 figure is correct" and no adjustment to TMT's projections was deemed necessary "since this error appeared only in Mr. Baci's statement. . . ." Perhaps such an explanation might have sufficed if the Commission had not specifically ordered me to determine whether TMT's projections are "sufficiently accurate" and

whether TMT used "appropriate methodology." (Issues Nos. two and three.) I cannot determine that the new 80,000 figure given by Mr. Baci is "sufficiently accurate" merely because "TMT has acknowledged that the 80,000 figure is correct" and that the figure 100,000 is not accurate simply because it appeared only in Mr. Baci's original, verified statement. Which Baci statement is accurate and, if the second statement is the correct one, what evidence proves it correct other than TMT's acknowledgment that the 80,000 figure is correct. What does such acknowledgment mean?

I do not mean to impugn the quality of Mr. New's work. On the contrary, he showed that he made five important corrections to TMT's original submissions, all of which served to reduce overstated items of expense and items in TMT's rate base, so as to ensure that TMT would not be overcompensated by the rate payers. However, since the Commission wants to know whether the TMT projection is "sufficiently accurate," I need more evidence and explanation than the record now contains before I can make findings about the accuracy of TMT's projections. Since the burden was, and is on TMT to prove this point about the accuracy of its later 80,000-ton projection and TMT provided such little evidence and argument despite the specific criticism on this point made by GVI/PRMA, TMT will now have to satisfy the Commission on this point. It has not satisfied me.²⁸

Since the matter of the 100,000 and 80,000 tons appears to me to be the most significant problem area regarding TMT, I have spent what little time I had discussing it. However, TMT has also used the footnote technique to answer another of GVI/PRMA's criticisms, namely, the possible double counting by TMT for management commission and supervision fees to TMT's parent, Crowley Maritime Corporation. See GVI/PRMA's reply brief, p. 105. Again, TMT's answer is contained in a footnote. (TMT/GCML's reply brief, p. 6 n. 2.) TMT's short answer is that TMT was only following prescribed G.O. 11 terminology. I think that GVI/PRMA and the ratepayers deserve a more thorough answer than that and that TMT should provide it to the Commission or be found not to have carried its burden of proof.²⁹

²⁸ It may be argued on exceptions that even if one adds back the 20,000 tons, TMT will still fall under an allowable rate of return. That may or may not be. However, that does not justify the failure to prove the point because the Commission wants to know the answers to the issues it has framed. As the case of *TMT Corp. - Proposed General Increase in Rates*, 22 F.M.C. 175, cited above, illustrates, the Commission has the right to obtain answers to questions it frames in its Orders of Investigation, even if it appears that the answers will have no effect on the ultimate question of the reasonableness of the carrier's rates.

²⁹ TMT states in its reply brief (p. 6) that "the obligation of the carriers in this proceeding is to establish that their projections in the specified categories are reasonably reliable, not to respond to every question asked by protestants' experts." But TMT has the statutory burden of persuasion. Moreover, the Commission docketed this proceeding to permit GVI/PRMA an opportunity to show the validity of their contentions, as the Order mentions. I do not believe that TMT's rather offhand attitude is appropriate in rate cases affecting so many people in Puerto Rico and the Virgin Islands.

I have no further time to linger on the inadequacies of TMT's explanations. I would, however, if I had more time, explore more fully GVI/PRMA's additional contention that TMT/GCML applied its cost-escalation factor to unidentified expense items and the contention that there is an improper \$7.4 million overstatement of TMT's rate base. TMT has ignored these criticisms in its briefs, unlike PRMSA and Sea-Land, who attempted to answer all of the attacks made upon their cases. Without explanation by TMT and with no time to dig out what its explanations might have been, I would suggest that TMT provide answers in an adequate fashion to the Commission on its exceptions.

RESPONDENTS' COST ESCALATION FACTORS - NON-LABOR, NON-FUEL

The fourth issue framed by the Commission's Order is as follows:

- (4) Have Respondents properly calculated their cost projections covering labor, fuel, vessel maintenance and administrative and general expenses, and, if not, what are the proper calculations?

This issue has broken down into two main categories, first, the general inflation factor to be used for non-labor, non-fuel expenses and second, the fuel expense calculation. As to the question of labor, vessel maintenance, and administrative and general expense, there appears to be no specific problem. Labor expenses are derived from labor contracts which were made available to protestants and to the Commission's staff. Vessel maintenance, as such, was not litigated, nor was administrative and general expense except regarding certain TMT and Sea-Land expenses, discussed above. These two items fall under the controversy as to what general index of inflation should have been used. Since the Commission's Order does not explain what problems the Commission had with these particular items and the parties did not litigate the issues, I will pass directly to the real issue, namely, whether the carriers used appropriate inflation factors to project their non-labor, non-fuel expenses. Here again, as in the case of the different rate-of-return recommendations, there is a variety of recommendations.

The different indices and percentages which each party employed are summarized in PRMSA's reply brief, p. 76 and by GVI/PRMA in their opening brief, pp. 45-50. Again, protestants' calculations and recommendations, like their recommendations for rate of return, are at the low end while the carriers are somewhat higher. BIE, which accepted the carriers' various calculations, falls in the range of the carriers' annualized rate of inflation. (See PRMSA's reply brief, p. 76.) As annualized, GVI/PRMA would hold the carriers to an inflation factor of 7.2 and later 6 percent, the carriers suggest 9.9 to 10.4 percent, while BIE would accept 10.4 percent. The following table prepared by PRMSA

PROPOSED GENERAL RATE INCREASES IN THE PUERTO RICO & VIRGIN ISLANDS TRADES 253

and found in its opening brief (p. 118) is very helpful as a visual aid and is set forth below:

INDEX AND FORCAST	U.S.G.N.P. Implicit Price Deflator (Price Deflator) as forecasted by Data Resources Inc.	Producer Price Index for Industrial Commodities Less Fuels and Related Power (PPI-ICLF) as Forecasted by Data Resources Inc.	Producer Price Index for Industrial Commodities Less Fuels and Related Power (PPI-ICLF) as Forecasted by Sea-Land	Consumer Price Index (CPI) as Forecasted by Citibank	Producer Price Index for Finished Goods (PPI-FG) as Forecasted by V.I./Mfrs.	Producer Price Index for Finished Goods Less Energy (PPI-FGLE) as Forecasted by V.I./Mfrs.
Party Escalation Factor Annual Rate	PRMSA 17.27% ¹ to 30 months 10.4%	BIE 17.3% ² to 30 months 10.4%	Sea-Land 14.9% ³ to 18 months 9.9% ⁴	TMT 4 14.2% ⁵	V.I./Mfrms. 12% ⁶ to 30 months 7.2%	V.I./Mfrms. 10% ⁶ to 30 months 6%

¹ D - Vasquez, p.5
² S - Fratter, p. 14
³ Sea-Land actually forecasted a 13.90% escalation factor, D - Zito, p. 8. However, Ms. Fratter noted that Sea-Land had erred in making its forecast and that the actual forecast should have been 14.9%. D - Fratter, p. 12 Sea-Land accepts this correction.
⁴ T.M.T. did not make an 18 or 20 month forecast.
⁵ D - Andic, p. 21.
⁶ H - Andic, p. 28.
⁷ Sea-Land's original erroneous projection worked out to a 9.3% annual rate.
⁸ T.M.T. used a 10 % escalation factor/12 months instead of 14.9% as forecasted by Citibank. Ms. Fratter notes that it was proper for T.M.T. to reduce the Citibank forecast. D - Fratter, p. 10, n.10.

As seen from the table, the differences in the various escalation factors stem from the choice of index and the adjustments made by the individual party. Included in the table are the U.S. Gross National Product (GNP) Implicit Price Deflator utilized as a forecast basis by Data Resources, Inc. (DRI), an independent, widely-used service, as adopted by PRMSA; forecasts derived from one type of the Producer Price Index as made by DRI and adjusted by BIE; forecasts derived from types of the Producer Price Index as made by Sea-Land and GVI/PRMA; and forecasts derived from the Consumer Price Index by Citibank, used by TMT with adjustments.

Time does not permit me to describe these various factors. Good explanations are provided in the briefs of the parties. Briefly, however, BIE explains in its brief why the staff does not generally challenge the carriers' calculations. As explained in its brief (BIE opening brief, p. 67), the most appropriate measure for a carrier's non-fuel, non-labor expenses would be an inflation factor designed specifically for the maritime industry. Such an index is not published, however. Therefore, it is necessary to use a proxy or surrogate index that is most closely aligned to the ideal maritime index of inflation. BIE's expert witness Fratter testified that a Producer Price Index for Finished Goods Less Food and Fuels would be the closest proxy for the ideal but that no independent service publishes such an index. However, an independent service, DRI, does make a forecast based upon a PPI for Industrial Commodities Less Fuel and Related Products, which Ms. Fratter recommends as a suitable proxy. Such a forecast has the advantage, furthermore, of being free from bias since it is prepared by a recognized, independent service, DRI. BIE explains in more detail why such a forecast prepared by an independent service is reliable for application to the carriers and why fuel and food are properly eliminated from such an index. (See BIE opening brief, pp. 68-70.)

BIE and the Commission's staff accept the carriers' calculations with slight modifications. Thus, BIE finds Sea-Land to have understated its inflationary factor by use of a simplistic trend-line type of analysis and makes a correction so as to raise the Sea-Land factor from an annualized rate of 9.3 percent, as originally calculated by Sea-Land, to 9.9 percent. (BIE opening brief, pp. 70-71.) BIE accepts PRMSA's calculations (10.4 percent annualized) although BIE believes that PRMSA used a conservative, i.e., understated index, the GNP Implicit Price Deflator, which, although prepared by the independent service, DRI, is an index derived from numerous other price indices and suffers from other problems. (BIE opening brief, p. 73.) However, since the GNP Price Deflator is historically a conservative index, it would tend to understate PRMSA's cost increases. Therefore, BIE accepts PRMSA's escalation factor of 10.4 percent (stated as 10 percent in BIE's opening brief, p. 74).

BIE accepts TMT/GCML's use of an inflation factor in the amount of 10 percent annualized. Although the index employed by TMT was the Consumer Price Index, which BIE shows to be unsuitable for carriers' use for a number of reasons (BIE opening brief, p. 77), the end result, as adjusted, was within the range of reasonableness and approximated that of PRMSA which was probably conservative. I agree that the CPI is not suitable for the reasons BIE explains (it is a "market basket" compendium of consumer items including clothing, shelter and medical services which are not relevant to a carrier's business). However, the result, as adjusted by TMT, conforms to results produced by more reliable indices.

I have only a very limited time to discuss GVI/PRMA's contentions and recommendations. As PRMSA states in its reply brief (p. 79): "No one agrees to the V.I./Mfrs. - sponsored indices except the V.I./Mfrs." That, of course, is not sufficient reason to reject it. There are, however, such reasons, and they are succinctly mentioned by PRMSA, among others (PRMSA reply brief, pp. 79-80). Essentially, GVI/PRMA's escalation factor, originally annualized to only 7.2 percent, later revised to drop to 6 percent, is not based upon an independent service such as DRI but is based upon the work of Dr. Andic who employed indices which are weighted by food and fuel factors. (BIE, it should be noted, strongly supports the use of an index prepared by an independent service such as DRI in place of an *ad hoc* study done by a particular carrier with its tendency to build in biases.) PRMSA explains in greater detail why Dr. Andic's incredibly low figure of 7.2 percent (later, 6 percent), well below every other estimate, is unreliable. (PRMSA opening brief, pp. 122-124.) Briefly, Dr. Andic, although purportedly starting from the PPI for finished goods in her first version, managed to lower the figure although the PPI index, according to BIE's witness Fratter, should have produced a higher result. What Dr. Andic did is similar to what she also did in regard to her alternative projection of PRMSA's cargo volume and revenue forecast, discussed earlier, namely, take the most recent months and assume that the same trend would continue into the future. In other words, according to BIE witness Fratter, Dr. Andic assumed that an inflation rate can be forecasted based on the rate that has occurred in the most recent past. (See rebuttal testimony—Fratter, p. 8, quoted in PRMSA's reply brief, p. 123.) Ms. Fratter calls the Andic methodology "naive." Moreover, Dr. Andic's result was much lower than the 10.5 percent annual rate of inflation predicted for both 1981 and 1982 by DRI, the source from which Dr. Andic purportedly drew her data. Finally, in Dr. Andic's second study, in which she reduced her earlier prediction from 7.2 percent to 6 percent, she used the PPI index for finished goods less energy. But this index is heavily weighted with food so that it is not really relevant to carriers and, as BIE witness Fratter showed, the

Andic methodology of projecting a 20-month period from a five-month period, if used one year earlier, would have predicted an inflation factor way out of line with reality. (PRMSA, reply brief, p. 124.)

I conclude that the record supports the inflation factors employed by the carriers with modifications discussed above and that, as in the case of the cargo volume and revenue projections, GVI/PRMA's unique and alternative methodology utilized by Dr. Andic does not withstand analysis. Furthermore, because of her continual revisions and unique results, I find Dr. Andic's work to be quick and resourceful but increasingly suspect. BIE has been even more severe with GVI/PRMA's expert witnesses.³⁰

THE FUEL COST INCREASE ISSUE

Another difficult question to solve in this already difficult case is what to do with the carriers' fuel cost predictions. A special problem with this particular estimate is, of course, the volatile, erratic price changes in oil and the corresponding need to employ a reasonably accurate methodology in Commission rate cases which rely upon the one-year forecast method. Again, I regret that the tremendous pressures of time and my lack of technical assistance make it impossible for me to discuss this complicated issue in more detail. Perhaps the Commission, which has given itself 43 days after the last pleadings (replies to exceptions to my Initial Decision) are filed, can devise a better solution but the problem taxes the wisdom of my ancestor, King Solomon.

The problem is that the carriers had to make their forecasts of increases in the price of oil back in November 1980 or before, approximately when they first submitted their cases to the Commission. Now that we are, at the time of writing, in July, the crazy oil market continues to amaze and dumbfound. Every day one can read different predictions. First one authority says that the Saudis will call off their game with OPEC and curtail production so as to raise prices. Then another authority claims that the Saudis have to maintain current production to finance domestic projects. Both PRMSA and GVI/PRMA attach conflicting cartoons and newspaper articles. The point is that no one really knows how long the current oil glut will last. Consequently, if we try to apply the most current daily prices of oil to any carrier's original forecast to make a new forecast, there is no way of knowing that such a forecast is more reliable than that which was originally

³⁰ Thus, in commenting upon the shortcomings of GVI/PRMA's witnesses in their calculations of inflation factors, BIE states:

The Bureau submits that not only does the blatant methodological error detailed above effect (sic) the inflation factor developed by GVI/PRMA's witnesses, but it draws into serious question the alleged expertise of these witnesses in this crucial area. Perhaps more telling, however, is GVI/PRMA's witnesses' inability to comprehend the mistake that they had made when confronted with criticisms of their methodology. (BIE reply brief, p. 69 n. 35, citations to the record omitted.)

submitted, even if it were conceptually sound to assume that later data would always supply a more reliable base merely because such data were more recent.

There are a few other basic problems here as well. First, there is the fact that the Commission has discontinued its bunker fuel surcharge program by which it had required special accounting on a forecasting as well as after-the-fact-reckoning basis. The Commission discontinued this program on the grounds that oil prices had supposedly stabilized. See *Bunker Surcharges in the Domestic Offshore Trades*, 20 S.R.R. 401 (1980), revoking 19 S.R.R. 406. But having announced that oil prices have stabilized, that meant that carriers could seek compensation for increases in fuel costs as part of their general-rate-increase cases. That is exactly what has happened in this case. This leads to the second problem, which I mentioned briefly earlier in connection with the carriers' revenue and cargo volume projections, namely, that Commission rate cases, based on testing carriers' forecasting methodologies, are prospective, not retroactive. In other words, to the largest extent possible, in order to assure responsible forecasting by carriers, they are not allowed to produce *ad hoc*, i.e., after-the-fact justifications. Similarly, if protestants are allowed to rely upon later, current events, this is a form of retroactive, *ex post facto* type of decisionmaking so that even if the carrier utilized the best techniques available at the time it filed its rate increases, it would be forced to make refunds and pay interest at something like 20 percent because of later events which the carrier could not have reasonably anticipated.

The particular solution in this case emerges after one has considered the relative merits of GVI/PRMA's alternative methodology to ascertain whether it will withstand analysis, even assuming that later events should be allowed to supplant a carrier's original case and the facts which the carrier had to rely upon at the time of submitting that case. A close analysis of GVI/PRMA's alternative calculations for PRMSA's fuel cost forecasts shows, as do the analyses of protestants' previous alternative projections and calculation of inflation factors, that they once again do not hold up. The various deficiencies in what otherwise might appear to have been a plausible alternative using a more current base, are well stated in PRMSA's reply brief, pp. 80-104. Time will not permit me to explain in detail how PRMSA shows the weaknesses in protestants' alternative methodology. I can only briefly touch upon the highlights and refer the reader to the complete explanation in the cited portions of the reply brief and to PRMSA's opening brief.

As explained in PRMSA's opening brief (pp. 125-127), PRMSA used a forecast based upon the forecast of Average Refiners Acquisition Domestic (A.R.A.D.) prices by Data Resources, Inc. (DRI), the same widely-used service discussed above in connection with the inflation factor issue. PRMSA then compared A.R.A.D. forecasts with its own

experience with oil prices using recognized statistical measuring techniques. BIE witness Straube examined PRMSA's forecasting technique and found it to be reasonable. GVI/PRMA's witness, Dr. Andic, however, attacked the PRMSA methodology and substituted her own, as she did previously in connection with cargo volume and revenue projections and inflation factors. Here again her attacks on PRMSA seem to pass through a variety of unsupportable allegations and changing rationales. Dr. Andic contends that a better base for prediction would be the March 1981 DRI forecasts rather than the November 1980 base used but her contentions fall apart under scrutiny. I cannot take the time to describe the manner in which PRMSA, in my opinion, has undermined Dr. Andic's work and credibility in PRMSA's opening and reply briefs. Among many other things, PRMSA has shown that Dr. Andic incorrectly accused PRMSA of applying a simplistic trend-line analysis to the DRI data. This is especially interesting since Dr. Andic herself appears to have used a trend-line analysis elsewhere. Moreover, even using the March 1981 DRI forecast, PRMSA has shown that the results would be more pessimistic than PRMSA had originally forecast and that the only reason why Dr. Andic is able to reduce PRMSA's forecasted cost increases is by use of techniques that are full of mistakes. As PRMSA shows, although supposedly using the March 1981 forecast, Dr. Andic actually ignored it by employing a percentage factor of 22.2 percent which was supposed to cover steady monthly increases in costs from first quarter 1981 to first quarter 1982 under another simplistic trend-line analysis. Also Dr. Andic's starting point of two weeks in March 1981, although sounding appealing because it is more current, leads to woefully distorted results, a danger that results whenever a single starting point is selected for projection purposes.

Essentially PRMSA has relied upon a recognized forecasting service, DRI, a technique which, as I have noted, BIE agrees to be reasonable while GVI/PRMA and its witness, Dr. Andic, once again substitute different data and make their own *sui generis* calculations, make unsupported allegations about PRMSA's evidence, change grounds, and end up looking worse for the effort. The statement made by PRMSA that Dr. Andic simply is not qualified to make predictions as to fuel costs because of her lack of experience in the field seems to be supportable. Moreover, the statement that she cannot compete with a service such as DRI coupled with the fact that the trend-line analysis method which she did employ has been shown in fact and in theory to be faulty, lead me to conclude that GVI/PRMSA's attacks on PRMSA's forecasts of fuel cost increases cannot be sustained and moreover, to conclude that the credibility of Dr. Andic has again been significantly undermined.

As to the fuel cost projections of Sea-Land and TMT/GCML, protestants seem to say nothing in their briefs, having concentrated on PRMSA. BIE, however, finds nothing wrong with these other carriers'

projections. Indeed, BIE states in its opening brief that both Sea-Land's and TMT/ GCML's projected average costs for the pro forma year of \$29.69 and \$29.45 per barrel which were below PRMSA's predictions, were probably too low. (See BIE's opening brief, pp. 71, 76.)

THE ISSUE OF ECONOMIC HARDSHIP

The final issue framed by the Commission's Order is as follows:

(5) Do the proposed rate increases impose an economic hardship on the affected interests represented by Protestants and Intervenor, and, if so, to what extent should this factor be considered in determining a reasonable rate of return for the carriers?

The parties claiming that the rate increases will cause economic hardship are protestants GVI/PRMA and the Chamber of Commerce of Puerto Rico, which did not take an active role in the case and did not file post-hearing briefs. Protestant DTPTC based its case on contentions similar to those of GVI/PRMA regarding rate of return, cargo volume projections, cost escalation factors, etc., not on economic hardship. Although the parties commented on this issue, however, only GVI/PRMA seem to present specific recommendations, because of alleged economic hardship, which are, of course, that the rate increases be rolled back to something like 11.2 percent from the 16 to 18 percent level.

The main factual issues falling under this general question stem from the testimony of individual shippers and business persons who testified in St. Thomas and San Juan that the rate increases affected them adversely. The legal issue concerns the question whether the Commission can change a carrier's return which is otherwise shown to be reasonable for reasons relating to economic hardship and, more particularly, to hardship affecting individual shippers in a general-revenue case.

There is considerable dispute as to whether the subject rate increases will cause economic harm on individual shippers and consumers, PRMSA and other carriers arguing that the shippers' problems are caused by many other factors and that many shippers are doing better financially than the carriers are. Moreover, PRMSA and Sea-Land ask me to apply sanctions against shippers who testified on behalf of GVI/PRMA because they did not furnish answers to questions which both PRMSA and Sea-Land had, by previous arrangement approved by myself, asked counsel for GVI/PRMA to have brought to their individual attention. The overall conclusion I draw from this area of the record is that the rate increases are an aggravation to the shippers, as are any price increases, but that I cannot find that these rate increases are the main cause of business problems which individual shippers are

facing. Moreover, because of the failure of most of them to prepare themselves to answer the specific questions which might have indicated how well their businesses were doing and how the specific rate increases resulted in cost increases to them, I find that they have, without intending to, weakened their individual cases because I have no idea whether some are able to absorb cost increases that may have directly or indirectly resulted from the rate increases out of healthy profits or whether they are being victimized by other factors.

I again regret that I have so little time to devote to this subject which concerns individual human beings whom I observed at the hearings in St. Thomas and San Juan and that I cannot find that this proceeding will be the vehicle through which they can enjoy some relief from the inexorable march of inflation. My problem is that their testimony, while entitled to careful consideration and sympathy, seems directed at the issues not in this type of case, even if I were persuaded that the rate increases were causing them substantial problems. Thus, before I mention the factual testimony, I will discuss basic principles of law and assume that the individual shippers have shown substantial economic harm because of the general rate increases.

A very basic problem here is the principle that the particular problems affecting individual commodity rates are generally not relevant to cases involving the issue of a carrier's need for additional revenue in a so-called general-rate-increase or general-revenue case. In general-revenue case after general-revenue case, individual shippers customarily march in to testify and customarily march out with no success. Basically they are in the wrong case because their evidence concerns factors peculiar to their own commodity rate and not factors affecting a carrier's rate of return in its rate base. Despite many years of general-revenue cases before this Commission, it never seems to fail that shippers consume their time trying to litigate irrelevant issues in the wrong type of case. The Commission has recognized the difference between a general-revenue case and an individual commodity case. In Docket No. 77-12, G.O. 16, Amdt. 20, 20 F.M.C. 202 (1977), the Commission amended its Rule 41, 46 C.F.R. 502.41, to clarify the fact that a "complainant" in an individual-commodity rate case was not the same thing as a protestant in a general-revenue case. The Commission tried to advise shippers that they should concentrate their efforts in fighting individual rates based upon transportation factors peculiar to the carrying of those commodities and other relevant factors involved in single-commodity cases rather than waste their time in general-revenue cases which, like the present one, are heavily involved in rate-of-return and general-revenue and cargo-volume predictions. The Commission stated:

However, the question of reasonableness of a particular rate is still an essentially different issue which should be litigated in consideration of transportation factors such as cost of service,

value of service, etc., which focus upon the particular commodity in question. (Footnote citations omitted.) All too frequently, however, shippers interested in obtaining a determination that a particular commodity rate or rates are unjust or unreasonable engage in the futile endeavor of contesting evidence pertaining to the carrier's need for increased overall revenue armed with little more than evidence concerning anticipated effects on movements of their particular commodities. As the Commission remarked in our previous notice, these efforts usually consume time needlessly and are essentially irrelevant in a general-revenue case. The answer to this problem is to avoid the wasteful practice of litigating issues in wrong proceedings. The proposed rule would require protestants to file their own complaints or, under the proper circumstances, petition the Commission to institute investigations concerning a particular rate or rates. In either event, the resulting proceeding would proceed to develop truly relevant evidence pertaining to revenue, transportation, and ratemaking factors relating to the specific rate in question. Docket No. 77-12, 20 F.M.C. 202, 205-206 (1977).

In the footnote citation omitted from the above quotation the Commission cited numerous authorities which held that general-revenue cases are essentially different from those involving specific commodities. Among the many cases are: *Chicago Board of Trade v. United States*, 223 F.2d 348, 351 (D.C. Cir. 1955); *Alcoa Steamship Co., Inc. - General Increase in Rates in the Atlantic/Gulf Puerto Rico Trade*, 9 F.M.C. 220, 222 (1966); *Matson Navigation Company - Rate Structure*, 3 U.S.M.C. 82, 87-88 (1948); *Wool Rates From Boston to Philadelphia*, 1 U.S.S.B. 20, 21 (1921); Locklin, *Economics of Transportation* (Irwin, Inc. 7th ed. 1972), pp. 421-422.

Even if this case were an individual-commodity investigation rather than general-revenue, the law is not clear that the Commission could depart from recognized principles of ratemaking and order rate reductions because particular businesses or industries claimed hardship. PRMSA cites a number of these cases holding against such orders in its opening brief (p. 156).³¹ This entire area of law concerning how far a transportation regulatory agency can determine reasonableness of rates (usually individual rates) is not free from confusion, however. See discussion in Locklin, *Economics of Transportation*, cited above, pp. 445-447. That author, after observing that the I.C.C. had, in some specific commodity cases, ordered reductions to relieve the problems of a

³¹ These are: *Eastbound Intercoastal Lumber*, 1 U.S.S.B. 608, 623 (1936); *Puerto Rican Rates*, 2 U.S.M.C. 117, 119 (1939); *Increased Rates on Sugar*, 7 F.M.C. 404, 413 (1962); *Pacific Coast/Puerto Rico Rate Increase*, 7 F.M.C. 525, 534 (1963); *Matson Navigation Co. - Rates on Pallets*, 7 F.M.C. 771, 772, 775 (1964).

particular business or industry, also observed that many other cases were opposed and concluded:

The general conclusion to be drawn from these cases is that although the Commission sometimes recognizes the economic and social effects of certain rates, it is on insecure ground if it modifies rates otherwise reasonable out of deference to these consequences. To give weight to considerations of welfare, economic policy, and the like would hardly be consistent with the statement of the Supreme Court that the standards set up by the Interstate Commerce Act are "transportation standards, not criteria of general welfare." Locklin, p. 447 (footnote citation omitted.)

BIE takes strong issue with respondent TMT/GCML which has argued that specific-commodity issues are not relevant in general-revenue cases. BIE develops a well-researched discussion of relevant law which elaborates upon the necessity to consider the interests of the public and allows agencies to utilize a zone of reasonableness so that agencies can select a rate within that zone which will reflect the proper balance between investor and consumer. (BIE opening brief, pp. 77-82.) (This position is interesting coming from BIE since BIE earlier advocated a single, fixed rate of return rather than a range like Dr. Silberman's range of 19-20 percent.) BIE also quite properly recognized a line of cases which establish that a carrier or utility must be allowed to earn a decent return comparable to other industries in order to maintain the quality of its service, otherwise the public suffers later from higher rates, reduced services, or even lack of service. (This, again, is interesting as applied to the carriers in the Puerto Rican/V.I. trades since over half of their fleets consist of ancient World War II ships.) (See Sea-Land's opening brief, p. 8, citing Dr. Nadel's direct testimony, p. 33, table 7.)

Having expressed the above principles well, however, BIE concludes that carriers are entitled to make earnings comparable to those earned by other U.S. corporations having similar risk and that no reductions should be ordered unless they would prevent "severe and harmful economic dislocation." (BIE opening brief, p. 82.) Such dislocation, however, has not been shown on this record, according to BIE.

Even if BIE's contention that "severe and harmful economic dislocation" must be shown to justify lowering a carrier's otherwise reasonable rate of return, I note that the bulk of the cases cited by BIE are either individual-commodity cases or utility cases. I know of no purely general-revenue case before the Commission in which the Commission has ordered a reduction of a tariff across-the-board because a number of individual shippers have contended that individual rates were harmful. However, as Locklin observes, in a case BIE cites, this Commission has in at least one individual commodity rate case followed a doctrine of

permitting high rates on luxury items to subsidize low rates on food and subsistence items and in the Puerto Rican trade. See *Reduced Rates on Autos - North Atlantic Ports to Puerto Rico*, 8 F.M.C. 404 (1965). Moreover, the Supreme Court has permitted an agency to reduce a carrier's rates below compensatory levels in the public interest provided, however, that the carrier was permitted an adequate return from its traffic as a whole. This is the famous case of *Baltimore & Ohio Railroad Co. v. United States*, 345 U.S. 146 (1953) (reduced rates on fresh fruits and vegetables prescribed by the I.C.C.).

What the above discussion shows is that there might be some relief available to the individual shippers if they would concentrate on seeking individual commodity rate relief or if their problems fell in the limited area of the Commission's and Supreme Court's decisions in *Reduced Rates on Autos* and the *Baltimore & Ohio* cases, cited above. Even without litigation, however, as the many current tariff pages filed with me by respondents show, and as Sea-Land contends, general rate increases do not hold up uniformly because individual shippers often negotiate roll-backs on the commodity rates which concern these shippers.

GVI/PRMA develops a similar discussion on applicable law to that presented by BIE. (See GVI/PRMA opening brief, pp. 128-135.) As did BIE, GVI/PRMA argue cogently that analogous case law holds that this Commission should consider factors other than cost of service, such as the impact on the economy, and should strive to fix the lowest reasonable rate of return. Again, most of the cases cited are utility cases but there are some I.C.C. cases and GVI/PRMA also cites another F.M.C. decision in which this Commission recognized that it would permit higher rates on certain items in a tariff to support lower rates on subsistence items. See *Reduced Rates on Machinery From U.S. to Puerto Rico*, 10 F.M.C. 248, 250-251 (1967). I think it is interesting, however, that after discussing all of this precedent and contending that the record shows specific economic hardship on individual shippers as well as general adverse effects on the economies of Puerto Rico and the Virgin Islands, in the final analysis, GVI/PRMA's case rests upon its evidence, discussed earlier, that PRMSA should be limited to no more than a 15 percent rate of return, that its cargo volume and revenue projections are too pessimistic, and that its forecasted expenses, especially for fuel, are overstated. If all that is so, what does one do with the evidence of economic hardship, assuming it is probative? Is one supposed to find that all GVI/PRMA's rate of return and related technical evidence passes over the line between non-persuasive and persuasive not on its own merits but because of the additional consideration of economic hardship? I do not mean to downplay GVI/PRMA's concerns over increased costs in ocean transportation. No one welcomes cost increases and the continual inflationary spiral under which

our economy has been groaning for so long. However, GVI/PRMA, besides arguing that the Commission should set the lowest fair rate of return within a zone of reasonableness,³² presumably 15 percent put forth by their witness Brennan, do not specify why Mr. Brennan's study nor Dr. Andic's alternative forecasting methodologies should be considered to be more reliable than any of the carriers' or BIE's corresponding technical evidence merely because of evidence of adverse economic impact, again assuming that such evidence is persuasive. (I note that the other active protestant in this case, DTPTC, did not bother to argue the issue of economic impact but confined itself to the technical rate of return and projection issues.)

I think that what I have just said corroborates my earlier observation that evidence of specific economic harm is far more relevant to an individual commodity rate case or perhaps to a case involving an investigation of a carrier's tariff structure, i.e., relationship among different rates in the tariff, to determine if there is some way in which value-of-service factors would warrant individual rate adjustments. However, this is not that type of case nor, for that matter, was this case docketed to determine whether there was any way in which carriers could increase their productivity, i.e., improve their efficiencies, so as to absorb some of the increases in costs which they are experiencing owing to the inexorable march of inflation.³³ Even GVI/PRMA do not deny that PRMSA and the other carriers need some rate increase (although on brief GVI/PRMA now argue that TMT's and perhaps even GCML's increases should be disapproved for failing to sustain their burden of proof (GVI/PRMA reply brief, p. 106; opening brief, p. 128).) Their position is that the rate increases should be reduced to

³² This principle, namely, selecting the lowest possible rate of return in a zone of reasonableness, while sounding appealing, appears, however, to conflict with another idea that various authors espouse, namely, the desirability of adjusting allowable rates of return to motivate carriers or utilities to improve their efficiencies. In other words, if a carrier is being operated inefficiently, a regulatory agency may hold its allowable return to a lower point whereas an efficiently-run carrier may be permitted a higher return within the zone of reasonableness. This proceeding is not designed to question the carriers' efficiencies but, considering the extreme age of the carriers' combined fleet in the Puerto Rican trade, a holddown to the lowest possible rate of return might not take into account the carriers' inability to offset inflation with increased productivity, not to mention the carriers' ability to replace their aging ships. For a brief discussion of the idea of adjusting allowable rates of return to motivate improvements in efficiencies, see Bonbright, *Principles of Public Rates*, pp. 262-265.

³³ Before everyone jumps all over this decision in exceptions, calling this observation "dicta," I will note that there is no evidence or suggestion that any carrier is inefficiently run. Indeed, it would be astonishing if PRMSA, owned by the Government of Puerto Rico, had a policy of oppressing the welfare of its own citizens. There is no suggestion of any such idea by anyone. What seems to be more likely is the probable fact that PRMSA, like the other carriers, is employing ancient ships, and is experiencing the impact of inflation which it cannot absorb without further endangering its ability to remain financially viable and that PRMSA believes that unless it can seek to maintain a certain revenue and income position, the people of the Commonwealth may be faced with the prospect, as BIE observed, of reduced service or decline in quality of service.

something like 11.2 percent so as to give the carriers a rate of return not to exceed the 15 percent which their witness Brennan espoused.

Although my above discussion indicates that there may be little that this particular proceeding can do to relieve the economies of Puerto Rico and the Virgin Islands when the record shows that GVI/PRMA's alternative evidence does not withstand careful analysis and is less persuasive generally than the evidence presented by the carriers (with the possible exception of the TMT problem discussed above), the Commission may, of course, feel otherwise and may wish to do something in this proceeding that would specifically address itself to the people who testified in this case in St. Thomas and in San Juan. Therefore, I commend to the Commission's attention the summary of testimony set forth in the briefs of the parties (GVI/PRMA opening brief, pp. 118-128; BIE opening brief, pp. 83-87; PRMSA opening brief, pp. 143-156).

I cannot, in the brief time allotted to me, describe in much detail the testimony of the witnesses who appeared in St. Thomas and in San Juan. The briefs of all the parties, cited above, give a good overall description, however. Generally the testimony demonstrated a great concern over increases in prices, especially increases in the cost of ocean transportation on which the two islands so vitally depend. The witnesses all appeared to be most sincere in their beliefs and in certain instances the particular rates with which they were concerned (e.g., Ms. Creque's comparison of rates from Japan compared to rates from the U.S.A. mainland on certain types of automobiles) were somewhat amazing. GVI/PRMA, in their brief, summarize all of this economic testimony and argue that it shows persuasively how harmful the increases in ocean freight rates are to the individual businesses and the economy of the islands generally. However, other observers reach different conclusions. BIE, for example, although conceding that the economic testimony indicating that adverse impact is "generally valid," (BIE opening brief, p. 87), believes the testimony to show that ocean-rate increases are not the entire story, by any means, as far as adverse impact is concerned in an inflationary environment. BIE states:

Ocean freight rates, like most other costs, have increased dramatically over the preceding years. Inflation is a fact of life. However, as noted above, the Bureau believes that something more than a suggestion that increased freight rates, like increased costs of all varieties, will contribute to the overall rise in costs and prices is necessary to compel a reduction in what would otherwise be considered a fair rate of return for the respondent carriers. (BIE opening brief, p. 85.)

Although BIE pointed out some technical deficiencies in the general economic impact testimony given by Mr. Castillo, President of PRMA, and by Dr. Francis, a well qualified economist testifying on behalf of GVI, PRMSA points out greater deficiencies in the testimony of these

and other witnesses (PRMSA reply brief, p. 105, with references contained therein). Sea-Land points out similar deficiencies. Generally PRMSA points to evidence showing that many of these businesses are in better financial shape than the carriers (and thus presumably better able to absorb inflationary cost increases than are the carriers). PRMSA describes in detail how the Virgin Islands suffer from a variety of economic problems of which cost of ocean transportation is only one (e.g., failure to diversify, heavy reliance on the tourist industry, failure to generate backhaul cargo). PRMSA argues that these deficiencies in the Virgin Islands' economies have led to the demise of carriers serving the Virgin Islands. (I note that the Virgin Islands can be served by foreign carriers, as an exception to the cabotage laws, yet this fact does not seem to ameliorate their problems.) PRMSA also cites evidence it introduced showing negligible increases on certain food items attributable to ocean freight rate increases, problems in the distribution system in the Virgin Islands, and evidence showing that the economy is too complex and is affected by too many factors to single out ocean rates as a cause of economic hardship. (PRMSA's opening brief, pp. 150-151.) PRMSA shows another side to the oral testimony given in St. Thomas and in San Juan. (PRMSA's opening brief, pp. 151-156.) First, PRMSA argues that only one witness in St. Thomas (Ms. Creque) brought relevant documents with her to the hearing, documents which had been requested through counsel for GVI/PRMA, earlier.³⁴ But aside from that omission, PRMSA shows that the testimony also indicates that the various businesses represented by the witnesses were doing better financially than any of the carriers whose rates are under investigation. Even as to Ms. Creque, who runs an automobile dealership in the Virgin Islands (and, incidentally, I found Ms. Creque to be an exceedingly impressive witness), the problems from which she suffers cannot be reduced simply to increases in ocean freight rates (e.g., heavy local taxes, GM's increases in prices, high financing rates). Other witnesses were shown to suffer from a variety of problems, again not related to ocean freight rates.

³⁴ Both PRMSA and Sea-Land ask me to apply sanctions against some of these witnesses because of their failure to bring relevant documents to the hearing so as to permit thorough cross-examination. I specifically advised the parties that I would consider sanctions upon request, to ensure that the witnesses would be prepared to answer questions. The sanctions now requested, namely, specific adverse findings and preclusionary rules, seem excessive and unnecessary. I note the great pressures under which all parties operated and have little desire to punish the well-intentioned residents of the Virgin Islands when it is not clear that they were at fault. I do note their failure as well as the effective cross-examination which was conducted notwithstanding the lack of documents but I cannot see how such sanctions are really necessary in view of the effectiveness of the examination. The failure to bring the documents or otherwise be prepared does, however, leave me with the impression that the documents would confirm the carriers' contentions, after consideration of evidence which PRMSA and Sea-Land did elicit during cross-examination.

None of the above discussion is intended to show lack of concern for these witnesses. I believe, however, that it confirms what I have said above, i.e., that even if high ocean freight rates were the main problem affecting them (and this was by no means clearly shown), their testimony would be much more relevant in an individual-commodity rate investigation, not a general-revenue case. No matter how impressed I was by Ms. Creque, for example, I do not see how I can convert GVI/PRMA's rate-of-return and cargo volume and cost projections, which have so many inherent defects described above, into reliable studies merely because Ms. Creque or Mr. Jacobson, another exceedingly impressive witness who manufactures garments in Puerto Rico, would welcome rate reductions. Moreover, especially in the case of Mr. Jacobson, an important manufacturer, I do not see why PRMSA cannot negotiate with him to assist him competitively rather than face him as an opposing witness in a general-revenue case. It was obvious at the hearing in San Juan that PRMSA, a government-owned carrier, treats citizens of Puerto Rico (who are also American citizens) with great respect and deference. It would make no sense for PRMSA to price one of its best customers out of the market.

I must conclude my limited discussion with an expression of sympathy for residents of the Virgin Islands and Puerto Rico who, like all of us, are suffering from the aggressive inroads of inflation but who have a greater dependence on ocean transportation. However, I cannot see how this proceeding is the appropriate vehicle to afford them relief and must conclude with the observation that I have made before, namely, that individual shippers generally should devote their efforts to relief in other than general-revenue cases, as a myriad of Commission general-revenue cases in the past have repeatedly shown. I hope, as with all Americans, that our country can defeat inflation, which is their real problem as it is with the carriers, and that in the meantime consideration can be given to an appropriate type of proceeding or negotiation for them. Perhaps the best way to emphasize my point regarding the difference between a general-revenue and single commodity rate case is to refer to the lengthy quotation from the Supreme Court's decision in *Aberdeen & Rockfish R. Co. v. SCRAP*, 422 U.S. 289, 311-314 (1975), contained in TMT/GCML's opening brief, pp. 27-28. After drawing the distinction between the two types of cases, the Court approved an I.C.C. order which invited parties complaining about individual rates or groups of rates to utilize different administrative remedies than general-revenue investigations. The Court then stated:

[U]nder the Louisiana case, the general rule has been that the ICC may confine its attention in general revenue proceedings almost entirely to the need for revenue and to any other factors that relate to the legality of the general increase as a

whole; and it follows a fortiori that if attention is given to other issues, that attention may be of a limited nature.

THE MATTER OF USE OF CURRENT OR REVISED DATA IN LIEU OF CARRIERS' PRE-DOCKETED DATA

I have alluded to a problem which has occurred in previous rate cases both under P.L. 95-475 and before, which problem has proven to be troublesome and for which a definitive answer seems elusive. This concerns BIE's contention that it is essential in rate cases, which must be expedited under P.L. 95-475 time schedules, that carriers and all parties confine themselves to the carriers' pre-docketed cases submitted to the Commission and that other parties essentially do likewise. In other words, BIE objects to the admission of any evidence such as current data which is dated after the original submissions except perhaps for corrections of obvious arithmetic errors. BIE believes that this problem is so critical for all Commission rate cases that "it is essential that a definitive statement resolving this question be issued in this proceeding." BIE reply brief, p. 56.

I do not doubt that this problem has been a recurrent thorn in the sides of litigants in Commission rate cases and that a "definitive" statement would be very helpful. However, I am not sure that a statement engraved in cement can be fashioned in this case or in any case. Unfortunately, time and other reasons do not permit me to give the matter the attention it deserves but, as I have said, the Commission, which enjoys a 43-day period (from August 14 to September 26, 1981) between the last pleading and final decision may be able to improve upon my suggestions.

All active parties have commented on BIE's suggestion but there is no unanimity of opinion. Even protestants do not agree with themselves. Respondents TMT/GCML support the idea of restricting the case to consideration of facts presented by carriers and to resist the temptation of looking at later events to use hindsight as a means to criticize or overturn carriers' cases. (TMT/GCML reply brief, p. 7.) Protestant DTPTC supports the idea of holding carriers to the submissions they made with their general rate increases. (DTPTC reply brief, p. 6.) But respondents PRMSA and Sea-Land, for once joined by protestants GVI/PRMA, reject such a rigid position. (PRMSA's reply brief, pp. 44-53; Sea-Land's reply brief, pp. 19-20; GVI/PRMA's reply brief, pp. 91-94.) These parties, in varying degrees, argue in favor of some degree of flexibility instead of what has been called the BIE's "freeze" or "frozen case" theory.

BIE mounts a very well crafted and sincerely argued appeal that for the sake of making P.L. 95-475 work the way it was supposedly intended, the Commission definitively establish that all cases will be, in effect, frozen to the pre-docketed submissions and that later current

data not be allowed to enter the record. Its arguments are set forth in detail in its opening brief, pp. 38-48. It relies upon statements made by Commissioners to the congressional committee before enactment of P.L. 95-475 as well as Commission precedent and practical considerations.

All parties, even those opposing BIE's "freeze" theory, seem to agree that the basic principle of Commission rate cases is to hold the carrier to its original submissions on the apparent theory that the Commission is testing the reasonableness of the carrier's decision to file a general rate increase and should not allow the carrier to engage in *post hoc* rationalizations by introducing later operational data. However, an with any extreme position, adherence to it could lead to absurd results which PRMSA and GVI/PRMA show. For example, unless some allowance is made for major factual changes, for example, a lost ship or a discontinuance of an entire area of service, or a cancellation of a rate increase, all parties would be required to continue to litigate phantom issues. In other words, parties would continue to pretend that carriers should or should not be allowed a return on a sunken ship or compensation for expenses relating thereto or whether a general rate increase should continue to be litigated even when it has been canceled (as for example, Sea-Land's cancellation of the rate increases in its Canadian tariff under investigation). It is hard to believe that even BIE would argue that the Commission could not consider such major events but would prefer to waste its time determining whether rate payers should pay phantom increases or phantom expenses.

The problem is not with such obvious examples of major catastrophes or cancellation of tariff increases (although BIE still seems to refuse to consider the fact that Sea-Land did cancel its Canadian tariff increases which had been under investigation).⁹⁵ The problem, as usual, is with the gray areas. In this case, for example, PRMSA wants the Commission to consider events which occurred after it had filed its pre-docketed case, such as the delay in redelivery of the *PONCE* and the effect of Reagan budget cuts. (I have already decided earlier that I would consider the effects of the late delivery of the *PONCE* but that the evidence of the effects of the Reagan budget cuts was too speculative. Therefore, I cannot find that my comments in this troublesome matter should be considered as pure dicta.)

If BIE's rigid position were to be adopted, then I would have rejected considerable evidence as a matter of law because it was based

⁹⁵ But even BIE does not wish to litigate issues concerning PRMSA's projections under its *ATLANTIC BEAR* case since the *BEAR* apparently will not be acquired by PRMSA, as I have noted earlier. But this fact was not known until after PRMSA made its original filing on December 5, 1980. Even BIE does not expect everyone to litigate complicated issues about the poor *BEAR* while she was still in her cave and would probably never come out.

upon current data or data which developed after the case was docketed. For example, I would have had to reject Dr. Andic's alternative cargo volume and revenue projections as a matter of law because they were ultimately based upon a more recent actual year ending in March 1981 and the same holds true for her fuel cost projections which utilized March 1981 fuel prices as a base. I would even have to reject some of BIE's own witnesses' evidence, for example, perhaps even BIE witness's Fratter's recalculation of Sea-Land's cost inflation factor because she utilized data running through December 1980 or later, after Sea-Land had submitted its case. Indeed so extreme is BIE's position (or perhaps so principled is BIE) that it urges me not to consider evidence given by its own witnesses! (See BIE reply brief, pp. 55 n. 29, asking me not to consider testimony of three of the Bureau's witnesses, Straube, New, and Coleman relating to updated fuel prices.)

I find that BIE's position, no matter how tempting and easy, is simply too extreme. At the least, as has happened in previous rate cases (see, e.g., Docket No. 79-55, *Matson Navigation Co. - Bunker Surcharge*, 22 F.M.C. 276) allowance should be made for obvious mathematical or methodological errors (which BIE concedes) and for obviously better evidence which is not reasonably subject to dispute, as both the case cited shows and Sea-Land argues. I agree, as I believe do all parties, that it is essential to hold carriers to the fullest extent possible to their original cases submitted in justification of their rate increases. Otherwise we are not testing the reasonableness of the carrier's decision to file rate increases but rather are applying retroactive, *ex post facto* type decisionmaking. If we do that, why not simply wait until the end of the actual year and require an accounting based upon actual results? But this is not the basic theory of Commission rate cases and when such an idea has been applied, it was done only in connection with bunker surcharges under the Commission's discontinued program (but even then not fully abandoning the prospective nature of the case). In the legislative history portions to P.L. 95-475 and case law cited by BIE, no one said that there can never be any change to the carriers' original submission. For example, the House Report (cited in BIE opening brief, p. 40) stated that the carrier's financial data must "essentially be the data relied on by the carrier throughout the expedited hearing." Commissioner Morse told the congressional committee considering what became P.L. 95-475 that the carrier's financial data would have to be "essentially the date (sic) relied upon by the carrier throughout the expedited hearing." (BIE opening brief, p. 40.) Commissioner Moakley did state that "we limit the carrier to the financial information that he started with and he has to stay with it." (*Id.*, p. 41.) But then Chairman Daschbach stated that the carrier "cannot make major changes or additions to that evidence which would require further analyses, cross-examination and possibly, rebuttal." (*Id.*) Even before enactment of

P.L. 95-475, the Commission attempted to put restrictions on carriers' changing their original cases but still allowed some flexibility. In Docket No. 75-57, *Matson Navigation Co. - Proposed Rate Increases, etc.*, 21 F.M.C. 538 at 540, cited by BIE (BIE opening brief, pp. 44-45), the Commission stated that the test year projections submitted by the carrier with its initial tariff filing must be the "starting point" and "should be amended only in unusual circumstances." The Commission went on to say that the original figures "were the basis for the carrier's decision to increase its rates" and allowance of revisions "contravenes the Commission's policy of expediting general revenue inquiries and hinders effective participation by persons opposed to rate increases." (*Id.*) I conclude that although the legislative history emphasizes the need to hold carriers to their original cases to the fullest extent, it does not mandate an unbending rule of extremism in this regard and does not require the Commission to bury its head in the sand when major events occur later which are not reasonably subject to dispute and which make a carrier's original projections impossible of being a reasonable approximation of the future. Both GVI/PRMA and PRMSA, in near agreement for once, formulate a rule of reason. GVI/PRMA would allow carriers to revise their original justifications to the extent of offering probative, relevant evidence which could not previously have been proffered, of new facts that materially "impact upon" the issues under investigation, subject to the rights of opposing parties to test the new evidence in whatever manner would be appropriate. (GVI/PRMA reply brief, pp. 93-94.) PRMSA, elaborating upon the test which the Commission adopted in Docket No. 79-55 (from my Initial Decision in that case), would establish a "flexible rule of reason" by which the presiding judge could "balance the equities and decide the admissibility of the proffered data." (PRMA reply brief, p. 49.) Essentially PRMSA's rule would permit admission of largely uncontested data which was not subject to constant change if it were introduced early enough in the proceeding to allow all parties to test its reliability.

I do not know if it is possible to create a fixed rule in this case which will not have to undergo revision in some future case. Furthermore, such a rule change might better be promulgated in a rulemaking proceeding which would revise Rule 67 so that the entire public can offer its comments, not merely the parties to this proceeding. In this case, however, at the least I would admit and have admitted evidence if it makes obvious corrections to earlier errors and if the new facts are so major and not subject to reasonable dispute that they will make the carriers' projections no longer capable of being a reasonable approximation of the future and if, furthermore, other parties have had opportunity to offer their rebuttal evidence or arguments. Such was the case with the delayed return of the *PONCE*, a fact which is not subject to dispute and to the recalculations which PRMSA offered in time for them to be

challenged. I also have considered the fact that Sea-Land has canceled its rate increases in its Canadian tariff, a fact beyond dispute, and has offered recalculations early enough before my decision for other parties to challenge. I have not, however, considered proffered evidence concerning Reagan budget cuts or pending court cases because they are too speculative, i.e., they are not sufficiently reliable and probative and do not permit me to make anything other than general, conjectural findings.

I agree that it would be extremely helpful and would relieve future litigants of much uncertainty, burden and expense if the Commission would announce a "definitive" cutoff rule for new evidence. Since, however, this particular matter has not been set down for determination in the Commission's Order and since the Commission has, in past cases, instructed me that my additional comments which were made in the spirit of helpfulness have been "dicta" and were not necessary to my decision (See Docket No. 77-19, *Consolidated Forwarders Intermodal Corporation*, 23 F.M.C. 905 (1981), I will confine myself to the rulings which I have made which I believe were necessary. As for a rule for the future, I commend to the Commission the formulations of GVI/PRMA, PRMSA, and Sea-Land, if the Commission chooses to adopt any of them or to institute a rulemaking proceeding to revise Rule 67.

ULTIMATE CONCLUSIONS AND CRITICAL RECOMMENDATIONS

Because of the enormous pressures imposed by the time restrictions described above, the massive size and scope of this case, and the mammoth briefs. I have been compelled to limit my discussion of the issues and to refer frequently to the briefs of the parties and to the portions of the parties' briefs with which I have agreed.³⁶ Since there are many hundreds of pages of briefs (GVI/PRMA's briefs alone totaling over 380 pages), it is impossible to discuss or even mention every matter raised by every party. Under different circumstances, I would have addressed many of the minor contentions in order to assist the Commission in resolving the issues that they raised if they reappear on exceptions. However, I have had to make a decision as to priorities in order to meet the tight time schedule and have therefore omitted discussion of contentions that I have found not to be material, i.e., whose resolution would not have affected my ultimate decision, no matter how interesting the particular contentions may have appeared to be in the briefs. In many other instances, furthermore, I have not found

³⁶ Moreover, because of the unprecedented time pressures in such a massive case, minor errors and inconsistencies might appear in this decision from time to time which I have not had full opportunity to screen out. The relevant portions of the briefs cited, however, should provide a ready resolution of any resulting confusion.

the proponents of these many minor arguments to have been persuasive after considering the particular rebuttals. Having travelled so far through such an enormous record in so short a time, however. I believe it is imperative that I summarize my ultimate conclusions and call the Commission's attention to matters which are critical to future rate cases conducted under the requirements of P.L. 95-475.

There are five critical matters that I must emphasize. The first refers to my basic evaluation of protestants' cases presented in this proceeding. The remaining four relate essentially to the great need for future reform if the Commission is to conduct rate regulation efficiently so that minimal cost will be imposed on all litigating parties. In short, these ultimate conclusions and critical recommendations are as follows:

- (1) Protestants' cases have been tested and found wanting in most respects as compared to the more persuasive cases and rebuttal arguments and evidence presented by respondent carriers and by BIE.
- (2) The Commission must amend and clarify General Order 11 in numerous critical respects in order to eliminate repetitive and unnecessarily expensive rate proceedings.
- (3) The Commission should, in its Orders of Investigation, strive to specify issues and advise parties carefully as to the specific reasons why the Commission believes that a formal proceeding is necessary to explore any particular matter.
- (4) The Commission should formulate an evidentiary rule as to if and when later evidence, current data, and the like can be entered into the record and considered after the case is docketed.
- (5) The Commission should encourage shippers and carriers to negotiate individual rate problems on humanitarian or value-of-service principles under the *Baltimore & Ohio* and *Reduction in Freight Rates on Automobiles* doctrines to the extent they can be applied. In this way the Commission can call a halt to the unfortunate practice of encouraging individual shippers to spend their time needlessly in general-revenue proceedings where their evidence is almost invariably unrelated to the broad financial issues which are characteristic of those proceedings. I now briefly explain.

(A) Protestants (mainly GVI/PRMA) have been given a fair opportunity to present a reliable, effective case. However, in almost every major respect their evidence and arguments were shown to be significantly defective and ultimately incapable of offsetting the persuasiveness of respondent carriers' and BIE's cases.⁹⁷ In many instances

⁹⁷ This statement holds true for the major portions of GVI/PRMA's case as I have mentioned. However, despite the fundamental fact that they simply have not presented reliable and probative evi-

Continued

protestants GVI/PRMA utilize inherently deficient, *ad hoc* methodologies or attempt to rehabilitate their questionable evidence by employing innumerable ingenious arguments in huge post-hearing briefs, sometimes even abandoning or ignoring the rationale underlying the evidence itself in such efforts. This massive effort in their briefs, however, simply cannot elevate their evidence above its level of non-persuasiveness nor eliminate its many inherent deficiencies and its aura of *ad hoc* expediency. The major examples which illustrate the above statements are GVI/PRMA's evidence on the issues concerning PRMSA's cargo volume projections, fuel cost projections, the non-fuel, non-labor inflation factor, and GVI/PRMA's alternate calculation of an allowable rate of return. The first three areas were covered by GVI/PRMA's witness, Dr. Andic, a qualified economist whose productivity and resourcefulness are remarkable. However, Dr. Andic's alternative projection for PRMSA's cargo volume substitutes her *ad hoc* methodology, namely, use of a later period of time adjusted by questionable elevations, in place of PRMSA's market-survey methodology which has been shown in the past to be very reliable and which has been found to be sound by the Commission's staff. Moreover, she makes upward adjustments to her selected base period of time which are contrary to certain calculations made in her earlier testimony which was based upon a different methodology. Indeed, her second methodology, which appears to represent a second attempt to fashion an acceptable alternative projection to PRMSA's cargo volume forecast, incredibly arrives at exactly the same number of trailerloads (174,101) that her different methodology had produced in her earlier testimony, now apparently abandoned (but adopted by protestant DTPTC before its abandonment by Dr. Andic).³⁸ Dr. Andic's fuel-cost projections are inherently less sound than PRMSA's, bring based upon a limited time period in March 1981 as a base and an adjustment by trend-line analysis that has been persuasively shown by BIE's staff expert witnesses and by others to be naive and simplistic, and there is other evidence showing that PRMSA's reliance on an independent forecasting service was reasonable. (For a good summary, see PRMSA's reply brief, pp. 80-88.) In this area of fuel price forecasting, furthermore, I find the most typical of GVI/PRMA's approaches, namely, to seize upon current events and create an *ad hoc*

dence sufficient to offset the justifications of the carriers and the persuasiveness of BIE's evidence, as my decision has shown, I believe that GVI/PRMA have made telling points in connection with such things as Sea-Land's gloomy cargo volume forecast in the North Atlantic, TMT's failure to explain the decline from 100,000 to 80,000 tons in its projection, PRMSA's attempt to quantify the effects of the Reagan budget cuts, Sea-land's Dr. Nadel's award of unprecedented premiums totalling 5 percent to reach a rate of return of 23.5 percent, and BIE's rigid, impractical position on freezing all evidence to time periods before the rate increases were filed.

³⁸ The serious flaws in Dr. Andic's revised forecast are cogently exposed in PRMSA's reply brief, pp. 68-70; 73-75.

methodology during the heat of litigation and try to persuade that such method is superior through lengthy but well crafted arguments on brief which ring with indignation and outrage. However, after the rebuttal arguments and evidence are thoroughly considered, it appears that GVI/PRMA's case is reduced to relying upon current uncertainty and methodologically unsound statistical adjustments in place of a far more thorough independent forecasting service. It comes down to the questions whether Dr. Andic should be relied upon more than DRI, Inc., are current data always a better base for forecasting than earlier data in such a complicated area, and can the superficially appealing arguments that PRMSA's actual oil prices have declined as of March 1981 because of a current oil glut be allowed to cloud sound and dispassionate forecasting. GVI/PRMA's invigorating emotional arguments in their reply brief (pp. 67-72) are emotionally stimulating but ultimately do not persuade me that PRMSA was wrong in relying upon DRI, Inc. Nor do they persuade me that the oil glut will continue forever or that PRMSA's forecasts cannot possibly be attained even as an approximation. Even as I write this, conflicting reports continue to come in. For example, the Washington Post of July 12, 1981, carried a front-page story which acknowledges that the Saudis are still trying to bring down OPEC prices (to their \$32 per barrel as opposed to OPEC prices of \$36 to \$41 per barrel) but also states that production has declined this year, that spot prices "have recently been rising slightly, a sign the glut may be finally starting to dry up." This article, of course, is not evidence, but neither are the many emotional contentions made by GVI/PRMA that urge me to find that PRMSA's original forecast has become totally overtaken by events. As I said earlier, the oil situation is simply too volatile and erratic for anyone to seize upon any particular day or month for projection purposes (a situation possibly justifying restoration of something like the Commission's bunker surcharge approach for the future). GVI/PRMA, however, argue vigorously and forcefully to the contrary.

Finally, Dr. Andic's cost-inflation factor for PRMSA's non-fuel, non-labor expenses was shown to be amazingly low (7.2 or 6 percent annualized), far below any other indicator, and to be based upon an index which is heavily weighed by food or fuels, giving unsound and distorted results, again after Dr. Andic had made her own adjustments.³⁹ GVI/PRMA's witness on rate of return, Mr. Brennan, while well qualified like all the expert witnesses more or less, is heavily influenced by ideas associated with the cost-of-capital rather than the comparable-earnings test, which latter test the Commission has adopted in General Order 11 and seems to have given testimony in another rate

³⁹ PRMSA reply brief, pp. 76-80, and its references, provides another good summary of the shortcomings affecting Dr. Andic's analysis.

case involving a utility which is inconsistent with portions of his present testimony. More importantly, perhaps, based on his testimony, GVI/PRMA struggle unsuccessfully to persuade that the four water carriers are less risky than utilities (such as even AT&T) and that, accordingly, no factors for risk should be allowed for such carriers above his reference group of comparable industrial companies. On brief, GVI/PRMA strive to save this shaky evidence with a new rationale based on the idea of preservation of the integrity of assets which their witness himself did not even articulate. Moreover, to support their arguments against allowing any adjustments to PRMSA's rate of return on account of risk, GVI/PRMA consumed time not in attempting to make their own measurements of risk by recognized objective techniques, three of which were employed by PRMSA's witness, Dr. Silberman, to show high business risk for PRMSA, but instead in continually quibbling about the measuring techniques. Furthermore, even though PRMSA's witness and PRMSA, as well as BIE's witness Copan and Sea-Land's expert witness Nadel, all seek no allowance for PRMSA on account of financial risk caused by PRMSA's total debt capitalization, GVI/PRMA make arguments about supposed harm to the public from this type of capitalization which are not only irrelevant under the circumstances but are based upon a misapplication of the so-called "prudent investment standard." Finally, even when GVI/PRMA have made telling points with which I have agreed to one extent or another, the necessary changes to the carriers' cases do not affect the outcome of the case. For example, Sea-Land has adjusted for its unduly gloomy decline in volume in the North Atlantic and still shows its increases to be reasonable, PRMSA's speculations as to the Reagan budget cuts has been rejected but PRMSA still shows the justification for its rate increases, I have rejected BIE's "frozen case" theory to allow consideration of Dr. Andic's use of current data but she fails to persuade, I have rejected consideration of Sea-Land's Dr. Nadel's total of five percent premiums added onto his 18.5 percent recommended rate of return, yet other evidence supports Sea-Land's contention that its increases are within a zone of reasonableness, I have rejected Dr. Silberman's "surrogate" G.O. 11 formula, as GVI/PRMA urge, and have found little support for his method of elevating benchmark rate of return to compensate for PRMSA's tax-exempt status, yet other evidence supports a rate of return for PRMSA of 17 to 18 percent or so. However, as to the remainder of their case concerning their alternative calculations for rate of return, cargo volume and revenue projections, fuel cost projections, and general inflationary factors, as I have indicated, the overall conclusion to which I am inescapably drawn is that GVI/PRMA are struggling to eradicate the effects of a well-prepared and well-presented case by PRMSA by improvising new methodologies and arguments as the proceeding goes on, hoping to find one methodol-

ogy or argument that will ultimately appear to be persuasive. I find their efforts to have been diligent, massive, and resourceful but increasingly expedient in appearance and ultimately unsuccessful. In short, GVI/PRMA were unable to show that PRMSA had utilized defective methodology and had prepared a defective, irresponsible case when it decided to file its general rate increases. I think that GVI/PRMA and DTPTC have had a fair opportunity to demonstrate the superiority of their cases or at least the failure of PRMSA and the other respondents to mount a persuasive case but they have not succeeded notwithstanding the amazing zeal and ingenuity poured into 380 pages of post-hearing briefs by GVI/PRMA's counsel nor even the fact that GVI/PRMA have had the benefit of several months of actual data and hindsight (the use of which, however, is subject to serious attack, especially by BIE, as a matter of law).⁴⁰

(B) It is imperative that the Commission, once and for all, clarify and revise General Order 11 in certain critical areas. Otherwise there will be no end to the continual, repetitive litigation of rate-of-return issues which unfairly burdens the Commission's staff, carriers, protestants, and ultimately the public. There simply is no reason why there should have been six different calculations of an allowable rate of return after so many years of Commission rate regulation and especially after the enactment of P.L. 95-475, which specifically instructed the Commission to end such wasteful litigation by issuing and revising appropriate regulations. However, despite the new law and despite the issuance of a revised General Order 11, litigating parties are still arguing about such basic things as which group of companies should be used for comparison, what time periods should be studied, what adjustments should be made for risk, etc. The Commission could perform a great service and confer tremendous savings in litigation costs if it could revise and clarify General Order 11 to select one standard group of comparable industries or companies, one standard recognized source (such as FTC-QFR, Value Line, Standard and Poor's, etc.) and a standard time period for comparison (e.g., last 5 years, 4 years, 3 years). Also, the Commission should clarify how its rate-of-return formula derived from

⁴⁰ In all fairness, I should mention that PRMSA has itself sometimes struggled to elevate shaky evidence from the speculative to the probative. This occurred when PRMSA's witness, Mr. Lopez-Mangual, tried strenuously to quantify the effects of the Reagan budget cuts on PRMSA's cargo volume forecasts. Among other things, Mr. Lopez-Mangual tried to use Census data which he apparently did not realize contained inexplicable inaccuracies and then also attempted to employ another study which varied from his own. Other serious errors affected his efforts as both BIE and GVI/PRMA have cogently shown. (See BIE's opening brief, pp. 48-54; GVI/PRMA's reply brief, pp. 58-64.) This shows that if anyone struggles to find specific evidence which simply is not there, one resorts to questionable methodologies and fails to persuade whether one testifies for PRMSA or for GVI/PRMA. I have accordingly found that I cannot rely on PRMSA's speculative evidence concerning the Reagan budget cuts no matter how gloomy the people of Puerto Rico find them to be any more than I can rely upon GVI/PRMA's speculations about what will be the price of oil as of February 28, 1982, the end of PRMSA's forecast year, or the average price of oil during PRMSA's total forecast year.

General Order 11 is to be applied to data published by independent reporting services which do not follow General Order 11 accounting methods or terminology. Much needless argument has ensued between BIE and PRMSA, both of whom presented impressive evidence, over this point and both of whom believed they were following the present General Order 11. Attention needs to be given, furthermore, to the special status of a tax-exempt carrier like PRMSA when applying the formula and to the problem of distortions in a comparable-earnings study caused by artificial elevation or reduction of a rate of return because of the failure to separate nonoperating income and assets from operating income and assets when using independent reporting services. The Commission should decide whether the distortions introduced as a result of comparing only total invested capital and income without separating nonoperating assets and incomes is a permissible degree of imprecision on the theory espoused by BIE that companies compete in the marketplace on a total-capital basis. This record shows that distortions will most likely be present in a comparable-earnings study performed without such a separation but does not show the degree of the distortion as far as I can tell.

(C) It is imperative to follow the requirements of P.L. 95-475 when the Commission frames its Orders of Investigation, not only by specifying particular issues but by explaining why the Commission needs more evidence on these particular issues and, as seen in this case, why a particular rate case must be the vehicle, rather than general rulemaking, to obtain such evidence and resolve such issues if the problems relate more generally to defects in Commission regulations like General Order 11. Otherwise, by merely identifying issues and reciting general allegations made by protestants in their protests, as was done in the present Orders, the Commission is not really narrowing the issues but is rather perpetuating the old practice of inviting litigants to make all manner of argument and develop all types of evidence under broad rubrics such as the issue as to "what is an appropriate rate of return" or whether cargo volume revenue and cargo volume projections are "sufficiently accurate." In this proceeding, because no one could be sure what was troubling the Commission after its staff had analyzed the carriers' cases for 60 days or more and had studied the protests, the parties covered themselves with innumerable lines of evidence and arguments. All this was undoubtedly very expensive as well as exhausting in view of the very tight 60-day hearing schedule. But this type of litigation, which had plagued previous Commission rate cases, was supposed to have ended with the enactment of P.L. 95-475. Clearly it has not ended. It is, moreover, particularly important to determine whether an adversary-type, *ad hoc* proceeding like the present massive investigation is a better procedure to resolve complicated General Order 11 or Rule 67 issues rather than a general rulemaking proceeding or a proceeding not con-

ducted under the strict time restrictions imposed by P.L. 95-475. By choosing the P.L. 95-475 approach to resolve complicated industry-wide issues, the Commission is forcing itself and the litigating parties to fashion solutions to complex accounting and methodological problems which affect all rate cases in a frenzied pressure cooker rather than in a more carefully planned rulemaking or other type of proceeding where the parties and the Commission would have time to breathe.

(D) It is imperative that the Commission formulate a rule concerning the admissibility of evidence or data that post-dates the carrier's pre-docketed evidentiary submissions. In other words, can a party utilize current data or post-docketed evidence and, if so, under what circumstances. BIE argues that it is critical for parties to obtain a "definitive" rule of procedure from the Commission. In this proceeding, BIE apparently chose to disregard all data or evidence relating to time periods occurring after the carrier's original pre-docketed evidentiary submissions even to the extent of disregarding the indisputable fact that respondent Sea-Land has permanently cancelled one of the rate increases set down for investigation, namely that in Sea-Land's Canadian tariff, and even to the extent of urging me to disregard certain testimony given by BIE's own staff witnesses. However, other parties, notably PRMSA, GVI/PRMA, and Sea-Land, utilized later evidence. I employed a rule of reason to allow corrections of obvious errors or consideration of major factual changes which were not reasonably subject to dispute, would make carriers' projections not reasonably attainable even as approximations, and which could be challenged before the record closed. Whatever the rule, however, the Commission cannot let its proceedings be tied up with needless, time-consuming arguments over such evidence and cannot allow one party to proceed under one set of rules such as those BIE advocates and actually employed⁴¹ while others proceed under another set. This problem continues to appear in successive rate cases under P.L. 95-475. If rate cases are to proceed efficiently under the new law, the Commission must provide guidance so as to prevent recurrence of the present situation in which, among other problems, BIE felt that the statute did not require it or its staff witnesses to consider later evidence. Since I have no law clerk or staff personnel assigned to assist me, this means that I have been deprived of the benefit of the staff's evaluation of such things as

⁴¹ As I have mentioned earlier, however, even BIE did not follow its own strict position completely. Thus, BIE urged me to consider PRMSA's case on the basis of its *Trans-class* vessel projections rather than those made under the *ATLANTIC BEAR* situation although PRMSA apparently did not know that the *BEAR* would never become available until some time after it had submitted its original evidentiary case. I do not see how the fact that the *BEAR* became unavailable is any different from the fact that Sea-Land cancelled the rate increases in its Canadian tariff or that the *PONCE* was delayed in redelivery to PRMSA except that the effects of the latter two factual changes had to be evaluated at a later time in the proceeding.

the effects of Sea-Land's cancellation of the rate increases in its Canadian tariff or the delayed redelivery of PRMSA's vessel, the *PONCE*, and moreover, so might be the Commission, since both the Commission and its administrative Law judges are on the decisionmaking side of the Administrative Procedure Act. If the Commission agrees with BIE's position that no evidence should be considered if it covers time periods occurring after the carriers' original evidentiary submissions 60 days or more before the rate changes or before the docketing of the proceeding, then staff evaluation of such evidence was unnecessary. However, if the Commission does not agree with BIE, then the staff in future cases will be obliged to reckon with later factual changes and give testimony where appropriate.

(E) It is imperative that the Commission, once and for all, save individual shippers with particular problems about individual rates from wasting their time and money in the wrong type of case where they beat their heads against a wall of general-revenue issues with tools which are designed to bring specific commodity rate relief. For over 20 years now I have seen individual shippers march into purely general-revenue cases and leave empty handed and the practice goes on, although the Commission tried to advise them in the past that general-revenue cases were ill suited to alleviate their particular individualized problems. It is once again frustrating and deeply disturbing to hear individual shippers and consumers, especially the elderly and retired living on fixed incomes, and realize that they are in the wrong type of case. As a service to these citizens who demonstrated sincere concerns, the Commission ought to encourage individual negotiations between shippers and carriers seeking to adjust rate relationships in the tariffs and work with the carriers, if necessary, to see if any individualized relief can be devised under the doctrines enunciated in the *Baltimore & Ohio* and *Reduction in Freight Rates on Automobiles* decisions to the extent those doctrines can be applied. This idea is worth pursuing especially if the Reagan budget cuts will adversely affect the food stamp program and presumably the ability to import food into Puerto Rico, as PRMSA contends. In any event, since the record shows that the respondent carriers (with the possible exception of TMT which has not adequately explained certain areas of its case, as I mentioned above) have shown that their projections are based on reasonable methodologies and are as reliable as can be expected when forecasting more than a year into the future, they have shown justification for their 16-18 percent general rate increases. Moreover, the various calculations performed by the carriers, as adjusted to satisfy BIE's objections or to factor in indisputable facts such as the cancellation of the increases in Sea-Land's Canadian tariff or the delayed redelivery of the *PONCE* to PRMSA, have corroborated the basic finding that these increases will not exceed a reasonable rate of return level. Therefore, as a consider-

ation to the shippers, businesspersons, and consumers who testified in this proceeding, I recommend that the Commission announce that it will encourage individualized attention to particular rate problems and will lend its good offices to any reasonable attempts to adjust any particular individual rate that appears to be causing problems. In any event, however, the Commission owes it to individual persons who are concerned over particular rates to save their time and money by steering them to negotiations or to proceedings in which their individualized rate evidence is relevant, i.e., individual commodity rate negotiations or proceedings, not general-revenue investigations.

This final recommendation which focuses on individual rate problems and rate relationships in the tariffs is not meant to disparage the economic impact testimony proffered by GVI/PRMA. It is rather designed to direct attention to areas where relief might be available and away from intangible abstract propositions which do not offer easy solutions. I do not necessarily disagree with GVI/PRMA's statement that "the Commission should consider the economic impact as one element of its equation, and set the lowest feasible rate of return in view of the economic impact of rates upon Puerto Rico and the Virgin Islands." (GVI/PRMA's reply brief, p. 118.) The problem arises, however, when one tries to fix the "lowest feasible rate of return" given the imprecise measuring tools available to any rate-of-return expert. The "lowest-feasible-rate-of-return" approach, while it sounds appealing, is not easy to apply. Moreover, it is not necessarily a panacea since it sidesteps real problems. For example, such an approach provides no incentive to a carrier to improve efficiencies. More importantly, perhaps, it does nothing to deal with what appears to be the real problem in these trades, namely, how to offset the effects of creeping inflation by improving productivity given so many old ships in the various fleets and how to attract the necessary money to replace these ships given the tendency of the dominant, government-owned carrier PRMSA to keep a lid on rate levels. It would be strange to discover that this latter carrier which was established by the Government of the Commonwealth of Puerto Rico to ensure continued water transportation services to the people of the Commonwealth, did not already pursue a policy of maintaining rates at the lowest feasible overall levels consistent with the ability of the economy of the Commonwealth to absorb rate increases. As history shows and as certain testimony in this proceeding has indicated, carriers serving the Puerto Rican trade have not been able to maintain rate levels that provide them with reasonable earnings, the trade simply not being lucrative. For example, PRMSA lost \$671,000 in its fiscal year ending June 29, 1980, and from June 29, 1980 through January 25, 1981, it lost \$1,260,000 before interest, \$10,777,000 after interest. To some extent, therefore, whatever the Commission can do by way of regulation to keep profits down to

PROPOSED GENERAL RATE INCREASES IN THE PUERTO 283
RICO & VIRGIN ISLANDS TRADES

reasonable levels has already been more than accomplished by the realities of the marketplace.

(S) NORMAN D. KLINE
Administrative Law Judge

FEDERAL MARITIME COMMISSION

DOCKET NO. 81-33

LOUISVILLE SCRAP MATERIAL COMPANY, INC.

v.

YAMASHITA-SHINNIHON STEAMSHIP COMPANY, LTD.

AND TTT SHIP AGENCIES, INC.

NOTICE

September 28, 1981

Notice is given that no appeal has been taken to the August 20, 1981 dismissal of the complaint in this proceeding and that the time within which the Commission could determine to review has expired. No such determination has been made and, accordingly, the dismissal has become administratively final.

(S) JOSEPH C. POLKING
Assistant Secretary

FEDERAL MARITIME COMMISSION

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Francis J. Gorman of Semmes, Bowen & Semmes for Complainant.

Elmer C. Maddy of Kirlin, Campbell & Keating for Respondents.

DISMISSAL OF SATISFIED COMPLAINT UNDER RULE 93 OF THE COMMISSION'S RULES OF PRACTICE AND PROCEDURE, 46 C.F.R. 502.93¹

Finalized September 28, 1981

The complaint in this proceeding was served April 30, 1981, and notice of the filing of the complaint and its Assignment to the Administrative Law Judge was published in the *Federal Register*, Vol. 46 No. 86, Tuesday, May 5, 1981, page 25143. The complainant Louisville Scrap Material Company, Inc., alleges that respondents Yamashita-Shinnihon Steamship Company, Ltd., and TTT Ship Agencies, Inc., failed to ship timely containers tendered for shipment and such failure is alleged to have resulted in violations of sections 14 and 16 of the Shipping Act, 1916.

Complainant alleges it was forced to sell the aluminum scrap on the open market, resulting in actual losses of \$33,708.89 and in addition expended in excess of \$5,000.00 in long distance telephone calls, transportation fees and other expenses in an attempt to resolve the problems. The complainant alleges its business reputation has been severely damaged because of the failure to make shipment on time, resulting in complainant's nearly total loss of its Far Eastern market, causing economic losses in excess of \$250,000.00.

¹ Satisfaction of complaint.

If a respondent satisfies a complaint either before its answer thereto is due or after answering, a statement to that effect, setting forth when and how the complaint has been satisfied and signed and verified by the opposing parties shall be filed with the Commission and served upon all parties of record. Such a statement, which may be by letter, shall show the amount of reparation agreed upon; shall contain the data called for by Appendix I(4), insofar as such form is applicable; and shall state that a like adjustment has been made or will be made by respondent with other persons similarly situated. Satisfied complaints will be dismissed in the discretion of the Commission.

The respondent TTT served its Answer to the Complaint May 19, 1981 (received in the Commission May 20, 1981).

The respondent Yamashita-Shinnihon Steamship Co., Ltd. served its Answer to the Complaint May 29, 1981 (received in the Commission June 1, 1981).

Notice was served June 3, 1981 of Prehearing Conference in this proceeding to be held on June 23, 1981. This was cancelled June 22, 1981 in response to telephone message that parties had settled the matter. See Notice to Submit Status Report, served July 16, 1981. In a letter dated July 23, 1981 (received July 27, 1981) counsel for complainant saying among other things that a notice of satisfaction of complaint had been prepared and was in the process of being executed by all parties.

Under date of August 12, 1981 covering letter the following notice of satisfaction of complaint was submitted:

Pursuant to 46 C.F.R. § 502.93, and the Commission's July 15, 1981, Notice to Submit Status Report, Complainant, Louisville Scrap Material Company, Inc., (the "Complainant") hereby gives notice that all claims, disagreements and misunderstandings between the Complainant and Respondents Yamashita-Shinnihon Shipping Company, Ltd. ("Y-S Line") and TTT Ship Agencies, Inc., ("TTT") have been satisfied and resolved. Specifically, Y-S Line has agreed to satisfy the complaint upon payment of FORTY-THOUSAND DOLLARS (\$40,000), which amount is currently being held in escrow by counsel for the Complainant.

The Complainant agrees to accept said amount in full satisfaction of, and as reparation for the claims against the Respondents as set forth in its complaint dated April 21, 1981, and further agrees to execute a release in the form attached hereto as Exhibit "A". A reparation statement, as required by 46 C.F.R. § 502.93, is attached hereto as Exhibit "B".

The parties wish to resolve this matter in suitable fashion in order to avoid the expense of litigation before both the Commission and that United States District Court for the District of Maryland. The parties believe that there are disputed issues of fact, particularly as to knowledge of respondents in connection with the contracts for the purchase of this cargo and as to the required delivery date as stated by Complainant's freight forwarder.

Respondent Y-S Line agrees to make a like adjustment for any other shippers similarly situated.

WHEREFORE, the Commission is urged to dismiss the complaint in this action.

(S) FRANCIS J. GORMAN
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Attorneys for Complainant

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Attorneys for Respondents

Upon consideration of the above, the Presiding Administrative Law Judge *finds* and *concludes* that the parties have conformed with the provisions of Rule 93 of the Commission's Rules of Practice and Procedure; that under the circumstances presented herein the satisfaction of the complaint appears to be reasonable and just. Further that upon execution of the terms of satisfaction, complaint should be dismissed.

Wherefore, it is ordered:

(A) The Notice of Satisfaction of Complaint is Approved.

(B) The parties shall serve notice and any necessary proof of execution and conformance by all with the terms of the Notice of Satisfaction of Complaint.

(C) The complaint is dismissed.

(S) WILLIAM BEASLEY HARRIS
Administrative Law Judge

FEDERAL MARITIME COMMISSION

DOCKET NO. 81-34

CALIFORNIA FREIGHT SPECIALISTS, INC.

WEST COAST/PUERTO RICO TARIFF FMC-F NO. 2

Domestic offshore commerce tariff is cancelled because it is either inactive or limited to transportation regulated by the ICC.

John Robert Ewers, Joseph B. Slunt and Janet F. Katz for the Bureau of Hearings and Field Operations.

REPORT AND ORDER

September 30, 1981

BY THE COMMISSION: (ALAN GREEN, JR., *Chairman*; THOMAS F. MOAKLEY, *Vice Chairman*; RICHARD J. DASCHBACH AND JAMES V. DAY, *Commissioners*)

On May 19, 1981, the Commission ordered California Freight Specialists, Inc. (CFS), to show cause why its Tariff FMC-F No. 2 should not be cancelled. This tariff offers non-vessel operating common carrier service from Los Angeles, California to San Juan, Puerto Rico, a trade in domestic offshore commerce.¹ The Show Cause Order alleged that CFS's operation is not subject to FMC jurisdiction because CFS uses an underlying means of transport subject to ICC regulation. This allegation was based upon the fact that: (1) no all-water common carrier service is presently available from Los Angeles to San Juan; and (2) intermodal service to Puerto Rico is subject to exclusive Interstate Commerce Commission regulation under the decisions in *Trailer Marine Transportation Corporation v. Federal Maritime Commission*, 602 F.2d 379 (D.C. Cir. 1979), governing rail/water transportation, and *Puerto Rico Maritime Shipping Authority v. Interstate Commerce Commission*, 645 F.2d 1102 (D.C. Cir. 1981) governing motor/water transportation.²

¹ A non-vessel operating common carrier (NVOCC) issues a through bill of lading and otherwise holds itself out to perform ocean transportation subject to the Shipping Act, 1916 (46 U.S.C. 801 *et seq.*). See *Capital Transportation, Inc. v. United States*, 621 F.2d 1312 (1st Cir. 1979); *Common Carriers by Water - Status of Express Companies, Truck Lines and Other Nonvessel Carriers*, 6 F.M.C. 245 (1961); *Bernard Ulmann Co., Inc. v. Porto Rican Express Co.*, 3 F.M.B. 771 (1952). Cf. *New York Foreign Freight Forwarders & Brokers Ass'n v. Interstate Commerce Commission*, 589 F.2d 69 (D.C. Cir. 1978).

² A nonequipment operating carrier which employs an underlying means of transportation subject to ICC regulation requires certification as a freight forwarder under former Part IV of the Interstate Commerce Act. 49 U.S.C. 10102(8). Section 33 of the Shipping Act, 1916 (46 U.S.C. 832) precludes the Commission from concurrently regulating activities regulated by the ICC.

CFS did not contest the Commission's assertion that its tariff represents an offering of through intermodal service via Atlantic and Gulf ports and not all-water service from the Port of Los Angeles. Instead, a letter dated June 26, 1981 was submitted by CFS's President, Mr. James H. Heater, stating that: CFS lacks the funds to pursue this matter "within the Federal Courts;" the means by which a vessel operating carrier moves cargo should not concern a non-vessel operating carrier; and that operations under Tariff FMC-F No. 2 will cease on August 31, 1981, in any event. This letter contains no reference to any all-water vessel service from Los Angeles to Puerto Rico, and the Commission's tariff records continue to show that no such common carrier service exists.³

The Commission's Bureau of Hearings and Field Operations argues that CFS failed to rebut the allegations made in the Show Cause Order and that the CFS tariff should be cancelled. Cancellation is claimed to be appropriate for the reasons stated in the Show Cause Order and because Tariff No. FMC-F No. 2 would be inactive after August 31, 1981.

It is concluded that CFS has depended upon ICC-regulated intermodal transportation to move cargoes from Los Angeles to San Juan and that no other type of service is presently available. The Commission lacks jurisdiction to accept nonvessel operating carrier tariffs in this trade because the maintenance of such tariffs would constitute the type of concurrent regulation forbidden by section 33 of the Shipping Act, 1916.

The CFS tariff is also defective because it is inactive and is therefore not a *bona fide* holding out of common carrier services insofar as *all-water FMC regulated carriage* is concerned. Moreover, CFS has expressed an intention to cease all of its activities in the Pacific Coast/Puerto Rico trade on August 31, 1981, so that both the FMC and ICC aspects of the tariff have become inactive. Section 2 of the Intercoastal Shipping Act, 1933 (46 U.S.C. 844), has been interpreted as prohibiting tariffs which do not describe a current common carrier service intended to attract cargo on an ongoing (or soon to be ongoing) basis, from being filed with the Commission. *Publication of Inactive Tariffs by Nonvessel Operating Common Carriers in Domestic Offshore Commerce*, 20 F.M.C. 371 (1978).⁴ It is concluded that CFS has been unable to

³ This does not mean a non-vessel operating carrier must always employ a common carrier subject to the Shipping Act to perform the actual ocean transportation provided to the shipper. In the case of domestic offshore commerce, however, vessel service not regulated by the FMC may be subject to the exclusive jurisdiction of the ICC. This situation does not occur in foreign commerce.

⁴ See also *Publication of Inactive Tariffs by Carriers in Foreign Commerce*, 20 F.M.C. 433 (1978); and *Publication of Inactive Tariffs*, 19 F.M.C. 774 (1977).

provide all-water service to Puerto Rico for over one year and will be unavailable to do so in the commercially reasonable future.⁵

Accordingly, CFS's Tariff FMC-F No. 2 will be cancelled for either being inactive or describing transportation exclusively within the jurisdiction of the ICC.

THEREFORE, IT IS ORDERED, That California Freight Specialists, Inc., Tariff FMC-F No. 2, is cancelled.

By the Commission.

(S) JOSEPH C. POLKING
Assistant Secretary

⁵ The Commission's records show that no vessel operating tariff has been on file on the Pacific Coast/Puerto Rico trade since at least July 1, 1980.

FEDERAL MARITIME COMMISSION

DOCKET NO. 77-7

AGREEMENTS NOS. 9929-6, 10266-3 AND 10374

ORDER ON REMAND

October 9, 1981

On April 14, 1981, the United States Court of Appeals for the District of Columbia Circuit partially vacated and remanded an order of the Federal Maritime Commission which had conditionally approved certain agreements among ocean carriers operating in the United States Atlantic & Gulf/Europe trades.¹ *Sea-Land Service, Inc. v. FMC*, 653 F.2d 544 (D.C. Cir. 1981). The purpose of this order on remand is to structure further proceedings consistent with the Court's decision.

BACKGROUND

The agreements under investigation in this proceeding trace their origins to Agreement No. 9929, a joint service arrangement between Hapag-Lloyd and Intercontinental Transport (ICT), B.V. (formerly Holland-American Line), to operate lighter-aboard-ship (LASH), container and breakbulk services under the trade name "Combi Line." This Agreement was approved on May 6, 1971, and, *inter alia*, provided that Hapag and ICT would share one vote in any conference or rate agreement to which the joint service became a party.

The LASH vessel portion of the Agreement was approved until December 31, 1986, but the container and breakbulk portions were approved for only a three-year term. Agreement No. 9929-1 extended the non-LASH services until April 8, 1977. On October 1, 1976, a further extension was proposed, coupled with significant modifications in the nature of the Combi Line operation (Agreement Nos. 9929-2, 9929-3, 9929-4, 10266 and 10266-1). Agreement No. 9929-2 authorized separate votes for Hapag, ICT, a new partner called Compagnie General Transatlantique (CGT)², and the joint LASH service as a whole in any conferences or rate agreements in which they participated. These Agreements were protested by United States Lines, Sea-Land Service, Inc. and Seatrain International, S.A., and were set down for hearing on April 8, 1977 as F.M.C. Docket No. 77-7.

¹ The Commission's order was served on June 5, 1979 (21 F.M.C. 1030). Petitions for reconsideration were denied on October 16, 1979 (22 F.M.C. 146).

² CGT was later succeeded in interest by Compagnie Generale Maritime (CGM), which is a party to Agreements Nos. 10374 and 10266-3, two of the three agreements presently under investigation in this proceeding.

Agreements Nos. 9929-2, 9929-4, 10266 and 10266-1 were withdrawn during the proceedings in Docket No. 77-7 and replaced by Agreements Nos. 9929-5 and 10266-2, respectively.³ Agreement No. 9929-5 had two separate and distinct parts. Part I called for the *joint operation* of a LASH and conventional vessel service by Hapag-Lloyd, ICT and CGM. This service was to be known as "Combi Line." CGM's contribution would be limited to one or more feeder vessels for the LASH service, if and when the joint service commenced a feeder operation at European ports.

Part II of Agreement No. 9929-5, as ultimately presented to the Commission, would have authorized the three proponents to cross-charter container space from one another on any and all vessels *separately operated* by them in the trades. Proponents could employ whatever vessels they wished, but would limit their containerized cargo carryings on these vessels to a combined total of 800 twenty-foot equivalent container units (TEU's) per week in each direction (averaged quarterly).⁴ No pooling of revenues or expenses would be allowed.

Agreement No. 10266-2 was titled a "Joint Marketing Agreement" between ICT and CGM, and dealt mainly with provisions concerning joint marketing and cargo solicitation. However, the Agreement also authorized ICT and CGM to share all revenues and expenses incurred by the parties collectively in offering container, breakbulk or combination breakbulk/container service in the trade (i.e., all non-LASH service). The two carriers would instruct their joint agent to solicit cargo for their mutual benefit, and could issue a joint bill of lading for any cargo booked. As long as ICT and CGM remained parties to Part II of Agreement No. 9929-5, the containerized cargo carried by them would be subject to the TEU ceiling imposed by that agreement.

In addition, these Agreements dispensed with their predecessors' multiple voting provisions, providing instead that, as parties to a conference, the proponents could not exercise collectively a greater number of votes than that accorded a single member of such conference.

³ Agreement No. 9929-3 proposed a two-year extension of the container and breakbulk services until 1979 and was approved by the Commission pending resolution of the administrative hearings in Docket No. 77-7. This *pendente lite* approval was vacated and remanded by the Court or Appeals because antitrust implications were not adequately considered. *United States Lines, Inc. v. FMC*, 584 F.2d 543 (D.C. Cir. 1978). After further deliberations, the Commission again approved Agreement No. 9929-3 on an interim basis for a term commencing April 9, 1977 and expiring 60 days following service of the Commission's final decision in Docket No. 77-7. 19 S.R.R. 84 (March 15, 1979).

⁴ Of these 800 TEU's, no more than 100 eastbound and 225 westbound (averaged monthly) could be carried to or from U.S. South Atlantic ports and none could be loaded or discharged north of Charleston, South Carolina. Moreover, no more than 30 TEU's of refrigerated cargo could be carried eastbound and no more than 10 such TEU's could be carried westbound. After the first year of operation the westbound limit could be increased to 15 TEU's and after the second year to 20 TEU's.

On January 30, 1979, the presiding Administrative Law Judge (ALJ) issued an Initial Decision conditionally approving both agreements.⁵ One of the conditions was that Agreement No. 9929-5 be modified to delete CGM as a party to the Combi Line LASH service, because the evidence showed that CGM would not participate in that service in the foreseeable future.⁶ The ALJ also expressly found that Agreement No. 10266-2 had an independent existence of its own and should not be tied to the continued approval of the cross-charter provisions of Part II of Agreement No. 9929-5.⁷ No exceptions to the Initial Decision were filed.

THE COMMISSION'S DECISION

On June 5, 1979, the Commission served an Order Partially Adopting Initial Decision and concluded that certain modifications, beyond those ordered by the Administrative Law Judge, were required before the agreements could be approved. Because the two proposed agreements did not "adequately reflect the three distinct section 15 activities proposed by proponents,"⁸ the Commission divided Agreement No. 9929-5 into two separate agreements: No. 9929-6, the "Combi Line" joint LASH service between Hapag-Lloyd and ICT;⁹ and a new Agreement, subsequently designated as No. 10374, which authorized the cross-charter container arrangement among Hapag, ICT and CGM.

The Commission also required that authority for Hapag and ICT to operate a joint conventional vessel service be deleted from new Agreement No. 9929-6; that new Agreement No. 10374 be modified to either delete authority for rate-fixing under certain circumstances, or to add language ensuring that such activity would be carried out in compliance with the Commission's self-policing rules; that the ICT/CGM agreement (redesignated as Agreement No. 10266-3) be amended to change its title from "Joint Marketing Agreement" to "Joint Service Agreement" and to place limitations on the parties' authority to offer conventional vessel service; and that both Agreement No. 9929-6 and No. 10266-3 be amended to include more detailed reporting requirements. (21 F.M.C. at 1032-1034).

Neither the Commission's restructuring of the agreements nor the substantive amendments described above were the subject of the subse-

⁵ 21 F.M.C. 1039.

⁶ The Initial Decision also required that the two remaining parties to the LASH service not concertedly offer LASH service between Mexican and U.S. ports. Agreement No. 10266-2 was also approved on the condition that the parties not offer joint container/breakbulk service between Mexican and United States ports. Reporting requirements were imposed to assure compliance with the limitation on total carryings established by Article 2.2 of Agreement No. 9929-5.

⁷ 21 F.M.C. at 1048-1049, 1055.

⁸ 21 F.M.C. at 1032.

⁹ As noted above, the ALJ had disapproved the proponents' proposal to add CGM as a partner to this service.

quent litigation in the U.S. Court of Appeals, and consequently are not affected by the Court's remand. As the Court itself noted, these actions by the Commission either do not alter the substance of the agreements or serve only to restrict the authority of the parties to the agreements. *Sea-Land Service, Inc. v. FMC, supra*, slip opinion at 15.

The further amendments required by the Commission which were the subject of the Court's decision concerned two separate matters.

One of the major benefits of the new container cross-chartering provisions proposed in Agreement No. 9929-5 was the replacement of the old Combi Line joint container service between Hapag and ICT by an arrangement whereby Hapag would compete with the ICT/CGM joint service authorized by Agreement No. 10266 for container cargo. However, as it had been approved by the ALJ, Agreement No. 9929-5 also limited the three carriers to essentially one vote among them in any conferences or rate agreements. Thus, even though Hapag would now be competing with ICT/CGM for container cargo, it would still be voting with its joint service competitor on conference decisions concerning such cargo, including rates, sailing schedules and related rules and regulations. This would require the three carriers to confer among themselves in order to arrive at a consensus position before a particular matter came before a conference for voting by the members.

In the Commission's opinion, such an arrangement would have been seriously inconsistent with the increased competition for container cargo promised by the new cross-chartering provisions and might thus have undercut the public interest basis for the Commission's approval of those provisions. Accordingly, in restructuring Agreement No. 9929-5 into Agreements Nos. 9929-6 and 10374, the Commission required that the voting provisions be revised so that only the Hapag/ICT joint LASH service be restricted to a single vote. In addition, in view of their convergence of interests under Agreement No. 10266-3 with regard to all non-LASH cargo, the Commission required that that Agreement include a provision limiting ICT and CGM to one vote between them on all container and conventional vessel services. (See 21 F.M.C. at 1033). Thus, the amendments to the conference voting provisions ordered by the Commission were consistent with the structure of the three separate services approved by the Commission. The Commission required that the parties to the Hapag/ICT joint LASH service cast one vote between them, the parties to the ICT/CGM joint service also be limited to one vote and that Hapag, to the extent that it participates in conferences as an individual container carrier, also have one vote.

The second matter which became the subject of controversy in the Court of Appeals concerned Agreement No. 10266-3. The Commission found that the Agreement actually created a joint service, not merely a joint marketing arrangement, because the Agreement provided for reve-

nue sharing between ICT and CGM, as well as several other characteristics of a joint service¹⁰ Although it was considered unlikely that ICT and CGM would, with respect to their carriage of containerized cargo, operate outside Agreement No. 10374 and the cargo limitations contained therein, the record indicated and the ALJ found that the approval of Agreement No. 10266-3 should not be tied to the continued existence of Agreement No. 10374.¹¹ In light of this finding, the Commission was faced with the problem of whether some control should be placed over the amount of cargo that could be carried by the ICT/CGM joint service if the controls operative under Agreement No. 10374 should cease. The Commission was also mindful of the fact that Agreement No. 10374 did not restrict the parties in any way as to the type or size of vessels they could deploy in the trades.

The solution arrived at by the Commission was to place an 800 TEU per week (averaged quarterly) cargo limitation upon the ICT/CGM service, similar (though not as detailed) to that placed upon the parties to Agreement No. 10374. Thus, so long as ICT and CGM remain parties (with Hapag) to Agreement No. 10374, they will be subject to the ceiling on containerized cargo imposed by that Agreement. In the event the Agreement should terminate, Hapag would become an independent carrier and of course would carry whatever containerized cargo it could obtain for itself. The ICT/CGM joint service, on the other hand, would remain in operation, with whatever vessels it may have deployed. The Commission therefore deemed it appropriate that some control be maintained over the joint service, and the Commission's modification was designed to provide such control by ensuring that a ceiling remained on the container cargo which can be carried by the service. The Commission recognized in its Order Denying Further Reconsideration that more detailed limitations on the cargo which can be carried by the service may be necessary if the service should begin to operate outside of Agreement No. 10374.¹²

Sea Land, Seatrain and United States Lines, the three carriers which had protested the original Agreements, objected to the Commission's modifications pertaining to voting and cargo limitations, and petitioned for clarification and reconsideration. The Commission denied the petitions and Sea-Land, joined by Seatrain, petitioned for review of the Commission's final order of conditional approval.

THE COURT'S DECISION

The Court's opinion focused on "whether the procedural aspects of section 15 were scrupulously observed by the Commission in arriving at

¹⁰ 21 F.M.C. at 1032, n. 8 and accompanying text.

¹¹ See note 7, *supra*, and accompanying text.

¹² 22 F.M.C. at 146, n.1.

its decision." *Sea-Land Service, Inc. v. FMC, supra*, slip opinion at 11 (footnote by Court omitted). While recognizing the necessity of the Commission's authority to impose modifications to proposed agreements as conditions of approval, the Court held that modifications to a particular agreement which *expand* the anticompetitive authority contemplated by the agreement's proponents must be preceded by notice and hearing "through which interested parties can air their views as to the competitive implications of . . . [the modifications] and the Commission can gain sufficient information to make a reasoned decision as to the competitive impact of . . . [the modifications.]" *Id.*, slip opinion at 15-16.

With respect to the modifications challenged by Sea-Land, the Court stated that:

The practical implications of these agreements are not readily apparent to the untrained eye, and the Commission must be credited with some expertise in understanding the pro- and anti-competitive aspects of private carrier agreements. Nevertheless, we think that both modifications appear to have expanded the proponents' authority and, as such, should have been the subject of prior notice and opportunity for comment. Any confusion as to the reach and impact of these modifications stems precisely from the fact that they were never addressed by the ALJ in the context of an adversary inquiry eliciting relevant facts and contentions. (Slip opinion at 19-20).

The Court examined the voting provisions imposed in Agreement No. 10374¹³ by the Commission, and concluded that the factual record of the proceeding did not adequately support the Commission's contention that the provisions restricted rather than expanded the scope of the Agreement. The Court noted that:

The anti- or pro-competitive impact of a multiple voting provision will always turn on the facts of the individual case, such as the particular parties involved, their relative strength or weakness within the industry, and, most important, whether the carriers involved in the agreement are so closely allied in interest as to make bloc voting likely. In such a situation, it is particularly inappropriate for the Commission to dispense with any notice and opportunity for comment by interested parties on the grounds that the Commission already understands the facts of the case. (Slip opinion at 22).

The Court then proceeded to discuss the imposition of capacity limitations in Agreement No. 10266-3, and concluded that the state of

¹³ As noted, the Commission also required that Agreement No. 10266-3 provide that ICT and CGM were limited to one vote between them with respect to their joint services under that Agreement. That action by the Commission was not challenged by Sea-Land and consequently was not addressed in the Court's decision.

the record required that a remand was again necessary to allow opportunity for comment by interested parties. (Slip Opinion at 26-27).

FURTHER PROCEEDINGS ON REMAND

One of the tasks confronting the Commission in light of the Court's remand order was determining whether the Court intended to vacate the Commission's approval of those agreements, or portions of agreements, which were not the subject of the petition for review or discussion by the Court.¹⁴ After careful study of the Court's decision, the Commission concludes that the Court intended these remand proceedings to be confined to the multiple voting provision in Agreement No. 10374 and the capacity limitation provision in Agreement No. 10266-3. We do not understand the Court to have vacated the Commission's order with respect to provisions not at issue before the Court.

As the discussion in this Order has indicated, the Commission continues to believe that, on the basis of the information presently at hand, the disputed voting provisions in Agreement No. 10374 and cargo limitation provisions in Agreement No. 10266-3 are desirable as a matter of regulatory policy. However, pursuant to the Court's instructions, further opportunity for comment on the impact of these provisions must be allowed in order to correct the deficiencies perceived by the Court. In view of what we believe to be the limited nature of the Court's remand and the narrowness of the issues addressed therein, these further hearings will initially be limited to the submissions of affidavits of fact and memoranda of law. The Commission expects any submissions to include more detailed and current information than was made available to the Commission when it acted on reconsideration requests following our 1979 order. The Commission will carefully consider all points of view set forth in these affidavits and memoranda. Furthermore, following the submission of these affidavits and memoranda, the parties will be given an opportunity to submit recommendations as to whether further proceedings are necessary and, if so, the form they should take. After consideration of these recommendations, the Commission will then issue an appropriate order.¹⁵

¹⁴ For example, as discussed *infra*, Agreement No. 9929-6 was not at all involved in the litigation before the Court and is not mentioned in the Court's decision.

¹⁵ ICT and CGM, the parties to Agreement No. 10266-3, have filed for approval by the Commission an amendment to the Agreement which would authorize the two carriers to provide intermodal service via ports within the scope of the Agreement. The proposed amendment is designated Agreement No. 10266-4 and notice of its filing was published in the *Federal Register* on June 23, 1980. Protests and requests for hearing were filed by Sea-Land and Seatrain. The Commission has determined to briefly defer action on this Agreement pending an initial assessment of the nature and scope of further proceedings on Agreement No. 10266-3, particularly since the disputed cargo limitation provisions of Agreement No. 10266-3 are again a subject of contention between the proponents and protestants of Agreement No. 10266-4. If evidentiary hearings become necessary on Agreement No. 10266-3, the Commission will at that time consider the inclusion of Agreement No. 10266-4 in such proceedings.

Although Sea-Land's petition for review and the Court's subsequent decision focus only on certain provisions of Agreements Nos. 10374 and 10266-3, it may be necessary to alter the corresponding provisions of Agreement No. 9929-6 (as well as Agreement No. 10266-3) if adjustments to the voting provisions of Agreement No. 10374 are deemed necessary. Therefore, Agreement No. 9929-6 is included within the scope of this proceeding.

Finally, there are indications that ICT and Hapag Lloyd may have ceased or substantially limited their joint LASH service under Agreement No. 9929-6. If this is the case, the need for the Commission's original modifications of the voting provisions of the other Agreements may have been altered or eliminated. Those two carriers are hereby directed, pursuant to section 21 of the Shipping Act, 1916 (46 U.S.C. 820(a)) to describe in their submissions the current status of that service, including service levels in 1980 and through the third quarter of 1981.

THEREFORE, IT IS ORDERED, That Docket No. 77-7 is hereby reopened; and

IT IS FURTHER ORDERED, That the scope of these proceedings shall be limited to the following issues:

- (1) Whether, in light of its own structure and the structure of Agreements Nos. 9929-6 and 10266-3, Agreement No. 10374 should provide that Hapag Lloyd, on the one hand, and ICT/CGM, on the other hand, shall exercise separate votes in conferences or rate agreements with respect to their respective container services, and the impact on competition in the trades of such a provision. Submissions by the parties on this issue should include, if possible, a discussion as to how Hapag and ICT/CGM have voted on conference and rate agreement decisions regarding container services since Agreement No. 10374 was given final approval by the Commission on December 28, 1979; and
- (2) (a) Whether Agreement No. 10266-3 should include a provision limiting the amount of containerized cargo which may be carried by ICT and CGM under the Agreement and, if so, the proper level of such a limitation;
(b) Whether any such limitation should be imposed, and at what level, if Agreement No. 10374 is terminated; and

IT IS FURTHER ORDERED That, pursuant to section 21 of the Shipping Act, Hapag Lloyd and ICT are hereby directed to include in their opening submissions a detailed description of the current status of their joint LASH service under Agreement No. 9929-6, including ports served and frequency of service at each port in 1980 and through the third quarter of 1981; and

IT IS FURTHER ORDERED, That these proceedings shall initially be limited to the submission of affidavits of fact and memoranda of law to the Commission; and

IT IS FURTHER ORDERED, That the following schedule be adhered to:

Affidavits of Fact and Memoranda of Law from all parties, including the Commission's Bureau of Hearings and Field Operations and any intervenors, shall be filed no later than the close of business November 9, 1981;

Reply Affidavits of Fact and Memoranda of Law from all parties, including the Commission's Bureau of Hearings and Field Operations and any intervenors, shall be filed no later than close of business December 9, 1981; and

IT IS FURTHER ORDERED, That within 15 days following the submission of the Reply Affidavits and Memoranda, the parties submit written statements identifying the unresolved issues of fact and specifying the procedures they believe are best suited to resolve those issues. Any requests by a party for a further hearing shall be accompanied by a detailed recital of the facts the party intends to prove at the hearing and a description of evidence intended to be used to prove those facts. After consideration of these submissions, the Commission will issue an appropriate order; and

IT IS FURTHER ORDERED, That any person, other than the parties, having an interest and desiring to participate in these proceedings may file a petition for leave to intervene pursuant to Rule 72 of the Commission's Rules of Practice and Procedure (46 C.F.R. 502.72); and

IT IS FURTHER ORDERED, That this Order be published in the *Federal Register* and a copy thereof be served upon all parties of record; and

IT IS FURTHER ORDERED, That all documents submitted by any party of record in this proceeding be filed in accordance with Rule 118 of the Commission's Rules of Practice and Procedure (46 C.F.R. 502.118) as well as being served directly on all other parties of record.

By the Commission.*

(S) JOSEPH C. POLKING
Assistant Secretary

* Commissioner Richard J. Daschbach's dissenting opinion is attached.

DOCKET NO. 77-7

AGREEMENTS NOS. 9929-6, 10266-3 AND 10374

ORDER ON REMAND

Commissioner Richard J. Daschbach, dissenting.

In my June 13, 1979 separate opinion to the Commission's Order Partially Adopting the Initial Decision in the above-captioned proceeding, I stated that the Commission should have fully adopted the ALJ's January 30, 1979 decision. The U.S. Court of Appeals' April 14, 1981 decision remanding the Commission's order and vacating two of the modifications which the Commission imposed upon the ALJ's decision re-enforces my view that adoption of the Initial Decision remains the Commission's most feasible and prudent option.

FEDERAL MARITIME COMMISSION

[46 C.F.R. PART 520]

[GENERAL ORDER 46, REVISED: DOCKET 81-16]
EXEMPTION OF CERTAIN AGENCY AGREEMENTS
FROM THE REQUIREMENTS OF SECTION 15,
SHIPPING ACT, 1916

October 9, 1981

ACTION: Final Rule

SUMMARY: This exempts agency agreements which provide for an agent's solicitation and booking of cargoes, and signing contracts of affreightment and bills of lading, on behalf of a common carrier by water from the filing and approval requirements of section 15 of the Shipping Act, 1916 (46 U.S.C. 814). The Commission has determined that this exemption will not substantially impair effective regulation of common carrier practices, result in unjust discrimination or be detrimental to commerce.

DATE: Effective November 18, 1981.

SUPPLEMENTARY INFORMATION:

Section 35 of the Shipping Act, 1916 (the Act) (46 U.S.C. 833a) provides that the Commission, upon application or on its own motion, may by order or rule exempt any class of agreements between persons subject to the Act from any requirement of the Act, where it finds that such exemption will not substantially impair effective regulation by the Commission, be unjustly discriminatory, or be detrimental to commerce. Under this authority the Commission previously announced (46 F.R. 12524) that it proposed to amend 46 C.F.R. 520 (Commission General Order 46) to exempt agreements which provide for an agent's solicitation and booking of cargoes, and signing contracts of affreightment and bills of lading, on behalf of a common carrier by water from the filing and approval requirements of section 15 of the Act.

Comments on the proposed rule were received from (1) Crowley Maritime Corporation (Crowley), (2) Matson Agencies, Inc. and Matson Agencies, (Matson), (3) eleven conference and rate agreements (Group of Eleven) and (4) TTT Ship Agencies, Inc. (TTT).

Crowley supports the rule as proposed. Matson and the Group of Eleven support the rule with various suggested modifications. TTT objects to the rule to the extent that it excludes from its coverage those

ship agents' agreements which are between carriers competing in the same trade, or under which agents represent different carriers in the same trade.

Matson suggests that the scope of the proposed exemption be clarified to include certain "incidental functions" performed by agents. Specifically, Matson proposes that the definition of exempted agency agreements be expanded to include:

" . . . other functions incidental to the performance of duties by agents including, but not limited to, processing of claims, container equipment control, collection and remittance of freight and reporting functions."

Matson's suggested definitional revision has merit and will be adopted except for the phrase "but not limited to," which the Commission finds to be too indefinite and uncertain. Also, in order to make it clear that the exempted agency functions do not include the actual control over the use of container equipment, the incidental function of "container equipment control" will be modified to read "maintenance of a container equipment inventory control system."

The Group of Eleven requests clarification of the scope of the exception under Item (2) of section 520.12. Specifically, it suggests that the term "carriers" be substituted for the term "principals" to make it consistent with Item (1) of that section. This is an appropriate suggestion and will be adopted. The Group of Eleven also proposes that the term "which is otherwise subject to the Shipping Act" be added after the word "agent" in Item (2) to make it clear that the agent is, in fact, a person subject to the Act. This revision is unnecessary and will be rejected since the introductory statement of section 520.12 addresses this point.

TTT objects to the requirement that agency agreements falling within the scope of Items (1) and (2) of section 520.12 must be submitted for approval pursuant to section 15. TTT believes that the required filing and approval of agreements which contain terms of an economic and financial nature and the subsequent possible public disclosure of those sensitive terms poses a serious threat to the confidential nature of the relationship between a carrier and its agent. If agency agreements like those named in Items (1) and (2) must be approved under section 15, TTT seeks Commission assurance that all agency agreements filed with it will not be subject to disclosure under the Freedom of Information Act (FOIA) (5 U.S.C. 552). Alternatively, it believes ship agents subject to the Act should be allowed to file agency agreements which have terms of a sensitive economic nature deleted but which are provided to the Commission upon request and on a privileged and confidential basis.

We are not persuaded by TTT's suggestion that the scope of the exemption should be expanded to cover the two exceptions to the

exemption set out in section 520.12 of the rule. These two exceptions involve potential conflicts of interest as well as possible market sharing, and therefore, we believe that they should continue to be subject to section 15. In addition, we cannot guarantee TTT's alternate request for confidential treatment of certain sections of agreements filed with the Commission. Such agreements are required to be available for inspection and copying by the public. 46 C.F.R. § 503.32. While 46 C.F.R. § 503.35 does provide that commercially or financially sensitive information submitted to the Commission will generally not be made available, that limitation is subject to the requirements of the FOIA. Because determinations as to whether particular information can be withheld under FOIA can only be made on an *ad hoc* basis, no blanket assurances of the type sought by TTT may be given.

One final matter, not raised by the comments, needs to be discussed. As presently worded, Item (2) of section 520.12 could be misinterpreted to apply only where an agent has established an agency relationship with two carriers in one document. Because Item (2) is intended to include any and all arrangements between an agent and an individual carrier which would permit that agent to enter into similar agency agreements with other competing carriers in the trade, it has been clarified accordingly.

Pursuant to the Regulatory Flexibility Act (5 U.S.C. 601 *et seq*), the Commission certifies that the rulemaking will not have a significant economic impact on a substantial number of small entities. The exemption will not impose any reporting or record keeping requirements which might result in a compliance or reporting burden on small entities. The exemption will primarily benefit carriers. The shipping public, some of whom undoubtedly are small entities may enjoy a secondary benefit from this exemption but it is not foreseen that this benefit will amount to a "significant economic impact," within the meaning of 5 U.S.C. 605(b).

Accordingly, under section 15, 35 and 43 of the Shipping Act, 1916 (46 U.S.C. 814, 833a and 841a) and 5 U.S.C. 553, the Federal Maritime Commission amends 16 C.F.R. Part 520 as follows:

1. Change the Part title to read "Exemption of Husbanding and Agency Agreements."
2. Designate existing Part 520 as "Subpart A - Husbanding Agreements."
3. Add a new "Subpart B - Agency Agreements" reading as follows:
 - Sec.
 - 520.10 Purpose and Scope
 - 520.11 Definition
 - 520.12 Exemption

520.13 Termination of Approved Agency Agreements**520.11 Optional Section 15 Approval**

AUTHORITY: Sections 15, 35 and 43; 46 U.S.C. 814, 833a and 841a.

520.10 Purpose and Scope.

Section 15 of the Shipping Act, 1916 requires that certain agreements between common carriers by water and other persons subject to the Act be filed with and approved by the Commission prior to implementation. Section 35 of the Act provides that the Commission, upon application or on its own motion, may by order or rule exempt for the future any class of agreements between persons subject to the Act, or any specified activity of such persons from any requirement of the Act, where it finds that such exemption will not substantially impair effective regulation by the Commission, be unjustly discriminatory, or detrimental to commerce.

In the interests of minimizing unnecessary expense and delay in the implementation of agency agreements between persons subject to the Act, this part provides for the exemption of certain agency agreements from the filing and approval requirements of section 15.

The exemption does not apply to agency agreements: (1) where a common carrier is to be an agent for a competing carrier in the same trade, or (2) which permit an agent to enter into similar agreements with more than one carrier in a trade.

520.11 Definitions.

As used in this part, agency agreements are agreements between persons subject to the Shipping Act, 1916, which provide for the agent's solicitation and booking of cargoes, and signing contracts of affreightment and bills of lading, on behalf of a common carrier by water. Such agreements may or may not also include husbanding service functions and other functions incidental to the performance of duties by agents including processing of claims, maintenance of a container equipment inventory control system, collection and remittance of freight and reporting functions.

520.12 Exemption.

Agency agreements between persons subject to the Act except those: (1) where a common carrier is to be an agent for a competing carrier in the same trade, or (2) which permit an agent to enter into similar agreements with more than one carrier in a trade, are exempted from the filing and approval requirements of section 15. Exempted agreements shall be kept on file by the parties and shall be available for inspection by the Commission during the term of the agreement and two years thereafter.

520.13 Termination of Approved Agency Agreements.

Agency agreements which have received section 15 approval shall continue to be approved for the duration of their term or until terminat-

ed by the parties. When such approved agreements are terminated by the parties, such parties shall immediately notify the Commission.

520.14 Optional Section 15 Approval.

Notwithstanding the provisions of this part, persons who desire approval of agency agreements may continue to submit such agreements to the Commission for section 15 consideration in accordance with ordinary filing procedures.

By the Commission

(S) JOSEPH C. POLKING
Assistant Secretary

FEDERAL MARITIME COMMISSION

DOCKET NO. 81-41
ATLANTIS LINE, LTD.

v.

FARRELL LINES, INC.

NOTICE

October 9, 1981

Notice is given that no exceptions have been filed to the September 4, 1981 initial decision in this proceeding and the time within which the Commission could determine to review that decision has expired. No such determination has been made and, accordingly, that decision has become administratively final.

(S) JOSEPH C. POLKING
Assistant Secretary

FEDERAL MARITIME COMMISSION

DOCKET NO. 81-41
ATLANTIS LINE, LTD.

v.

FARRELL LINES, INC.

Volumes of the Sesame Street Library improperly classified as "Books, N.O.S." Proper classification found to be "Books, Toy viz: coloring, cut-out picture and story, not school books." Reparation awarded.

Steven B. Chamides for complainant.

Richard H. Bowen for respondent.

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

Finalized October 9, 1981

The complainant Atlantis Line, Ltd. alleges that respondent Farrell Lines, Inc., overcharged it in the amount of \$41,904.24 in freight charges on three shipments of "certain books." The controversy arises over the proper description of the books for rate purposes.

The books in question are part of a series entitled "The Sesame Street Library" which according to the complainant "contain stories and illustrations designed to entertain pre-schoolers while introducing them to the alphabet and numbers."

The bills of lading issued for each of the shipments described the shipments as "comic books." The bills of lading were prepared by Atlantis. Farrell rated the books under Item 1815 "Magazines and Comic Books."² Subsequently, Farrell received a sample of the books being shipped and concluded that the books were not "comic books" but hard cover children's educational books. Taking the position that the Tariff had no entry covering the books, Farrell rebilled Atlantis under Item 361 "Books N.O.S."

Farrell told Atlantis of the reclassification and the additional charges due. Atlantis at that time insisted that the books were "comic books." Unable to agree upon a classification, Atlantis then filed the present complaint abandoning, however, its insistence that the books were

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

² U.S. Atlantic and Gulf/Australian-New Zealand Conference, Freight Tariff No. 4, FMC No. 13 (hereinafter the Tariff).

comic books. Instead the complaint alleges that what was actually shipped were "story books," and should have been classified under Item 365 of the Tariff as "Books, Toy viz: coloring, cut-out picture and story, not school books." Farrell in its answer points out that as it appears in the complaint Item 365 reads "Books, Toy viz: coloring, cut-out, picture, and story, not school books." As it actually appears in the tariff there is no comma between the words "cut-out" and "picture." The absence of that comma leads Farrell and the Conference³ to construe the item as including only "toy coloring or *toy cut-out picture and story books*." (Emphasis theirs.) Presumably, since the books in question have pictures and tell a story, it is the absence of "cut-out pictures" which excludes them from the coverage of Item 365.

Atlantis considers Farrell's interpretation to be "strained and unnatural."⁴ It contends that the term "cut out picture and story" books describes three different possibilities: "(1) cut-out picture books; (2) story books; and (3) cut-out picture books together with story books." Atlantis, citing Follett, *Modern American Usage*, p. 64 (1966) says that the three possibilities stem from the common use of the word "and" as having both the conjunctive and disjunctive meanings. In other words says Atlantis "and" is the equivalent of "and/or." Atlantis goes on to cite several instances in the Tariff where it is clear, at least to Atlantis, that "and" is used to mean "and/or." For example Item 1810 reads:

Machinery and Machine Parts, Viz: Foundry and Metal Milling.

To Atlantis it is obvious that this means "(1) foundry machine/parts or metal milling machines/parts, since there would not be a single machine for 'foundry and metal milling'."⁵ Again, Atlantis offers Item 1325 which applies to:

Glass Fiber, Viz: Including Reinforcing, Resin or Asphalt Coated Roving, Chopped Strand and Mats.

Atlantis argues that this item plainly covers "chopped strand as well as mats because "strand is often chopped for use" but "mat is not chopped."⁶ The remaining examples of Atlantis where "and" is used to mean "and/or" are:

Item 2113: Paper, Printing, Viz: Cover Text, Offset and Writing.

³ Farrell consulted with the Conference as to the proper interpretation of Item 365.

⁴ Atlantis, without mentioning the added comma in the complaint has omitted the comma when discussing Item 365 in its reply memorandum.

⁵ According to Atlantis, "foundry machines are for casting or forming metals while milling machines are for cutting and shaping." No authority is given for this proposition however.

⁶ Again no authority is cited for this proposition, although the reason offered for it is: "Strand is glass fiber thread; mat is a flat piece of woven, reived or pressed or otherwise formed glass fibers." I suppose logic and good business would dictate that once having gone to the trouble to weave, reive, press, or otherwise form glass fibers into a mat it would make little sense to then *chop* it up.

Item 70 Agricultural Implements, machinery and parts . . .
 Viz: Corn binders, Cleaners, Graders, Huskers, Mills, Pickers,
 Shellers, Shredders and Sorters.⁷

Item 987 Disposable Hospital Supplies, Viz: . . . Surgical Sup-
 plies, Paper: Disposable Masks, Gowns, Bedding, Drapes and
 Underpads.

From these examples, and some other authorities Atlantis arrives at the conclusion that the "and" in Item 365 means "or" and argues that the books in question are within the coverage of the item. In urging their respective interpretations of Item 365 Atlantis relies upon grammar and the proper or common usage of the word "and" while Farrell relies upon punctuation and the absence of a comma between the words "cut-out" and "picture."

In discussing the use of the term and/or Follett says:

And/or. Whether a lawyer can or cannot make out a case for the use of this ungraceful expression in legal documents only a lawyer is competent to say; but anyone else is entitled to the view that it has no right to intrude in ordinary prose.⁸

Whatever the case lawyers may make for the use of and/or it is clear that in this day "and" is the equivalent of "and/or" and that "and" is used in the disjunctive as well as the conjunctive. An example offered by Follett is: "A majority of the tourists come here with camping and/or fishing on their minds." According to Follett "any sensible reader" would if the stroke and the word *or* were left out still read the sentence as meaning that some camp without fishing, some fish with camping, and some do both.⁹ So were it not for the missing comma, upon which Farrell relies, this case would present little difficulty and the term "cut out picture and story books" would clearly include the tales of Big Bird, the Cookie Monster, Ernie and the other Muppets which are found in the Sesame Street Library of "story books." However, there seems to me to be an inconsistency if not a contradiction among the "authorities" when you attempt to reconcile "and" as meaning "and/

⁷ No explanation is given as to why a single machine can't both "shred" and "sort." I can only guess that counsel are relying on the order in which the various kinds of machines are listed in the item or rather the order of the functions of the last two. For if you shred the corn or whatever it is that's shredded there would appear little need to sort the shreds. However, this may be a misplaced reliance because it would seem necessary to "pick" the corn before you "husk" or "clean" it.

⁸ Follett, *Modern American Usage*, paperback, Warner Books, New York, 1974, pp. 88-89 (hereinafter Follett).

⁹ Follett, p. 89. For further evidence of the common use of and in both the conjunctive and disjunctive meaning see Strunk & White, *Elements of Style*, (2d Ed. 1972), p. 35; Sutherland, *Statutory Construction*, § 21.14 (4th Ed. 1972); and *U.S. v. Del Rio Springs, Inc.* 392 F. Supp. 226, 228 (D. Ariz. 1975).

or” and the presence or absence of a comma between the last two members of an enumerative series.¹⁰ Concerning the latter Follett says:

How to punctuate . . . enumerations is argued with more heat than is called forth by any other rhetorical problem except the split infinitive. Leaving aside a few poets and a handful of crotcheteers who want to abolish all punctuation, everybody favors the use of commas between all members up to the last two; but that is where the shooting begins. To insist that the first perform the duty of the second is rather like prescribing sand in the bearings.¹¹

Follett is four-square for the use of a comma between the last two members of an enumerative series. He rejects the “dictum” that if you have the conjunction [“and” or “or”] you don’t need the comma because that is bad reasoning. He argues that, “A conjunction is a connective device, as its name announces; whereas a mark of punctuation is nothing if not separative. And this in the face of his advocacy of the use of “and,” a conjunction, as meaning “and/or” both conjunctive and disjunctive.¹² If I may be permitted a rather long quote, I feel certain that Follett can best demonstrate the need for the missing comma:

Whatever is to be said for punctuating *a, b and c* (i.e. without a comma before *and*), it is not the *and* which replaces the missing mark. The comma, when present, separates *b* from *c*; the *and* joins *c* and *b* and (just as much) *a*—a material point commonly overlooked. It is implicit in the standard for of a series that when you write *red, white, and blue* you mean *red and white and blue*—three equal terms. The form itself is a convention for making the conjunction work between *a* and *b* though it is present only between *b* and *c*, one conjunction at the end serves for all the intervals.¹³

The danger which arises from the absent comma is the question: how many members of the series are there meant to be? According to Follett if there are four members of the series the omission of the comma will confuse the reader as to how many members of the series are intended, e.g., does the term “cut-out picture and story” mean that only books that have both cutouts and tell a story are included within the phrase? Apparently it does at least if you are not a newspaper editor or a “crotcheteer.” But what if we apply “common usage” and allow *and* to mean *and/or*? Item 365 would read: Books, Toy, Viz:

¹⁰ I am assuming that the term “cut-out picture” represents to Farrell a single member of the enumerative series comprising in their view at least (1) coloring books and (2) cut-out picture and story books.

¹¹ Follett, page 486.

¹² At this point, I should admit that in no sense of the word am I a grammarian; and as for proper punctuation I rely with embarrassing regularity upon the secretaries.

¹³ Follett, p. 486-487.

Coloring, Cut-out Picture and/or Story. If written this way, story books are clearly included whether they have cut-out pictures or not; and the absence of the comma between *Picture* and the word *and* is meaningless. As one whose every effort to grapple with the maze-like intricacies of grammar and punctuation always resulted in meeting himself coming the other way, I have probably missed one of Mr. Follett's fine or subtle distinctions which would call both for the use of *and* as *and/or* and the inclusion of a comma between the last two members of a series when the final member is preceded by *and*.

One way of reconciling the seeming contradiction could be to note that when Follett uses *and* to mean *and/or* he restricts its use to simple pairs, e.g., "camping or fishing."¹⁴ But when he talks about an enumerated series and the use of a comma the series has at least three members.¹⁵ At this point everyone, except the parties to the case, for they led us into the labyrinth, is justified in asking: Just what does all this have to do with the proper construction of a common carrier's tariff? And this suggests that it is time to turn to the principles of tariff construction to see if therein may lie a release from the horns of this seeming dilemma.

To begin with the obvious, tariffs are "but forms of words." *Inter-coastal Investigation 1935*, 1 U.S.S.B. 400. In construing these forms of words, a "fair and reasonable construction is required." *Nat. Cable & Metal Co. v. Amer. Hawaiian S.S. Co.*, 2 U.S.M.C. 470-473 (1941). However, if there is an ambiguity in the tariff it must be construed against the one making and issuing the tariff. *Sacramento-Yolo Port Dist. v. Fred V. Noon Co., Inc.*, 9 F.M.C. 551 (1966). Citations could be multiplied and "principles" could be elaborated; but they mostly deal with the construction of phrases or the meaning of technical words with virtually no exposition of the effect of punctuation upon the words as they are used in tariffs.¹⁶

Here there is no dispute as to the nature of the articles shipped. They are "story books." So we need not concern ourselves with those principles governing the use of "technical" words. *Aleutian Homes, Inc. v. Coastwise Line*, 5 F.M.B. 602 (1959). And since no one has offered any evidence that the term *story book* has by custom and usage in the trade acquired a special meaning, there is no need to accept story book in

¹⁴ However he does not say that *and* cannot mean *and/or* when used in an enumerative series of three or more members.

¹⁵ See Fowler, pp. 88-89, 485-489. Lest it be thought that I view Fowler as some sort of holy writ, I should say that I consulted Fowler's *Modern English Usage*, Oxford, 1966. This effort only brought to mind what someone, his name escapes me now, once said: "Americans and Englishmen are a people separated only by a common language."

¹⁶ I have been referred to no Commission decision dealing with the word *and* and while I have not exhaustively searched the Commission's decisions, a review of the digests failed to uncover any examples of the Commission's position on the use of *and* to mean *and/or*.

any way but its generally understood meaning. *C.S.C. Intl. v. Lykes Bros.*, 20 F.M.C. 551, 555 (1978). From all of this it would seem that we have come back to square one and found ourselves still without a way out of the maze. However, one of the hoariest principles of tariff lore may light a small lamp at the end of the tunnel.¹⁷

Farrell's case for the exclusion of "story books" without cut-outs is based upon the absence of a comma. While Farrell cites no authority for its position that the absent comma results in the exclusion of story books such as those which comprise the Sesame Street Library, it nevertheless must have relied upon a particular theory of punctuation. This is clear from Farrell's response to the complaint which concentrates on the absence of the comma:

In their complaint they state Tariff Item 365 reads "Books, Toy Viz coloring, cutout, picture and story, not school books." Tariff Item 365 actually states "Books, Toy, viz: coloring, cut-out picture and story, not school books." The tariff item does not separate cut-out books from picture and story. It applies to toy coloring or *toy cut-out picture and story books* only.

Farrell obviously feels that the absence of the comma after the word "picture" irrevocably commits the *and* as used in Item 365 to the conjunctive.¹⁸ The trouble with this proposition is that the average shipper, traffic manager, freight forwarder or person who reads the tariff should not need so intimate a familiarity with the subtler "rules" governing the use of commas in an "enumerative series"; nor should they have to concern themselves with words that can be used in both the *disjunctive* and *conjunctive* sense. In short, the potential user of the tariff is confronted with an ambiguity, i.e., is *and* used only in the conjunctive or in both the conjunctive and disjunctive? This ambiguity must be resolved in favor of the shipper, Atlantis. *Sacramento Yolo, supra*. Therefore, Item 365 is to be read as including story books whether or not they contain "cut-outs."

I suppose one final point needs to be discussed.¹⁹ Item 365 reads in part "Books, Toy viz. . . ." Thus it would seem that only *books* which are also *toys* are to be within the coverage of Item 365. But is there not something a bit unusual about the term *toy books*?

¹⁷ According to both Fowler and Follett cliches and time-worn phrases are to be avoided at all costs. However, there are some temptations that can't be resisted.

¹⁸ I have no way of knowing whether any or all of the people participating in the interpretation of Item 365 are "punctuationalists," or grammarians, or whether any of them are aware of the usage of *and* as the equivalent of *and/or*. What is clear however is that Farrell has chosen to rest its case upon a theory of punctuation, and Atlantis upon a principle of grammar.

¹⁹ See *European Trade Specialists*, Order on Remand where a third tariff description was injected into the case by the Commission.

If there is no specific commercial meaning of a term, that term must be given its ordinary meaning and one can turn to dictionary definitions as an aid. *Webster's Third International Dictionary* defines a toy as:

Something designed for amusement or diversion rather than practical use; an article for the playtime use of a child either representational . . . and intended esp. to stimulate imagination mimetic activity or manipulative skill or nonrepresentational . . . and intended esp. to encourage manual and muscular dexterity and group integration; something diminutive esp. in comparison with others in the same general class (the toy was a toy beside the ship that it guided).

A "toy" should not have "a more practical use than one chiefly for amusement." *Equality Plastics Inc., et al.* 17 F.M.C. 217, 228 (1973).²⁰

Whatever, one chooses to make of the word "practical," books do not seem to fit the definition of toys, at least as most people think of toys.²¹ *Webster* defines a book as:

1. a number of sheets of paper . . . with writing or printing on them, fastened together along one edge, usually between protective covers; literary or scientific work, anthology, etc., distinguished in length and form from a magazine, tract, etc.

Whether the volumes of the Sesame Street Library are literature would, I am sure, depend upon the particular "scholar" consulted.²² It is clear, at least to me, that as commonly used the words toys and books are not synonymous. However, the question remains whether the word "Toy" was included in Item 365 to restrict the books covered only to those containing cut-out pictures. But here again, assuming such an intention, I find an ambiguity inherent in the description. While a "book" containing "cut-out pictures" only could perhaps be called a toy, a "story book" can more readily be called "literature" and thus a "book" in commonly understood non-toy sense. What to make of a book containing both cut-out pictures and a story only further compounds the ambiguity. Since, as already noted, ambiguities in a tariff must be resolved in favor of the user or shipper, I conclude that the presence of "Toy" in Item 365 does not preclude the inclusion of the books in question in that item.

Based upon the record before me, it is my conclusion that the three shipments of books here in question were improperly classified under Item 361 "Books N.O.S." and should have been classified as "Books,

²⁰ See also, *Mego Corp. v. U.S.*, 405 F. Supp. 1088 (Cust. Ct. 1915); *New York Merchandise Co. v. U.S.*, 294 F. Supp. 971 (Cust. Ct. 1969); *U.S. v. Topp Chewing Gum, Inc.*, 440 F. 2d 1384 (CCPA 1971); and *Henry A. Wess, Inc. v. U.S.*, 434 F. Supp. 650 (Cust. Ct. 1977).

²¹ Of course, some books are written "chiefly for amusement," e.g., "comic books." But even comic books serve the "practical purpose of advancing reading skills."

²² *Webster* says literature can be "all writings in prose or verse, especially those of an imaginative or critical character without regard to their excellence. . . ."

Toy viz: coloring, cut-out picture and story, not school books" under Item 365 of the U.S. Atlantic and Gulf/Australian-New Zealand Conference Freight Tariff No. 4 F.M.C. No. 13. As a result of this improper classification, Farrell Lines, Inc., is hereby ordered to pay to Atlantis Line, Ltd., reparation in the amount of \$41,904.24 with interest at 12% from the date of payment of the overcharge.

(S) JOHN E. COGRAVE
Administrative Law Judge

FEDERAL MARITIME COMMISSION

DOCKET NO. 80-20

KUEHNE & NAGEL, INC. - INDEPENDENT OCEAN
FREIGHT FORWARDER LICENSE NO. 1162

NOTICE

October 13, 1981

Notice is given that no exceptions have been filed to the September 4, 1981 initial decision in this proceeding and the time within which the Commission could determine to review has expired. No such determination has been made and, accordingly, that decision has become administratively final.

(S) JOSEPH C. POLKING
Assistant Secretary

FEDERAL MARITIME COMMISSION

DOCKET NO. 80-20

KUEHNE & NAGEL, INC. - INDEPENDENT OCEAN FREIGHT FORWARDER LICENSE NO. 1162

An investigation was begun to determine whether respondent, Kuehne & Nagel, Inc., a licensed ocean freight forwarder, had violated various provisions of the Commission's regulations and sections 15 and 16, Initial Paragraph, Shipping Act, 1916, during the five-year period from 1975 through 1980. The conduct in question concerned alleged misconduct in various billing, paying, and recordkeeping activities, as well as possible receipt of compensation from some carriers in excess of amounts specified in the carriers' tariffs, possible obtaining of transportation for less than applicable charges, and possible unfiled agreements with the carriers in question. After many months of painstaking inspection and discovery which were not near completion, respondent and the Commission's Office of Hearing Counsel began discussions which culminated in a settlement agreement. On the basis of the record developed and applicable principles of law, it is found that:

- (1) The settlement agreement, which calls for payment of \$350,000 in lieu of penalties, plus numerous strict internal controls, audits, reports, and personnel reassignments, instituted and financed by respondent, is fair and reasonable and comports with Commission case law and regulations establishing criteria for determining the approvability of settlements.
- (2) The settlement agreement, although unprecedented in scope, size of payment, and imposition of internal controls, is commensurate with the scope and seriousness of the charges contained in the Commission's Order of Investigation and is therefore neither excessive nor too lenient. It would obtain for the Commission immediate beneficial results in place of expensive, risky litigation which would have tied up the Commission's scarce resources for many months and even possibly years. The settlement also gives due regard to respondent's financial situation, the Commission's enforcement policies, and considers factors in mitigation.
- (3) The record developed on the question of respondent's fitness to retain its license shows that respondent should be allowed to continue its operations without revocation or suspension of its license, the latter sanctions being excessive and drastic under the circumstances. Respondent has done virtually everything possible to ensure that its employees will follow applicable laws and regulations scrupulously and that it can be trusted to act responsibly. Revocation or suspension of respondent's license would jeopardize its business, the jobs of 450 employees, and the full range of services it provides for American shippers. Such drastic sanctions, under the facts of this case, would be unduly vindictive and punitive rather than remedial and would therefore depart from Commission precedent.

John P. Meade and Eliot J. Halperin for respondent Kuehne & Nagel, Inc.

John Robert Ewers, Joseph B. Slunt, Charles C. Hunter, and Janet F. Katz for the Bureau of Hearings and Field Operations, Office of Hearing Counsel.

INITIAL DECISION ¹ OF NORMAN D. KLINE,
ADMINISTRATIVE LAW JUDGE*Finalized October 13, 1981*

This is an investigation begun by the Commission's Order of Investigation and Hearing, served April 3, 1980. According to that Order, the Commission began the proceeding because information which had been obtained from two of the offices of the corporate respondent, Kuehne & Nagel, Inc., allegedly indicated possible violations of various provisions of the Commission's regulations governing the conduct of licensed freight forwarders (General Order 4, 46 C.F.R. 510) as well as possible violations of sections 15 and 16, Initial Paragraph, Shipping Act, 1916 (46 U.S.C. 814, 815). More specifically, on the basis of the initial information obtained from two of respondent's offices, the Commission expressed concern that the corporate respondent and its officers at various periods of time from 1975 through 1978 may have failed to exercise due diligence or may have imparted false information to or withheld certain information from its shipper customers in regard to certain charges, may have failed to promptly account to its shipper customers for overpayments or failed to use proper billing forms itemizing various charges, may have failed to make payments to certain persons of sums advanced by shippers, or to pay over such sums to carriers on time, may have failed to maintain records and files as required by Commission regulations, and may have failed to make books and records available to authorized Commission representatives. If any of these events in fact occurred and could be proven, they could constitute violations of six different provisions of the Commission's General Order 4, namely, sections 510.23(d), 510.23(e), 510.23(f), 510.23(j), 510.23(k), and 510.23(l).

In addition to the above possible violations of the Commission's regulations, the Commission's Order alleged that the corporate respondent and its officers may have received sums of money from ocean carriers in excess of freight forwarder compensation specified in the carriers' tariffs and if so, may have violated sections 15 and 16, Initial Paragraph, Shipping Act, 1916, if these alleged excessive payments evidenced an unfiled agreement between the corporate respondent and the carriers involved, and if these payments were passed through to shippers, thereby permitting shippers to obtain ocean transportation at less than the applicable rates and charges, or even if not passed through, still resulting in the movement of shipments at less than applicable rates and charges. Because the initial information obtained by the Commission's staff indicated possible conduct in violation of regula-

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

tions and statutory provisions, the Commission was concerned that the same activities might have been widespread throughout the corporate respondent's many offices so that respondent could be found to be unfit to retain its license. Accordingly, the Commission wanted the investigation to determine whether the various violations had occurred during the last five years and, if so, whether civil penalties should be assessed after consideration of possible mitigating factors, and whether the respondent's license should be suspended or revoked because of lack of fitness.

After the proceeding commenced on April 3, 1980, it entered into a lengthy phase of prehearing discovery and inspection consisting not only of various subpoenas, depositions, requests and rulings, but of a variety of pleadings relating to the myriad discovery and inspection efforts conducted by or sought to be conducted both by the Commission's Bureau of Hearings and Field Operations, Office of Hearing Counsel (formerly entitled Bureau of Investigation and Enforcement) and by respondent Kuehne & Nagel, Inc. (K & N). This discovery and inspection phase began to assume rather massive dimensions because of the mammoth scope of the Commission's Order, the number of issues, the five-year time period framed therein, and the size of the corporate respondent which has many offices throughout the country. Finally, after the parties had been engaged in approximately eight months' discovery efforts with no end in sight to the prehearing phase and with numerous discovery motions pending, the parties advised that they had begun to discuss the possibility of settlement in lieu of what promised to be months and even years of continued discovery and litigation. (See *Discovery Proceedings Stayed to Permit Settlement Discussions*, December 23, 1980.)² Because of the strong policy followed by courts

² The following brief discussion should indicate how comprehensive these discovery efforts were. Immediately upon service of the Commission's Order on April 3, 1980, Hearing Counsel served subpoenas duces tecum on seven offices of K & N throughout the country, asking for production of what Hearing Counsel characterize as "tens of thousands" of so-called "blue cards." K & N requested permission for adequate time to gather these materials and make them available during the month of April, which was done. These materials were inspected and analyzed by Commission investigators. Thereafter, both Hearing Counsel and K & N served additional lengthy and detailed discovery requests. Pursuant to my rulings, K & N's discovery was held in abeyance to permit Hearing Counsel to conclude their discovery, although Hearing Counsel did produce a large quantity of material in response to K & N's initial discovery requests. Subsequently K & N produced at a number of locations throughout the country in excess of one thousand shipping files in addition to a variety of other operational and financial materials. Furthermore, eight officers and employees of K & N were deposed, although six of them declined to respond to certain questions as individuals asserting their constitutional rights under the Fifth Amendment. Thereafter, Hearing Counsel served a second round of interrogatories and requests for production of documents. In response, K & N produced thousands of additional "blue cards" together with a quantity of other requested materials. Hearing Counsel also deposed two additional employees of K & N whom K & N furnished as spokespersons for the corporation. Although K & N produced a large volume of material in response to discovery requests, K & N also raised a variety of objections to a significant percentage of other requests, leading to the filing of a number of motions by Hearing Counsel seeking compulsory orders. At that stage the parties decided to explore the possibility of settlement.

and this Commission which favors settlement in lieu of costly and lengthy formal hearings, I stayed further discovery efforts to permit the parties to begin their settlement negotiations, ordering them to furnish me with periodic status reports of their progress. Despite diligence on both sides to complete negotiations and compile the necessary record and documents on which a just and reasonable settlement could be supported, the size of the case and of respondent's operations and the need to analyze additional materials exchanged by the parties during the negotiations consumed several months' time. Finally, on June 4, 1981, the parties submitted their preliminary draft of a settlement, and on July 14, 1981, the parties were able to submit their completed product consisting of a proposed settlement together with numerous supporting materials consisting of legal memoranda and affidavits of various Commission investigators and of several officers of respondent corporation, and miscellaneous exhibits. It is this package which is before me now. My task is to determine first, whether the proposed settlement should be approved under applicable standards of law and second, whether the record shows that respondent is unfit to retain its license. Both Hearing Counsel and respondent urge approval of the proposed settlement. Moreover, on the basis of the record developed showing certain reforms and internal controls which respondent has and will implement to ensure complete compliance with the Commission's regulations and other applicable provisions of law, Hearing Counsel as well as respondent urge me to find that respondent is fit to continue to be licensed as an independent ocean freight forwarder. As I will show, I am convinced by the record developed and by the persuasive arguments of both parties, that the settlement is just and reasonable and that respondent is fit to retain its license.

DESCRIPTION OF THE TERMS OF THE SETTLEMENT

The proposed settlement consists of a substantial payment of money (\$350,000) in lieu of assessment of civil penalties together with a series of detailed undertakings by K & N to prevent recurrence of the type of practices questioned by the Commission's Order. The scope and depth of K & N's undertakings designed to ensure against recurrence of questionable practices and to demonstrate that K & N seriously intends to enforce rigid compliance with all Commission regulations and statutory standards governing the conduct of licensed freight forwarders may well be unprecedented. In brief, the settlement and the related promissory note and implementing documents, which are all attached as an appendix to this decision, provide for the following: ³

³ The brief description of the settlement agreement which follows is only an outline and is not all-inclusive. For a description of the entire agreement and its implementing provisions and documents, the reader should consult the complete text shown in the appendix.

1. K & N will pay the sum of \$350,000 in settlement of claims for civil penalties in installments over a period of four years.

2. K & N has terminated the practices in question and has informed all its owners, officers, and employees of itself and its affiliated companies in great detail of the strict company policy to follow the Commission's regulations scrupulously. Such notices will be sent in writing and require an acknowledgment by the various persons receiving them.

3. K & N has required each of its officers and the qualifying officer of each of its branch offices to execute a statement under oath that he has read and understood the settlement agreement and will abide by all of its terms and conditions. For a period of three years following approval of the settlement agreement, all new owners, officers and qualifying branch officers shall submit similar statements.

4. For a period of three years following approval of the agreement, K & N will, at its own expense, permit an independent audit of all its books and records located in the United States. This audit will be performed by Mr. Charles Clow, formerly Chief of the Commission's Office of Freight Forwarders. Mr. Clow will be authorized to audit K & N's books and records for the purpose of detecting violations of the Commission's regulations and relevant laws and will conduct the audit whenever Mr. Clow chooses but no less than once every twelve months with or without prior notice to K & N. In case of violations, K & N will pay any injured shipper or other person twice any improperly retained monies. Mr. Clow will report the results of all audits to the Commission. Any findings by Mr. Clow or monetary payments made pursuant to this agreement will not be in derogation of any Commission authority or obligations under the relevant regulations and law.

5. K & N will keep relevant documents relating to the practices questioned in the Commission's Order available to the Commission on request at its New York office and each of its branch offices for a period of three years following approval of the agreement.

6. K & N will prohibit certain individuals from acting as officers or directors or in any other policy or managerial capacity for the corporation for one year.

APPROVABILITY OF THE PROPOSED SETTLEMENT

Both respondent and Hearing Counsel strongly urge me to find that the proposed settlement is just and reasonable and should be approved, as I have noted earlier. Respondent points out that continuance of litigation would entail enormous expenditures of time and money as seen by the lengthy history of discovery which had not been near conclusion after eight months when the parties began to discuss the possibility of settlement. Respondent also points out the many unique features of the settlement agreement which will ensure the Commission and the public that K & N, whatever might have happened in the past,

is firmly committed to rigid enforcement of all pertinent Commission regulations and provisions of law governing the conduct of licensed ocean freight forwarders. Particularly significant is respondent's willingness to undertake an independent continuing audit of its books and records, an undertaking which respondent proposed during settlement negotiations with Hearing Counsel. This, argues respondent, demonstrates respondent's good faith in trying to cooperate with the Commission not only in bringing expensive litigation to a conclusion but in showing the seriousness with which respondent views the matters under investigation and its firm conviction that no such practices will recur. Respondent notes, furthermore, that the person conducting the audit will be Mr. Charles Clow, a person who has had wide experience in regulating forwarders, who has been Chief of the Commission's Office of Freight Forwarders, and who will enjoy complete independence in auditing respondent's books and records and in making findings and reporting to the Commission. Not only will K & N bear the expenses of Mr. Clow's audits, but it has also obligated itself to pay shippers twice any amount found to have been improperly retained if Mr. Clow should discover any improper withholdings. Thus, K & N has gone beyond previous settlement agreements in devising effective deterrents as well as in terminating all the questionable practices mentioned in the Commission's Order, has done these things at considerable cost to itself, and, by the terms of the agreement, has in no way precluded the Commission from imposing additional penalties if any of the practices do in fact recur notwithstanding K & N's agreement voluntarily to compensate injured shippers or other persons. As K & N states in urging approval of these extensive undertakings:

One of the major motivating factors for Kuehne & Nagel in settling the case and incorporating into its settlement the elaborate safeguards against any possible future violations was to do everything possible to demonstrate to the Commission the ironclad policy of the present management against any future violations. This is not only because management aims to eliminate possible future violations, but because management wishes to make it abundantly clear that the company is fit to act as an FMC licensed forwarder. (Respondent's Memorandum in Support of Settlement, p. 11.)

After arguing that the various elaborate safeguards erected in the settlement agreement will ensure rigid compliance with law, respondent proceeds to apply the criteria established by the Commission's regulations and case law which, according to respondent, demonstrate the approvability of the settlement. K & N cites ample case law holding that settlements are favored by courts and by this Commission. More specifically, K & N argues that there are four particular criteria established by the Commission's regulations which are especially applicable

in this case to show that the settlement should be approved. These are respondent's ability to pay (4 C.F.R. 103.2); litigative possibilities (4 C.F.R. 103.3); cost of collecting the claim (4 C.F.R. 103.4); and effect on enforcement policy (4 C.F.R. 103.5). In addition, K & N points out a "combination of other reasons" (4 C.F.R. 103.7) and the Commission's direction in its Order of Investigation and Hearing (p. 9) that instructs the parties and myself to determine possible penalties "taking into consideration factors in possible mitigation." Under these various criteria, K & N point out respondent's limited ability to pay based upon its restricted financial situation, extensive areas of factual dispute and legal uncertainties affecting Hearing Counsel's case, additional substantial expense to the Commission that would be involved in developing more evidence and trying the case in a case of this size, the deterrent effects stemming from the size of the settlement payment and the numerous strict procedures instituted by or to be instituted by K & N to ensure against recurrence of the questionable practices. Finally, K & N cites instances of its cooperation with the Commission's staff and with Hearing Counsel in disclosing information, placing limitations on certain employees, and the considerable expense which it has already borne in defending itself, not to mention the harm to its business relationships caused by the publicity of the case, and finally, the innovative deterrent/compliance system which it has proffered, all as evidence of mitigating factors to be considered.

Hearing Counsel urge approval of the settlement agreement for many of the same reasons espoused by K & N. Hearing Counsel have thoroughly researched case law and legislative history to the Administrative Procedure Act (APA), especially section 5, 5 U.S.C. 554, governing offers of settlement. Both this research and the great multitude of Commission decisions approving settlements under virtually every operative section of the Shipping Act, 1916, fully support Hearing Counsel's contention that there is a very strong policy favoring settlements in lieu of needless expensive litigation and that the Commission has been following this policy frequently, especially in most recent years. Hearing Counsel explain that they have developed information which they believe would show that K & N engaged in conduct which the Bureau believes is violative of the various statutory and regulatory provisions cited by the Commission's Order. Hearing Counsel state that certain officers or employees of K & N may have destroyed pertinent shipping documents or attempted to mislead Commission investigators. From certain records obtained from K & N, furthermore, Hearing Counsel state that K & N has "acknowledged that during the period April 1975 through April 1980" at various offices, K & N engaged in numerous instances of inflating, marking up, or otherwise incorrectly computing certain charges, and that these instances were shown in only a sampling of respondent's records. Hearing Counsel believe that these practices

are "clearly violative of the Commission's rules and regulations" and were done with the knowledge of "high level corporate officers and qualifying officers," that the conduct was "willful," and that it showed a breach of respondent's fiduciary duty to its shipper principals. (Hearing Counsel's Memorandum in Support of Proposed Settlement, pp. 16-20.) Hearing Counsel also cite materials that they believe would show that K & N also engaged in conduct violative of sections 15 and 16, Initial Paragraph, Shipping Act, 1916, in connection with so-called "excess compensation" which Hearing Counsel state that K & N admitted receiving from three oceangoing common carriers prior to 1979. Although the question of whether receipt of "excess compensation" (compensation paid by carriers to forwarders in excess of the amounts specified in carriers' tariffs) by licensed forwarders is a violation of law has, as Hearing Counsel concede, not been definitively decided, Hearing Counsel believe such practice to evidence violation not only of section 16 but of section 15 insofar as such transactions may reveal special agreements with the carriers involved. Finally, Hearing Counsel state that the type of evidence being developed shows that K & N has admitted to practices which are also violative of section 16, Initial Paragraph, involving the sharing of revenues with a foreign affiliate of K & N in Bremen, Germany, and some instances of cargo misdescription and misdeclaration of weight.

Having discussed the type of factual materials which Hearing Counsel would be prepared to introduce as evidence if this case had to proceed to trial and the contentions which Hearing Counsel would make as to the legal conclusions to be drawn, Hearing Counsel agree that formal hearing (i.e., trial) with all of its attendant risks and expenses should be avoided because a just and reasonable settlement has been reached which serves salutary purposes. Hearing Counsel specifically acknowledge that respondent has not admitted that any of the preceding practices which occurred constitute violations of law. Hearing Counsel note correctly that I do not have to make findings of violations in order to approve a proffered settlement under the Commission's regulations and relevant case law. (Hearing Counsel's Memorandum, p. 12; p. 7 n. 5.) Hearing Counsel also correctly point out that because the parties have agreed upon a settlement, K & N has not put forth any defenses it might have to the various allegations and charges. Rather K & N has spent its time formulating a settlement and instituting or proposing various internal controls to prevent recurrence of the questioned practices. Should the settlement be rejected by the Commission, however, Hearing Counsel quite properly state that "fundamental notions of fairness and established considerations of due process" require that K & N be given the opportunity of presenting defenses. (Hearing Counsel's Memorandum, p. 7 n. 5.) Having said all of this, however, Hearing Counsel explain in some detail why the proposed

settlement meets the various criteria established by the Commission's regulations and previous decisions and should therefore be approved in much the same way as did K & N, as discussed above. Hearing Counsel, in urging approval of the settlement, commence by stating that "[t]he Bureau believes that the offer of settlement submitted by Kuehne & Nagel serves the public interest and is fair to Kuehne & Nagel." (Hearing Counsel's Memorandum, p. 24.) They state that the proposed settlement "is within a zone of reasonableness and is neither an attempt by the Bureau to extract an exorbitant amount of money nor an excessively strict standard of compliance without a strong basis in fact or a 'give-away' in which the government's case is clearly shown to be worth much more than has been agreed to." (Memorandum cited, p. 24.) They cite the fact that the \$350,000 which K & N has agreed to pay in settlement is the largest amount ever imposed by the Commission upon a freight forwarder and that the controls developed by K & N and incorporated into the proposed settlement are "unique, thorough, and innovative" and "may serve as a standard for the forwarding industry and prove to be a significant aid to the Commission in its regulation of the industry." (Memorandum cited, p. 24 and n. 12.) Hearing Counsel persuasively explain that the unique provisions in the settlement agreement will serve the Commission's enforcement policy in terms of deterrence and of securing compliance under 4 C.F.R. 103.5; that the settlement saves the Commission considerable money which would otherwise be spent in proceeding with continued discovery, formal hearings, and the usual subsequent phases of litigation in what Hearing Counsel describe as a "potentially immense investigation" (Memorandum cited, p. 29) thus satisfying 4 C.F.R. 103.4; that there are unsettled questions of law regarding the significance of the receipt of excess compensation by forwarders, and that there are obstacles which will severely hamper Hearing Counsel's ability to obtain and develop necessary evidence because of the lack of corporate records and constitutional defenses of certain individual employees who have shown reluctance to testify, thus showing the risks of continued litigation, under 4 C.F.R. 103.3; and that K & N's recent unfavorable financial situation demonstrates that any payment in excess of \$350,000 would, in effect, jeopardize the continuation of its business, a consideration set forth in 4 C.F.R. 103.2, as well as in previous Commission decisions. I find that these statements of both K & N and Hearing Counsel fully comport with the principles of law applicable to settlements and support their contentions that the settlement is just and reasonable and ought to be approved. A brief explanation of the law of settlements will demonstrate the validity of this finding.

HOW THE PROPOSED SETTLEMENT AGREEMENT IS SUPPORTED BY GOVERNING PRINCIPLES OF LAW

There is so much case law as well as statutory law which emphasizes that settlements are to be encouraged and that every effort should be made to find them correct and fair that it is difficult to know where to begin any discussion on this point. Perhaps to emphasize how old this particular doctrine is and how it has found support throughout the decades, I can quote Abraham Lincoln on the subject. He is often quoted in his advice to lawyers as follows:

Discourage litigation. Persuade your neighbors to compromise whenever you can. Point out to them how the nominal winner is often a real loser - in fees, expenses and waste of time. As a peacemaker, the lawyer has a superior opportunity of being a good man.⁴

Both Hearing Counsel and respondent, in their memoranda urging approval of the proposed settlement agreement, cite a vast multitude of Commission and other cases which reiterate the same theme, that settlements are invaluable tools which save time and money of litigants as well as of courts and administrative agencies, that they are salutary and beneficial, and that they are especially important to administrative agencies. In this last regard, the courts have urged agencies to follow the provisions of the Administrative Procedure Act (5 U.S.C. 554(c)) by making full use of the settlement technique which the Congress expected them to utilize when enacting the APA. In *Cities of Lexington, Georgetown, Winchester, Kentucky v. Federal Power Commission*, 295 F.2d 109, 121 (4th Cir. 1961), a case cited by Hearing Counsel, the court emphatically advised the agency in question that it was not necessary to continue with hearings and litigation merely because the agency had commenced a formal proceeding if the parties had reached a settlement. In this regard, the court stated:

No court of law would tolerate for a moment the idea that it would be obliged to try a case that had been assigned for hearing notwithstanding the fact that the parties had reached a settlement of the controversy. Much less should such a contention be considered . . . with reference to the ruling of an administrative tribunal where liberality of procedure is essential in the interest of the dispatch of business.

In other cases courts have given similar advice to agencies. For example, in *Pennsylvania Gas and Water Co. v. Federal Power Commis-*

⁴ This passage was quoted in *Clarion Corp. v. American Home Products Corp.*, 494 F.2d 860, 863 (7th Cir. 1974) (footnote citation omitted). That court also stated:

Compromises of disputed claims are favored by the courts. . . . Former Canon 8 of the Canons of Professional Ethics provided that "[w]henver the controversy will admit of fair adjustment, the client should be advised to avoid or to end the litigation." *Id.* (footnote citation omitted).

tion, 463 F.2d 1242, 1247 (D.C. Cir. 1972), the court affirmed the right of an agency to approve a settlement and terminate its proceeding even though some parties did not agree. The court provided this advice:

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

See also *Placid Oil Company v. Federal Power Commission*, 483 F.2d 880, 893 (5th Cir. 1973), affirmed, 417 U.S. 283 (1974).

Recently, in another case involving approvability of a settlement in a freight forwarder case, *Behring International, Inc. - Independent Ocean Freight Forwarder License No. 910*, 23 F.M.C. 973, the Commission approved the proposed settlement, found the licensee fit to retain its license, and described the principles and policies favoring settlements in some detail with reference to Commission regulations which had implemented both the APA and Public Law 96-25, which, among other things, amended section 32 of the Shipping Act, 1916, to authorize the Commission to assess civil penalties. In its discussion in *Behring*, 23 F.M.C. at 981-986, the Commission quoted the basic principle favoring settlements and presuming them to be fair, correct, and valid. It cited the relevant provisions of the APA cited above and the Commission's implementing regulations, Rules 91 and 94, 46 C.F.R. 502.91 and 502.94, as well as the *Pennsylvania Gas and Water Co.* case, cited above, and its own decisions, including, among others, *Old Ben Coal Company v. Sea-Land Service, Inc.*, 21 F.M.C. 506, 511-515 (1978), and *Del Monte Corporation v. Matson Navigation Company*, 22 F.M.C. 365, 368-369 (1979). These latter two cases were cited to show how advantageous to litigants, to the courts and to judicial administration were settlements and how the Commission has approved and endorsed settlements in virtually every type of case arising under the Shipping Act, 1916, without the need to proceed to full hearings and decisions or to make findings of violations of law.⁵ The Commission described the limited function which its judges and itself would perform when passing on the reasonableness of proposed settlements, making sure that they were freely entered into and that they did not contravene any policy or provision of law. However, the Commission indicated that it

⁵ The discussion in *Old Ben Coal Co. v. Sea-Land Service, Inc.*, cited above, is enlightening on the point that "[i]t is not necessary for respondents to admit to violations of law for purposes of offering settlements" and in many Commission decisions approving settlements cited in that decision there were no such admissions. The decision emphasized the fact that to require respondents to admit to violations as conditions to accepting their offers of settlement or to use their factual admissions made in seeking settlement against them by finding violations is an objectionable practice forbidden by the Commission's rules of procedure as well as case law. See 21 F.M.C. at 514, n. 7. See also Federal Rule of Evidence, 408, 28 U.S.C.A.

would follow the traditional view that it would approve settlements to avoid wasteful litigation if the parties had appeared to make a sound economical judgment to the effect that the settlement would be less costly and more beneficial than continued litigation, even if one side or the other were to prevail completely after full litigation.

Since the present proceeding is governed by Public Law 96-25 and its implementing regulations, General Order No. 30, 46 C.F.R. 505, concerning compromise and settlement of penalties, the Commission's statements in *Behring* are especially relevant to this case. In regard to that new law and the regulation cited, the Commission remarked that it "did not intend to frustrate settlements in its formal proceedings" when it enacted General Order No. 30 and that it intended that if a settlement were approved, it would be placed in the initial and final decisions "in lieu of making findings of violations." The Commission discussed the criteria to be employed when determining reasonableness of settlements, among which are those cited above which are set forth in 4 C.F.R. 101-105, namely, respondent's ability to pay (4 C.F.R. 103.2); litigative possibilities (4 C.F.R. 103.3); cost of collecting the claim (4 C.F.R. 103.4); effect on enforcement policy, i.e., deterrent effect (4 C.F.R. 103.5); and settlement for a combination of these stated reasons (4 C.F.R. 103.7). This was not intended to be an exclusive list of criteria. For example, the Commission also stated that it would consider specific mitigating factors when passing upon penalty settlements, such as a respondent's history of good behavior, its cooperation with the Commission's staff, and its prompt remedial action. Of course, in this very case, the Commission's Order of Investigation and Hearing directed the parties and myself to consider "factors in possible mitigation. . . ." (Order, p. 9.)

In the present case my first task is to determine whether, as Hearing Counsel and respondent both argue, the settlement meets the various criteria enumerated above. More specifically, I must also determine whether the particular provisions of the settlement fall within a zone of reasonableness, i.e., whether requiring payment of \$350,000 and imposing strict auditing and other controls is too lenient judging by the apparent probable worth of the government's case or whether it is too onerous judging by the same standard. This was one of the considerations which led the Commission to conclude that the settlement in *Behring* was just and reasonable. See *Behring*, cited above, 23 F.M.C. 988 ("It is apparent that the amount agreed upon is well within a zone of reasonableness and constitutes neither an attempt to extract an exorbitant amount of money from a respondent without necessary basis in facts nor a 'giveaway' in which the government's case is clearly shown to be worth much more than it has agreed to receive"). The idea that a presiding judge, the Commission, or a court will exercise certain functions when reviewing settlements under established criteria, however

limited by the strong policy favoring settlements, has been established in case law. See discussion in *Old Ben*, cited above, 21 F.M.C. at 513-514. A very important consideration in determining the reasonableness of a settlement, as both case law and the Commission's regulations cited above show, is the factor of weighing the value of the government's or complainant's case with due regard to litigative risks. Thus, as one court stated:

Approval should be given if the settlement offered is fair, reasonable, and adequate. These terms are general and cannot be measured scientifically. The most important factor is the strength of the case for plaintiffs on the merits, balanced against the amount offered in settlement. This factor is sometimes referred to as the likelihood of success. The Supreme Court directs the judge to reach "an intelligent and objective opinion of the probabilities of ultimate success should the claim be litigated" and to "form an educated estimate of the complexity, expense, and likely duration of such litigation . . . and all other factors relevant to a full and fair assessment of the wisdom of the proposed compromise." *State of West Virginia v. Chas. Pfizer Co.*, 440 F.2d 1079, 1085 (2d Cir. 1971), cited in *Old Ben Coal Co. v. Sea-Land Service, Inc.*, 21 F.M.C. at 513.

To similar effect see the recent decision of the Supreme Court in *Carson v. American Brands, Inc.*, 450 U.S. 79, 88, 67 L.Ed.2d 59, 67 (1981). In that case the Supreme Court reversed lower courts which had refused to approve a settlement, allowing an unusual interlocutory appeal because rejection of the settlement by the lower courts caused the parties irreparable harm by forcing them to forego their agreement and give up the immediate benefits that they had obtained from the settlement agreement in favor of costly litigation. The Court stated, among other things, that "Courts judge the fairness of a proposed compromise by weighing the plaintiff's likelihood of success on the merits against the amount and form of the relief offered in the settlement." 67 L.Ed.2d at 67 n. 14. (The Court also stated that the courts, in reviewing settlements, "do not decide the merits of the case or resolve unsettled legal questions." *Id.*)

WHY THIS PARTICULAR SETTLEMENT WARRANTS APPROVAL

When the proposed settlement is considered in light of the above factors, it is readily apparent that both Hearing Counsel and respondent are correct in urging its approval. In brief, Hearing Counsel, on behalf of the Commission, has obtained immediate concrete results by means of the settlement which are justified by the scope of the case and the efforts already exerted by Hearing Counsel and the staff, and are

avoiding the risks and great expense of continued lengthy litigation. Respondent has also avoided the great costs which it would have had to absorb if it were required to mount its defense in formal trial-type hearings added to the huge costs already borne in attorney's and other litigation fees and costs. Under the terms of the agreement, as described above, Hearing Counsel have obtained agreement that respondents will ultimately pay the Commission an unprecedented sum of \$350,000 in settlement of penalty claims, will institute unprecedented audits and internal controls, and will even reassign certain key personnel to ensure strict compliance with the law. All these things will happen if the Commission approves the proffered settlement agreement. If the Commission chooses to reject the settlement, however, these immediate benefits are lost and in their place the Commission must face up to the fact that its limited resources will be tied up in lengthy formal litigation which, judging from the scope of the case (a five-year investigation of 15 offices of K & N) will consume at least another year's time before the formal evidentiary record can be compiled. Three attorneys in the Office of Hearing Counsel have already been working on this case together with at least seven Commission investigators. Massive amounts of documents have already been obtained from respondent's offices throughout the country and many more would have to be procured, assuming they were still in existence. A half dozen or so discovery motions are still pending before me. If the case were to continue into litigation, these and probably more motions would have to be decided and District Court intervention for enforcement purposes is quite possible. Although thousands of documents have already been scrutinized and ten employees of respondent have been deposed, the Commission's Order of Investigation and Hearing frames 15 or more issues covering five years' time involving the many offices of K & N scattered throughout the country. Here, continued litigation would tie up the present Commission personnel assigned to the case and perhaps many more people for at least another year. Although discovery began immediately with the issuance of the Commission's Order in April 1980, eight months later, when settlement discussions had begun and thousands of materials had been assembled, it was obvious that Hearing Counsel were still far from being ready to proceed into formal hearings with all of their evidence. (See Hearing Counsel's Memorandum, p. 30.) In short, although much has been done to gather evidence through the efforts of many members of the Commission's legal and investigatory staff, much more remains to be done if the literal commandment of the Commission's Order to conduct such a massive investigation must be followed despite the fact that a fair and reasonable settlement has been achieved. It indeed seems foolhardy to commit the limited resources of the Commission to such lengthy litigation with ensuing costs and uncertain results when immediate benefits can be achieved by approving the

proffered settlement. As the court said in *Cities of Lexington, Georgetown, Winchester, Kentucky v. Federal Power Commission*, 295 F.2d at 121, in a quotation I repeat:

No court of law would tolerate for a moment the idea that it would be obliged to try a case that had been assigned for hearing notwithstanding the fact that the parties had reached a settlement of the controversy. Much less should such a contention be considered . . . with reference to the ruling of an administrative tribunal where liberality of procedure is essential in the interest of the dispatch of business.

True, this is a Commission investigation and the Commission obviously has the last word on the question of whether it wishes to continue with its investigations and commit its resources to develop the necessary lengthy records in massive investigations. In a recent ruling in Docket No. 80-12, *Dart Containerline Company, Ltd. Possible Violations of Section 16 Second Paragraph and 18(b)(3), Shipping Act, 1916*, Order of Remand, August 18, 1981, 24 F.M.C. 102, the Commission stated that it was unwilling to discontinue the investigation, indicating that additional evidence was readily available. However, the present case is vastly different. In this case Hearing Counsel and staff investigators have already expended much time and effort to develop an evidentiary record and have amassed considerable materials in their endeavors. But much more evidence would have to be uncovered and developed because of the enormous scope of the Commission's Order and it is not clear that such evidence is readily available or that it even still exists among the corporate records. There are, furthermore, constitutional problems concerning certain individual witnesses in this case. In brief, Hearing Counsel have utilized discovery techniques and other staff resources to uncover evidence and have developed a sufficient body of evidentiary materials which support the conclusion that it is indeed economically prudent to terminate litigation at this stage of the proceeding and to accept the benefits of a carefully negotiated settlement agreement. However, rejection of the settlement agreement would, as Hearing Counsel state, "consume vast amounts of the Commission's resources," tying up Commission attorneys and "investigators from all of the Commission's field offices." (Hearing Counsel's Memorandum, p. 30.) I therefore agree with the statements of Hearing Counsel as follows:

The Bureau submits that the adoption of the proposed settlement would serve to conserve the vast amount of time and expense that would otherwise be expended by the Commission in litigating this case. In that the Commission's resources, both in terms of funds and staff, are limited, they should be allocated so as to produce the optimum public benefit. The Bureau believes that due to the measures Kuehne & Nagel has agreed

to implement as part of its offer of settlement, the public interest would be well served by the proposed settlement. Therefore, it is the Bureau's position that the resources that would otherwise be consumed in litigating this case would be better utilized in other regulatory matters. (Hearing Counsel's Memorandum, pp. 30-31.)

As indicated above, I am convinced that it is sound and most prudent for the Commission to approve the proffered settlement agreement under the simple proposition that the Commission would save considerable time and money and would achieve immediate results which are consistent with its own budgetary interests as well as protective of the public interest. In so doing, the Commission would be neither surrendering a good case for a pittance nor exacting an exorbitant penalty from respondent. That is because the evidentiary materials already assembled by Hearing Counsel indicate a good possibility that the variety of violations of law specified in the Commission's Order can be proved. As I discussed above, Hearing Counsel have assembled evidentiary materials from respondent's own records and from other sources which appear to show that K & N engaged in numerous instances of inflating and otherwise incorrectly billing their clients and of receiving "excess compensation" from three carriers, and believe these materials show that K & N was acting pursuant to an unfiled section 15 agreement with certain carriers and was obtaining transportation in some instances for less than applicable rates and charges in violation of section 16. Hearing Counsel also apparently are prepared to prove that these various objectionable activities occurred at various offices of respondent at various times during the period April 1975 through April 1980 and that they occurred with the knowledge of highlevel corporate officers of respondent. Hearing Counsel also believe they have evidence of certain obstructive behavior of certain employees of respondent concerning the present investigation. There are, of course, possible defenses which K & N would assert if the case proceeded to trial at some time far in the future after Hearing Counsel and respondent had fully utilized all of their discovery rights. For example, the question of whether receipt of "excess compensation" by a licensed forwarder was unlawful has not been definitively decided nor has it ever been found, as far as I am aware, that a section 15 agreement existed when forwarders received "excess compensation" from carriers. My point, of course, is that Hearing Counsel seem able ultimately to put on a strong case, that fact shows that the payment of \$350,000 and strict internal controls required by the settlement agreement are not unduly exorbitant or onerous, and Hearing Counsel are not throwing away a good case. On the other hand, if full-blown trial is had and K & N presents its various legal and factual defenses, there is certainly a risk that Hearing Counsel will not be able to prove any or all of the violations and may not be

able to justify the assessment of \$350,000 in penalties or the imposition of the strict controls and audits which respondent will voluntarily institute upon approval of the settlement agreement. Finally, it should be noted that it is hard to conceive of what more the Commission could accomplish by continuing formal hearings looking to penalties and remedial orders than would already be accomplished by approval of the settlement agreement. The many stringent internal controls, audits, and reporting requirements, and even reassignment of certain key personnel which respondent will implement if the settlement agreement is approved are already unprecedented in scope. One could hardly expect a formal order after a lengthy trial to go beyond these measures. As to the payment of \$350,000 in settlement of penalty claims which K & N will make under the terms of the settlement agreement, the evidence of record shows that this amount is already at the limit of what the corporation can afford to expend without throwing its financial situation into precariousness. Therefore, a formal assessment order following lengthy proceedings cannot reasonably be expected to exceed what has already been agreed to by respondent in the settlement package. This discussion again illustrates the imprudence of rejecting such a settlement in favor of committing the Commission's resources to many more months of staff investigation and formal trial-type hearings with attendant costs of and risks of such litigation.

The above discussion demonstrates that the settlement agreement comports with at least three of the criteria set forth in the Commission's regulations (General Order 30 revised, 46 C.F.R. 505.1, incorporating 4 C.F.R. 103). See *Behring International, Inc.*, cited above, 23 F.M.C. at 986. These are litigative possibilities (4 C.F.R. 103.3); cost of collecting the claim (4 C.F.R. 103.4); and respondent's inability to pay (4 C.F.R. 103.2).⁶ Although Hearing Counsel's case appears to be potentially strong, there are possible legal and factual defenses, the cost of committing the Commission's limited resources to full litigation in

⁶ In pertinent part the regulations describing the criteria of litigative possibilities, cost of collecting the claim, and respondent's inability to pay are as follows respectively:

A claim may be compromised pursuant to this part if there is a real doubt concerning the Government's ability to prove its case in court for the full amount claimed either because of the legal issues involved or a bona fide dispute as to the facts. The amount accepted in compromise in such cases should fairly reflect the probability of prevailing on the legal question involved, the probabilities with respect to full or partial recovery of a judgment having due regard to the availability of witnesses and other evidentiary support for the Government claim, and related pragmatic considerations. . . . (4 C.F.R. 103.3.)

A claim may be compromised pursuant to this part if the cost of collecting the claim does not justify the enforced collection of the full amount. The amount accepted in compromise in such cases may reflect an appropriate discount for the administrative and litigative costs of collection having regard for the time which it will take to effect collection. . . . (4 C.F.R. 103.4.)

A claim may be compromised pursuant to this part if the Government cannot collect the full amount because of (a) the debtor's inability to pay the full amount within a reasonable time. . . . (4 C.F.R. 103.2.)

this one huge case ought to be saved if possible by accepting respondent's agreement to pay substantial sums of money and to institute strict controls, and respondent's marginally profitable or recently unprofitable history illustrates that penalty payments in excess of the \$350,000 agreed to in the settlement are not very realistic. Hearing Counsel quite properly point out that pursuit of additional sums of money beyond the agreed-upon amount to something approaching the statutory maximum would be "draconian," not remedial, and would probably serve to drive respondent out of business. (Hearing Counsel's Memorandum, p. 34.) Moreover, such a vindictive, punitive expedition without regard to respondent's inability to pay would depart from Commission precedent in previous forwarder cases when respondents' precarious financial situations and inability to pay were given due consideration. *See, e.g., Emmett I. Sindik - Freight Forwarder License Application*, 23 F.M.C. 731; *Billie Ione Crtalic et al. - Possible Violations of Section 44(a)*, 23 F.M.C. 565.

Another important criterion set forth in the Commission's regulations which the proposed settlement agreement satisfies is that relating to the Commission's enforcement policy, i.e., aid to this policy because of the deterrent effect and ensurance of compliance with law which the settlement offers. In pertinent part this regulation states:

Statutory penalties . . . established as an aid to enforcement and to compel compliance may be compromised . . . if the agency's enforcement policy in terms of deterrence and securing compliance, both present and future, will be adequately served by acceptance of the sum to be agreed upon. (4 C.F.R. 103.5.)

It is clear that the proposed settlement will have a deterrent effect and will ensure compliance both by K & N and generally by the forwarding industry as well. The settlement payment is the largest amount to be collected from a forwarder, respondent has terminated the questionable practices, and the measures to be instituted by K & N to prevent recurrence are innovative and unprecedented. Under the terms of the settlement, K & N will do much more than merely notify its employees of proper conduct and modify its procedures. It will undertake at its own expense to have all its books and records audited at least annually for three years by an independent expert in Commission freight forwarder regulation, imposes fines on itself in case the auditor uncovers irregularities, requires reports to be made to the Commission in case the Commission wishes to take further action, and it will require all of its officers to submit sworn affidavits attesting to their business conduct during the preceding year under criminal penalties for false statements. It will even bar certain officers from policy-making and management positions for a period of one year. All of this will be done under the proposed agreement apart from K & N's own

program begun in 1977 to identify and eliminate possible violations of law. Again, it is hard to imagine more stringent controls and devices which could be imposed upon K & N as a result of formal orders emanating from the conclusion of a lengthy formal hearing process, even assuming that all of the alleged violations of law could be proven and that there were no valid defenses to any of them. As far as the specific amount of payment in settlement of the claims is concerned (\$350,000), not only is it apparently the highest ever to be collected from a forwarder, but there is evidence showing that it will eradicate any possibility that K & N has reaped any financial benefit from its alleged misconduct. Whatever the amount of income derived by K & N from the practices in question was, the \$350,000 payment plus the already expended \$200,000 in legal fees in this case, plus the payment of corporate income taxes on such income would appear to remove any economic benefit from the practices in question. Added to these expenses are the additional costs to K & N stemming from publicity of this investigation, which evidence of record shows to have occurred in the form of loss of business and competitive harm.⁷ These factors indicate that K & N has absorbed costs and suffered substantial harm which, added to the payment of \$350,000, will act as a deterrent and ensure compliance with law in the future.

Finally, the proposed settlement seems approvable in consideration of mitigating factors and a combination of the reasons set forth under the various criteria described above. Both the regulations (4 C.F.R. 103.7) which authorize a compromise of a claim "for one or more than one of the reasons authorized in this part" and the Commission's Order (p. 9) requiring consideration of "factors in possible mitigation" justify consideration of these matters. Relevant to these factors are not only the substantial harm to K & N's business and its difficult financial situation which has become aggravated by the investigation, as discussed above, but the fact that K & N has cooperated in furnishing evidence and in proposing innovative controls to ensure full compliance with law, has terminated the practices in question, and had itself begun to investigate irregularities before this proceeding commenced. As discussed below, furthermore, there is some evidence that part of the trouble stemmed from the fact that certain employees were more familiar with European

⁷ According to the confidential affidavit of Mr. Stoppenbrink, Vice-Chairman and Treasurer of respondent, K & N's future earning capacity has been impaired by the adverse publicity from this case and the suspension of key officers, causing a loss of clientele and requiring a fresh start in building customer relations and employing new officers. (Affidavit, para. 7.) Mr. Stoppenbrink actually identifies 12 important corporate clients who ceased doing business with K & N or, in some instances, delayed signing contracts with K & N because of this proceeding. (See Attachment "B" to the Stoppenbrink affidavit.) He also states that K & N's competitors have used the publicity of this investigation to disparage K & N in the mind of clients and that this adverse situation is especially harmful in view of K & N's financial results. (Affidavit, paragraphs 7-10.)

methods of forwarder conduct rather than those required by American law and that certain practices may have been instigated not as company policy but on the personal initiative of some employees unbeknownst to the corporate owners.

THE QUESTION OF FITNESS

The question of fitness of K & N to continue to operate under its license without suspension or revocation now remains for determination. This is the last issue (no. 15) framed in the Commission's Order (p. 9), and it is also mentioned in issue No. 13 in the Order. As decided in previous Commission cases, the issues of fitness in freight forwarder cases cannot be settled by the parties. See *Behring International, Inc.*, 23 F.M.C. 989; *Independent Freight Forwarder's License—E. L. Mobley, Inc.*, Order, 21 F.M.C. 845. Consequently, both parties have developed an evidentiary record and have taken positions so as to enable me to determine the question.

Respondent argues that the drastic sanction of revocation or suspension should not be invoked because the regulatory purposes of the freight forwarder law will be fully served as a result of K & N's undertakings in the settlement agreement and other facts. Respondent cites Commission and court cases which emphasize that the Commission does not view the freight forwarder statute as a vindictive, punitive tool designed to wipe out ongoing businesses but rather as a remedial device enacted to correct abuses in the forwarding industry. Moreover, the Commission has followed the principle of fashioning sanctions only after considering mitigating factors and has employed less drastic alternative measures suitable to the facts of record. Respondent points out its cooperation in furnishing evidence, its readiness to institute strict controls, its previous clean record before the Commission, its demonstrated eagerness to correct and prevent abuses, and its 14-year old business employing over 450 persons in many cities who would be out of work to show that revocation or suspension would be an unduly drastic sanction to employ.

Hearing Counsel also do not believe that revocation or suspension is warranted under the facts in this case. Hearing Counsel recognize that revocation is an "extreme sanction" and that it is justified in cases in which the forwarder does not demonstrate its good-faith intention to adhere to the high standards of conduct mandated by law and the Commission's regulations or if the forwarder shows by its conduct that it is unable to maintain the high standards of professional conduct, responsibility, and integrity which a licensee must demonstrate to merit serving the public in a fiduciary capacity. However, Hearing Counsel also cite previous Commission decisions in which the Commission has shown that it does not view the freight forwarder law as vindictive but as remedial and in which the Commission will fashion appropriate

remedies after considering all mitigating factors. Moreover, these decisions of the Commission also illustrate the principle that the Commission will look at respondent's present behavior, not just its past, to determine if the respondent can be trusted to comply with law in its future operations. Hearing Counsel do not condone K & N's past conduct which, had the case proceeded to trial, Hearing Counsel believe would show to have constituted serious violations of law. However, Hearing Counsel, following Commission precedent, view K & N's circumstances "as they presently exist" and these circumstances show that K & N has demonstrated its commitment to terminate all questionable conduct. Thus, as Hearing Counsel state:

It has made a disclosure as to its past course of conduct and has agreed to pay a substantial civil penalty arising out of that course of action. It has developed and proposed to implement a detailed and innovative system of controls and reports, both within and without the corporate structure, that is designed to prevent a reoccurrence of past practices. Further, significant personnel changes have been undertaken to assure that future conduct will be in compliance with the Shipping Act, 1916, and the Commission's General Order 4. (Hearing Counsel's Memorandum, p. 40.)

The above facts convince Hearing Counsel that K & N "has demonstrated a willingness to modify its future conduct to assure future compliance with pertinent authority" (Hearing Counsel's Memorandum, p. 40) and that it should therefore be found fit to continue to be licensed. I agree with both parties that revocation or suspension is an unnecessary and excessive sanction in view of the unprecedented undertakings to which K & N has committed itself to ensure strict compliance with law and the various other mitigating factors mentioned above and discussed below. In view of K & N's present financial setback, in some measure caused by the adverse publicity of this case, moreover, even suspension would be unwarranted as it may well jeopardize the continuance of an ongoing business and the jobs of hundreds of employees. Finally, the record indicates that to some extent the corporate respondent might have become involved in the questionable practices because of the reliance of certain employees on European standards of forwarding, which are inconsistent from American, and unawareness of corporate owners that proscribed conduct was occurring.

There is no question but that the Commission has exercised care in fashioning remedial orders in freight forwarder cases to ensure compliance with law and protect the public against unfit forwarders and that the Commission has not merely hurled draconian decrees wiping out businesses by revoking or suspending licenses when there have been mitigating circumstances. In *Behring International, Inc.*, the Commission again confirmed this reasonable doctrine, relying upon earlier decisions.

The Commission, by adopting the Initial Decision, stated (23 F.M.C. 992):

***Administrative sanctions should not, however, be blindly or automatically imposed and even in cases where the violation is clear, evidence of mitigation will be considered in tailoring the sanctions to the facts of the specific case. Section 44 and its regulations are based on an underlying remedial public interest purpose and the sanctions imposed must serve such a purpose and not be punitive in character. 21 F.M.C. at 847.

* * * * *

In making the above statements the Commission was following sound precedent. Thus, the courts as well as the Commission have recognized that evidence of mitigation should be considered when determining whether a license applicant should be found to be fit although implicated in violations of the Act in the past. . . . Furthermore, in previous cases the Commission has expressed its belief that the Freight Forwarder Law, P.L. 87-254, was enacted as a remedial statute in order to correct abuses in the forwarding industry. . . .

The principle that the Commission should not rush to extreme sanctions without considering all factors of mitigation in an effort to fashion a just and reasonable remedy is well supported by the courts. Although agencies are not required to impose sanctions in a perfectly even manner because of the wide latitude they are given by the courts as the expert bodies most skilled in devising means to carry out specific legislative purposes, the agencies are nevertheless expected to consider less drastic alternative remedies and to base whatever remedy they select on facts and reasonable interpretations of law. 22 F.M.C. at 598.(Emphasis in original.)

These quotations illustrate that the Commission is primarily interested in fashioning reasonable sanctions to ensure compliance with law, not in hurling vindictive decrees nor in destroying ongoing businesses if the forwarders involved demonstrate that they will comply with law and be trustworthy in their future operations. Even when found to have violated law, furthermore, the quotation shows that this alone does not necessarily require revocation or suspension provided there are mitigating factors. Evidence of past violations, as Hearing Counsel point out, "although they do constitute a major factor in the Commission's determination as to whether a license should be denied or revoked, are not dispositive of an individual's fitness to be licensed." (Hearing Counsel's Memorandum, p. 38, citing *Cargo Systems International (CSI) - Independent Ocean Freight Forwarder Application and Possible Violations of Section 44, Shipping Act, 1916*, 22 F.M.C. 57, 71-72 (I.D., administratively finalized, August 10, 1979). The doctrine that past violations do not

forever poison a person's chance to obtain a license or permit and that evidence of such violations is only one factor to be weighed in determining fitness, I might add, is supported in the courts. *See, e.g., Florida-Texas Freight, Inc. v. United States*, 373 F. Supp. 479, 483 (S.D. Fla. 1973), affirmed, 416 U.S. 976 (I.C.C. granted permit to forwarder even though forwarder had operated without a license contrary to law). This Commission has similarly granted authority to parties wishing to operate under section 15 approval even though the parties had violated that law by operating without necessary approval. *See Agreements Nos. T-1685, T-1685-6 & T-3130*, 19 F.M.C. 440, 454 (1977), and the four cases cited therein. *See also Ikeda International Corp.*, 22 F.M.C. 799 (1980) (no revocation or suspension despite past violations).

In the present case, of course, although Hearing Counsel believe they could prove that K & N's admitted past conduct was violative of law if the case had to proceed to formal trial and decision on all these questions and although, as I have discussed above, they appear to have a good chance of proving many or all of their allegations, there is no finding of violation. However, even assuming that all of the past violations were proven, this, as I have said, is only one factor to be weighed and what is possibly more important, as Hearing Counsel have argued, is to consider what is K & N's present attitude and what are the prospects that K & N will be completely trustworthy. As noted in *Independent Ocean Freight Forwarder License Application Guy G. Sorrentino*, 15 F.M.C. 127, 136 (1972):

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. (Emphasis added.)

Under this realistic and reasonable standard, Hearing Counsel correctly point out that the unprecedented controls and reforms which K & N has and will institute quite amply demonstrate its present and future trustworthiness and, consequently, its fitness as defined by the Commission in such cases as *Harry Kaufman D/B/A International Shippers Co. of N.Y., etc.*, 16 F.M.C. 256, 271 (1973); *Guy G. Sorrentino*, 15 F.M.C. at 134; *Application for Freight Forwarding License: Dixie Forwarding Co., Inc.*, 8 F.M.C. 109, 118, reversed on other grounds, 8 F.M.C. 167 (1964); *Independent Ocean Freight Forwarder Application—Alvarez Shipping Co., Inc.*, 16 F.M.C. 78 (1973); *G.R. Minon-Freight Forwarder License*, 12 F.M.C. 75 (1968). These cases emphasize not only the need for high standards of professional and moral conduct as befitting a fiduciary but also the need to determine whether the forwarder can be deemed fit by considering evidence as to whether the

forwarder will truly conduct itself in full compliance with law and with such high standards, in other words, whether the Commission and the public can trust the forwarder in dealing with it on the basis of present evidence after considering a past history of misconduct. Given the elaborate reforms instituted or to be instituted by respondent which demonstrate its commitment to future unimpeachable conduct, it is difficult to argue that respondent should be found to be unfit, i.e., untrustworthy, now and for the future because of past errors, even if such errors were all found to be violations of law.

In finding that respondent is fit to retain its license and to continue serving its clients, I have also considered a variety of mitigating factors in addition to the fact that respondent will institute many strict internal controls and audits pursuant to the settlement agreement and has terminated the practices in question. Some of these factors in mitigation have been discussed above relating to the fact that respondent has cooperated in furnishing evidence, even of transactions which were of doubtful legality but which were not specified in the Commission's Order and as to which the documentary evidence is sparse or no longer exists (the so-called "Bremen transactions" in which an affiliate of K & N in Bremen had in the past shared money from carriers with respondent). Moreover, respondent has terminated the practices questioned in the Commission's Order and, long before this investigation formally commenced, had itself instituted internal investigations to rid itself of irregularities.

K & N has been a licensed forwarder for 14 years offering a complete forwarding service to its clients. It has valuable worldwide connections and can therefore help develop new markets for American exporters. Prior to this formal investigation, K & N's record had been generally clean, as far as the record before me shows. Upon commencing forwarding operations in the United States, K & N apparently had to rely upon personnel brought over from Germany who were not familiar with the different standards of law applicable to forwarders in this country which varied from the standards observed in Europe. When K & N's operations expanded, they appear to have outstripped its staff's ability to maintain strict controls in accordance with U.S. practices.

In June 1976, K & N, through its Chairman, Mr. K. M. Kuehne, issued a Statement of Business Principles, stressing the necessity of adhering to applicable laws and regulations. In August 1976, K & N's Board of Directors took steps to correct certain irregularities which had occurred at its Houston office, not only rectifying errors to its customers but taking certain disciplinary actions against the Houston Branch Manager. In 1977 K & N began an internal audit, bringing in people from its Canadian operation to help, later expanding the audit by augmenting the auditors with a team from Switzerland. Still later a

permanent auditor was appointed to conduct an ongoing audit beginning in late 1979. As a result of these audits, K & N discovered improprieties and corrected them. The results of the audits led to the appointment of a new management team and corrective personnel action including reassignment and in one case apparently even termination of employment. To some extent it appears that the corporate respondent's business was adversely affected because of conduct initiated by certain employees and not by company policy. (These facts are discussed in greater detail in Mr. Kuehne's Confidential Affidavit, in the Confidential Affidavit of Mr. Stoppenbrink, K & N's Vice-Chairman/Treasurer, and in the latter's "Confidential Affidavit of Disclosure.")

ULTIMATE CONCLUSIONS

I find that the proposed settlement agreement which Hearing Counsel and respondent have negotiated is fair and reasonable and ought to be approved by the Commission. The agreement would produce immediate concrete results in the form of strict internal controls, independent audits and reports, payments of claims to shippers if necessary, reassignment of certain employees, and payment of an unprecedented amount of money in lieu of penalties (payments to be made in installments over a period of time). It is difficult to argue persuasively that the Commission should throw away all of these tangible results in favor of resumption of formal hearings and the multiple phases of litigation which promise to consume many months and even years of time, tying up scarce Commission resources in personnel and funds on this one case with uncertain prospects. Based upon respondent's current financial posture, the amount of payment to be made already appears to be at the maximum limit which K & N can bear and the many controls, audits, and reports should prevent recurrence of any objectionable practices and ensure that K & N will comply strictly with all applicable laws and regulations. Approval of the settlement, therefore, seems eminently prudent both from the view of allocation of Commission resources and of the public interest in ensuring respondent's strict compliance with law. The settlement agreement also follows the various criteria set forth in the Commission's regulations relating to respondent's ability to pay, litigative possibilities, cost of collecting the claim, effect on the Commission's enforcement policies, and considers factors in mitigation. Although the settlement appears to be substantial in terms of payment of money and the various audits and controls to be imposed, the evidentiary record which Hearing Counsel have developed is correspondingly substantial in scope and seriousness and the probabilities that Hearing Counsel could prove many or all violations charged in the Commission's Order were the case to complete the discovery phase and proceed into formal, trial-type hearings seem fairly good although not

without risks and, of course, not without considerable costs to the Commission and its staff. In short, the settlement neither throws away a good Government case for nothing nor extracts an exorbitant penalty from respondent considering the type of evidence which Hearing Counsel would have developed and would proffer into evidence if trial were to be had. Every relevant statement of courts, the Commission, and even of Abraham Lincoln strongly favors settlement over expensive and risky litigation and this case illustrates why.

The question of respondent's fitness to retain its license, according to Commission precedent, cannot be settled. On this issue the parties have submitted evidence and separate arguments, both urging me not to find respondent unfit. The Commission has frequently shown that it will act with reason and moderation when fashioning sanctions in forwarder cases and will not resort to drastic revocations and suspensions of licenses except in extreme cases when nothing less will suffice to protect the public. In this case the record supports moderation. Although the various charges brought against K & N are many and serious, K & N has itself taken corrective action and will, under the settlement, pay for stringent controls and audits to ensure against recurrence of any objectionable practices. K & N has also cooperated in obtaining and furnishing evidence, has a previous clean history before the Commission, has provided full services for its American clients for 14 years, employs 450 people, has suffered financially and competitively from adverse publicity stemming from this case, and has done virtually everything that one could ask in fashioning measures to guarantee to the Commission and to the public that it will follow all the requirements of freight forwarder law scrupulously. To some extent, furthermore, K & N, which is a corporation, appears to have suffered adversely from the questionable conduct of certain employees who were not acting in pursuance of company policy and who were schooled in European standards of forwarding rather than American. Further sanctions against K & N in the form of revocation or even suspension of its license would not only jeopardize a worthwhile business helpful to American exporters but would mark a departure from the Commission's previous decisions to fashion reasonable remedies, not vindictive punishments, in forwarder cases.

(S) NORMAN D. KLINE
Administrative Law Judge

APPENDIX
BEFORE THE FEDERAL MARITIME COMMISSION

KUEHNE & NAGEL, INC.
INDEPENDENT OCEAN FREIGHT

DOCKET NO. 80-20

FORWARDER LICENSE NO. 1162

PROPOSED SETTLEMENT

This Proposed Settlement is entered into between the Bureau of Investigation and Enforcement ("Bureau") and Respondent Kuehne & Nagel, Inc. ("Respondent"), the only parties ("the Parties") to this proceeding. This Agreement is submitted to the Presiding Administrative Law Judge pursuant to Rule 162 of the Commission's Rules of Practice and Procedure (46 C.F.R. 502.162) and section 505.3 of the Commission's General Order 30 (46 C.F.R. 505.3) and is to be included in the Final Order in the proceeding if so approved.

WHEREAS, by Order of Investigation and Hearing served April 3, 1980, the Commission instituted a formal investigation of Respondent's activities, including a determination of whether civil penalties should be assessed for possible violations of the Shipping Act, 1916, and/or the Commission's Rules and Regulations;

WHEREAS, the April 3, 1980 Order of Investigation and Hearing recites that Respondent may have engaged in violations of sections 15 and 16, Initial Paragraph, of the Shipping Act, 1916 (46 U.S.C. §§ 814 & 815) and sections 510.23 (d), (e), (f), (j), (k), and (l) of the Commission's General Order 4 (46 C.F.R. 510.23 (d), (e), (f), (j), (k) & (l));

WHEREAS, Respondent has admitted that it has engaged in specified conduct that may be violative of sections 15 and 16, Initial Paragraph, of the Shipping Act, 1916, and sections 510.23 (d), (e), (f), (j), (k) and (l) of the Commission's General Order 4;

WHEREAS, Respondent has terminated the allegedly violative conduct and has instituted and has indicated its willingness and commitment to maintain measures designed to eliminate, discourage, and prevent such conduct in the future;

WHEREAS, the Parties are desirous of expeditiously settling this matter according to the terms and conditions of this Agreement and wish to avoid the delays and expense to both the Parties that would accompany further agency litigation concerning the activities set forth in the April 3, 1980 Order of Investigation and Hearing;

WHEREAS, Public Law Nos. 92-416 and 96-25 authorize the Commission to collect and compromise civil penalties arising under the Shipping Act, 1916, including the civil penalties that might arise from the alleged violations set forth and described herein;

NOW, THEREFORE, in consideration of the premises set forth herein, and the compromise of all civil penalties under the Shipping Act, 1916, arising from violations of the Act and the Commission's General Order 4, as set forth and described herein, that the Commission believes may have been committed during the period April, 1975 through May, 1980, Respondent agrees as a condition of this Agreement to comply with all requirements set forth hereinafter, subject to the stipulations, conditions and terms of settlement contained herein:

(1) Respondent hereby agrees, as a condition of this Agreement, to pay to the Federal Maritime Commission the sum of Three Hundred and Fifty Thousand Dollars (\$350,000) in full settlement of all claims for civil penalties arising under the Shipping Act, 1916, and the Commission's General Order 4 from violations that the Commission believes may have been occasioned by the activities of Respondent that are referred to in the Commission's April 3, 1980 Order of Investigation and Hearing and by the "Bremen" transactions that are set forth and described in the factual record submitted in the present proceeding and that occurred during the period April, 1975 through May, 1980.

(2) Payment of said Three Hundred and Fifty Thousand Dollars (\$350,000) shall be payable according to the terms of the Promissory Note attached hereto as Appendix "1".

(3) Respondent has terminated all practices such as those described in the Commission's April 3, 1980 Order of Investigation and Hearing, and has informed all of its owners, officers and employees and the owners, officers and employees of all of its parents, subsidiaries and affiliates in writing, that such practices, and all practices not in accordance with the provisions of the Shipping Act, 1916, and the Commission's Rules and Regulations now in force or that may be adopted, are contrary to Respondent's company policy, must be terminated immediately and must not be engaged in at any time. A copy of such notice is attached hereto as Exhibit "A".

(4) Respondent will, within thirty (30) days following final approval of this Proposed Settlement, furnish a copy of Exhibit "A" hereof to all its owners, officers and employees, and to all the owners, officers and employees of its parents, subsidiaries and affiliates; and Respondent will furnish a copy hereof to all future such owners, officers and employees.

(5) Respondent will institute and has indicated its willingness to maintain all reasonable measures designed to eliminate, discourage and prevent the practices that are referred to in the Commission's April 3, 1980 Order of Investigation and Hearing and the practices that are herein referred to as "Bremen" transactions, and to review Respondent's administration, accounting and procedures and modify them to the extent necessary to safeguard against reoccurrence of such practices by Respondent, its owners, officers, employees, Respondent's parents, subsidiaries and affiliates and the owners, officers and employees thereof.

A statement describing those measures is attached hereto as Exhibit "B". Any failure on the part of Respondent to adhere to the measures set forth in Exhibit "B" will be considered a breach of this Settlement Agreement.

(6) Each of Respondent's officers and the qualifying officer of each of its branch offices has executed a statement under oath that he has read and understood this Agreement, and that he will abide by all of its terms and conditions with respect to the termination of the practices set forth and described in the factual record submitted in the present proceeding. These statements are attached hereto as Exhibit "C". For a period of three (3) years following such final approval, all new owners, officers and qualifying branch officers shall submit similar statements. Every officer and qualifying branch officer will submit a new statement annually for a period of three (3) years following such final approval, a form of which is attached hereto as Exhibit "D".

(7) Respondent will, for a period of three (3) years following final approval of this Proposed Settlement, submit annual reports, and such other reports as the Commission may require, to the Commission concerning Respondent's compliance with the terms of this Agreement and with the Shipping Act, 1916, and the Commission's Rules and Regulations, such reports to be submitted in the form the Commission may require and signed under oath by the chief executive officer of Respondent.

(8) Upon final Commission approval of this Proposed Settlement, certain individuals will not act as officers or directors of or in any other policy or managerial capacity for Respondent for one year.

(9) Respondent will, for a period of three (3) years following final approval of this Proposed Settlement, maintain at its offices in New York and each of its branch offices, and make available to the Commission on request, all of the documents which reveal or relate to the practices referred to in the Commission's April 3, 1980 Order of Investigation and Hearing and those practices disclosed to the Bureau.

(10) Except as provided in paragraph eleven (11) below, upon payment of the amount specified in paragraph one (1) above following final approval of this Proposed Settlement by the Commission, this instrument will forever bar the commencement or institution of any civil action or other claim for recovery of civil penalties from Respondent arising from the practices that are referred to in the Commission's April 3, 1980 Order of Investigation and Hearing or the practices that are herein referred to as "Bremen" transactions that occurred during the period April, 1975 through May, 1980 and that the Commission believes constitute violations of the Shipping Act, 1916, and the Commission's Rules and Regulations. It is understood by Respondent that this Agreement shall not serve as a bar or defense to any criminal prosecution or civil litigation by the Commission or any other department or

agency of the United States Government for conduct engaged in by Respondent.

(11) Respondent hereby agrees as a condition of this Agreement that, if it breaches this Agreement, it will not interpose the Statute of Limitations as a bar or a defense in any action or proceeding instituted prior to January 1, 1985, by or on behalf of the Commission, to recover civil penalties for violations of the Shipping Act, 1916, or the Commission's General Order 4 arising out of the conduct that is referred to in the April 3, 1980 Order of Investigation and Hearing and the practices that are herein referred to as "Bremen" transactions. In the event of such a breach by Respondent, if such noncompliance shall not have been explained to the Commission's satisfaction within thirty (30) days after written notice to Respondent by the Commission, the Commission shall have the option to seek enforcement of all terms and conditions of the Agreement, or to declare this Agreement null and void; provided, however, that Respondent's waiver of the Statute of Limitations under this paragraph shall remain in full force and effect. In the event the Commission declares this Agreement null, any monies paid to the Commission shall remain the property of the United States, and Respondent will not interpose any defense based on the Statute of Limitations in any action which the Commission may institute to recover civil penalties arising out of the conduct set forth in the factual record submitted in the present proceeding.

(12) It is expressly understood and agreed that this Agreement and final approval hereof is not to be construed as an admission by Respondent or its owners, officers, employees, parents, affiliates or subsidiaries to any violations of law, of the Shipping Act, 1916, or of the Commission's Rules and Regulations.

(13) In the event of any changes of law or other circumstances at any time during a period of three (3) years following final approval of the Agreement that Respondent believes warrant modification or mitigation of any of the requirements imposed on Respondent by this Agreement, the Bureau recognizes Respondent's right to petition the Commission to this end.

(14) The undersigned represents that he is properly authorized and empowered to execute this Agreement on behalf of Respondent and to fully bind Respondent to all of the terms and conditions herein.
Kuehne & Nagel, Inc.

JOHN ROBERT EWERS, DIRECTOR
Bureau of Investigation and Enforcement

By: _____

JOSEPH B. SLUNT
Attorney

Dated: _____

CHARLES C. HUNTER
Attorney

JANET F. KATZ
Attorney

DATED: _____

APPENDIX I

PROMISSORY NOTE

For value received, Kuehne and Nagel, Inc. (Kuehne and Nagel) promises to pay to the Federal Maritime Commission (the Commission) the principal sum of Three Hundred and Fifty Thousand Dollars (\$350,000) to be paid at the offices of the Commission in Washington, D.C., by bank cashier's or certified check in the following installments:

Seventy Thousand Dollars (\$70,000) on or before thirty (30) days following the approval by the Commission of the Proposed Settlement in FMC Docket No. 80-20;

Thirty-Five Thousand Dollars (\$35,000) on or before six (6) months following the approval by the Commission of the Proposed Settlement in FMC Docket No. 80-20;

Thirty-Five Thousand Dollars (\$35,000) on or before twelve (12) months following the approval by the Commission of the Proposed Settlement in FMC Docket No. 80-20;

Thirty-Five Thousand Dollars (\$35,000) on or before eighteen (18) months following the approval by the Commission of the Proposed Settlement in FMC Docket No. 80-20;

Thirty-Five Thousand Dollars (\$35,000) on or before twenty-four (24) months following the approval by the Commission of the Proposed Settlement in FMC Docket No. 80-20;

Thirty-Five Thousand Dollars (\$35,000) on or before thirty (30) months following the approval by the Commission of the Proposed Settlement in FMC Docket No. 80-20;

Thirty-Five Thousand Dollars (\$35,000) on or before thirty six (36) months following the approval by the Commission of the Proposed Settlement in FMC Docket No. 80-20;

Thirty-Five Thousand Dollars (\$35,000) on or before forty-two (42) months following the approval by the Commission of the Proposed Settlement in FMC Docket No. 80-20;

Thirty-Five Thousand Dollars (\$35,000) on or before forty-eight (48) months following the approval by the Commission of the Proposed Settlement in FMC Docket No. 80-20.

In addition to the principal amount payable hereunder, interest on the unpaid balance thereof shall be paid with each installment. Such interest shall accrue from the date upon which the Commission approves the Proposed Settlement in FMC Docket No. 80-20 and be computed at the rate of twelve percent (12%) per annum.

If any payment of principal or interest shall remain unpaid for a period of thirty (30) days after becoming due and payable, the entire

unpaid principal amount of the Promissory Note, together with interest thereon, shall become immediately due and payable at the option of the Commission without demand or notice, said demand and notice being hereby expressly waived.

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

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

KUEHNE AND NAGEL, INC.

BY: _____
DATE: _____

EXHIBIT "A" TO PROPOSED
SETTLEMENT AGREEMENT IN
DOCKET No. 80-20

KUEHNE & NAGEL, INC.

NOTICE

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

This means that this company, its owners, officers and employees will familiarize themselves with applicable provisions of the U.S. Shipping Act, 1916, and Federal Maritime Commission General Order 4, and will abide completely by the provisions contained in these documents. Your attention is directed to the following particular provisions to which strict adherence is required:

(1) Take proper care to give correct information to our shipper clients regarding the charges we incur for them and the charge we make to them for wharfage, insurance, ocean freight, inland freight and other services.

(2) Give correct information to ocean carriers regarding the weight and measurement of shipments.

(3) Do not withhold any information from shipper clients regarding the actual charges for ocean freight, inland freight, and other services.

(4) Promptly pay over monies to ocean carriers within any time limit permitted.

(5) Do not fail to pay to persons other than ocean carriers, e.g., inland carriers, all monies advanced by our shipper clients.

(6) Promptly account and reimburse to our shipper clients for their overpayments to us for all services.

(7) On all invoices and billings to shipper clients state separately the actual amount of ocean freight charges, insured value, insurance rates, insurance premiums, terminal charges, mark-ups, and all other fees and charges for accessorial services; except that with respect to special contracts with clients whereby the client agrees in advance to a lump sum charge, only the ocean and inland freight need be separately stated, and a copy or memorandum of such special agreement is to be maintained.

(8) Maintain currently and correctly all records and books of account in an orderly, systematic and convenient manner.

(9) Keep records so as to enable authorized Federal Maritime Commission personnel to check our cash position, accounts receivable and accounts payable.

(10) Maintain a current running account of overall cash receipts, disbursements, and daily balance, supported by bank deposit slips, paid checks and monthly reconciliation of bank statements.

(11) Maintain a separate file for each shipment, including in each file a copy, or notation of, all documents pertaining to each shipment.

(12) Maintain records showing the date and amount for payments received, and disbursements, for services rendered and reimbursements for out-of-pocket expenses.

(13) Make all books and records promptly available to authorized Federal Maritime Commission personnel upon request.

(14) Do not accept and do not agree to accept, compensation from ocean carriers in excess of the amount provided in the carriers' tariffs on file with the Federal Maritime Commission.

(15) Do not pass to shippers any portion of the compensation received from ocean carriers, give shippers any benefit on account of such compensation, or obtain transportation at other than applicable rates.

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

If you become aware that any ocean carrier is offering excess compensation or that any other forwarding company may be engaging in any unfair practices or in apparent violations of the Shipping Act or of General Order 4, report this immediately to your supervisor.

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

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

 TITLE:
 OFFICE:

 DATE

EXHIBIT "B" TO PROPOSED
SETTLEMENT AGREEMENT IN
DOCKET NO. 80-20

Kuehne. & Nagel, Inc. has adopted and will maintain the measures set forth below in order to eliminate, discourage and prevent all practices which violate the U.S. Shipping Act, 1916, and U.S. Federal Maritime Commission General Order 4:

For a period of three years following final Commission approval of the Settlement in Docket No. 80-20, Kuehne & Nagel, Inc. will permit an independent audit of all its books and records located in the United States, as described below.

(1) The audit will be conducted by Mr. Charles Clow, or such other independent auditor as may be named, who will have complete authority to examine any and all records, located in the United States, of Kuehne & Nagel, Inc. or any of its branch offices (see Attachment "1" hereto); and upon the issuance of a written statement by Mr. Clow that he has been denied access or reasonable cooperation in any investigation of any of Kuehne & Nagel, Inc.'s records, he will so certify to the Federal Maritime Commission, and said action by Kuehne & Nagel, Inc. will be conclusively considered to be a breach of its Settlement Agreement of even date with the Commission.

(2) Mr. Clow will be authorized to audit Kuehne & Nagel, Inc.'s books and records for the purpose of detecting violations of Federal Maritime Commission freight forwarder regulations and/or Sections 16, Initial Paragraph, and 44 of the Shipping Act, 1916, as amended; and all findings of violations of said regulations or Act will be conclusive and binding upon Kuehne & Nagel, Inc.

(3) The audits will take place no less frequently than once every twelve months for each Kuehne & Nagel, Inc. office, and at such other times as Mr. Clow determines in his sole discretion with or without prior notice to Kuehne & Nagel, Inc.

(4) Mr. Clow will notify Kuehne & Nagel, Inc. in writing of all findings of violations of said regulations or Act; and in the case of intentional violations or a continuing pattern of negligent violations by Kuehne & Nagel, Inc. as determined in Mr. Clow's sole discretion, Kuehne & Nagel, Inc. will, within sixty days of the date of such notification, pay an amount equal to twice any improperly retained monies to the shipper, consignee, carrier or other person involved as the case may be. Proof of any such payments will be provided by Kuehne & Nagel, Inc. to the Federal Maritime Commission with supporting documentation. Mr. Clow will report the results of all audits to the Federal Maritime Commission, and any failure of Kuehne & Nagel, Inc. to make the payments as herein provided will be considered a breach of its Settlement Agreement of even date with the Commission.

(5) Any such findings of violations and monetary payments will not be in derogation of any Federal Maritime Commission authority or obligations under said regulations or Act.

[NAME]
[TITLE]

ATTACHMENT "1" TO
EXHIBIT "B" TO
PROPOSED SETTLEMENT AGREEMENT
IN DOCKET NO. 80-20

[K&N LETTERHEAD]

Mr. Charles Clow
815 - 15th Street, N.W.
Suite 525A
Washington, D.C. 20005

Re: *Audit of Kuehne & Nagel, Inc.*

Dear Mr. Clow:

This is to set forth the terms of our agreement that you provide the necessary services to audit the ocean freight forwarding practices of Kuehne & Nagel, Inc.

Pursuant to a Settlement Agreement in Federal Maritime Commission Docket No. 80-20, Kuehne & Nagel, Inc. has undertaken to adopt measures to eliminate and prevent practices by Kuehne & Nagel, Inc. which violate the U.S. Shipping Act, 1916 and Federal Maritime Commission freight forwarder regulations.

To accomplish this, Kuehne & Nagel, Inc. has authorized you to conduct an independent audit of all the books and records of Kuehne & Nagel, Inc. and all its branch offices. This auditing is to continue for a period of three years following final Federal Maritime Commission approval of the Settlement Agreement. The audits will take place at least once every twelve months for each Kuehne & Nagel, Inc. office and at such other times as you may determine with or without notice to Kuehne Nagel, Inc. The complete terms of the audit procedures and of Kuehne & Nagel, Inc.'s obligations thereunder are contained in Exhibit "B" to the Settlement, which is attached hereto.

It is agreed that you will be compensated for your audit services at \$_____ . Your statements for services rendered, to be submitted quarterly, will be paid within 15 days of presentment by you to our attorneys, Graham & James, 1050 17th Street, N.W., Washington, D.C. 20036.

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

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

YOURS TRULY,

[NAME]

[TITLE]

Attachment

EXHIBIT "C" TO PROPOSED
SETTLEMENT AGREEMENT IN
DOCKET NO. 80-20

AFFIDAVIT

I, _____, hereby depose and state as follows:

(1) I am the _____ of Kuehne & Nagel, Inc.
with offices at _____.

(2) I have read and understood the settlement agreement entered into
between Kuehne & Nagel, Inc. and Federal Maritime Commission
Bureau of Investigation and Enforcement in Commission Docket No.
80-20.

(3) I will not engage in, and will instruct those under my supervision
to not engage in any practices which would violate the U.S. Shipping
Act, 1916, and Federal Maritime Commission General Order 4, both of
which I have read and with which I have become familiar.

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

(5) I understand that I am signing this affidavit under oath, and that
any false statement herein could subject me to possible criminal penal-
ties.

Sworn to before me, a Notary Public, this _____ day of
_____, 19____.

NOTARY PUBLIC

My Commission Expires:

[SEAL]

EXHIBIT "D" TO PROPOSED
SETTLEMENT AGREEMENT IN
DOCKET NO. 80-20

AFFIDAVIT

I, _____, hereby depose and state as follows:

(1) I am the _____ of Kuehne & Nagel, Inc. with offices at _____.

(2) During the past twelve months I have not knowingly engaged in any practice which would violate any provision of the U.S. Shipping Act, 1916, or of Federal Maritime Commission General Order 4, and I have conducted my work so as to avoid any such violations.

(3) During the past twelve months I have/have not become aware that any person under my supervision engaged, intentionally or not, in any practice as described in paragraph "(2)" above, and if and when I became aware of such activity, I immediately issued instructions to the responsible person or his supervisor as to the proper course of conduct, and to promptly correct the improper activity.

(4) I have/have not been informed by any other employee of Kuehne & Nagel, Inc. that I engaged in any practice as described in paragraph "(2)" above, and if and when so informed I immediately adjusted the performance of my work to avoid repetition of such practice.

(5) If the statement in paragraph "(3)" above is completed in the affirmative, following are the circumstances of the practices and a description of what was done to correct them:

(6) If the statement in paragraph "(4)" above is completed in the affirmative, following are the circumstances of the practices and a description of what was done to correct them:

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

Sworn to before me, a Notary Public, this _____ day of _____, 19____.

NOTARY PUBLIC

My Commission Expires:

[SEAL]

FEDERAL MARITIME COMMISSION

SPECIAL DOCKET NO. 606

APPLICATION OF SEA-LAND SERVICE, INC. FOR THE
BENEFIT OF NEPERA CHEMICAL, INC.

ORDER ON REMAND

October 13, 1981

On August 6, 1981, the United States Court of Appeals for the District of Columbia Circuit reversed and remanded the Federal Maritime Commission's Report and Order Adopting Initial Decision in this proceeding, served August 8, 1979. *Nepera Chemical, Inc. v. FMC*, 662 F.2d 18 (D.C. Cir. 1981). The Commission's order denied an application by Sea-Land Service, Inc., pursuant to section 18(b)(3) of the Shipping Act, 1916 (46 U.S.C. § 817), for permission to waive \$42,569.90 and refund \$280.00 in freight charges to Nepera Chemical, Inc. in order to give effect to a rate negotiated between Sea-Land and Nepera but not filed in the appropriate tariff prior to shipment. The Commission based its decision on the fact that the corrective tariff filed by Sea-Land subsequent to shipment resulted in a charge to Nepera of \$18.25 per container more than the rate negotiated prior to shipment because the new tariff employed a different weight measure. The Commission agreed with the conclusion of the presiding Administrative Law Judge that this variance between the negotiated rate and the rate appearing in the corrective tariff represented a jurisdictional defect in Sea Land's application, due to the requirement imposed by section 18(b)(3) that the carrier must, prior to applying to the Commission for permission to refund or waive collection of freight charges, have filed a new tariff "which sets forth the rate on which such refund or waiver would be based." 46 U.S.C. § 17(b). In the Commission's view, Sea-Land's new tariff failed to meet this standard.

However, in acting upon Nepera's petition for review of the Commission's order, the Court of Appeals held that section 18(b)(3) does not impose a requirement of "mathematical exactitude" (slip opinion at 10) between the negotiated rate and the rate subsequently filed by the carrier, and agreed with Nepera's contention that the rate filed by Sea-Land accurately reflected the parties' original agreement. The Court concluded that the "FMC must accept the Sea-Land application." (*Id.*)

THEREFORE, IT IS ORDERED, That the application by Sea-Land Service, Inc. for permission to waive a total of \$42,569.90 and refund \$280 in freight charges, in connection with two shipments of a

liquid chemical called "beta picoline" transported by Sea-Land for Nepera Chemical, Inc. from Port Elizabeth, New Jersey, to Barcelona, Spain, on June 10, 1978, is hereby granted; *

IT IS FURTHER ORDERED, That Sea-Land shall publish and file the following notice in an appropriate place in its tariff:

Notice is hereby given as required by the Federal Maritime Commission's decision in Special Docket No. 606, That effective December 31, 1977, and continuing through June 21, 1978, the rate on Beta Picoline, in tanks, is \$162.25 per WT, minimum 17 WT per tank container, such rate being subject to all other applicable rules, regulations, terms and conditions of this tariff.

IT IS FURTHER ORDERED, That Sea-Land shall determine whether an adjustment in freight forwarder compensation is required in light of this decision and, if so, shall take such measures as are necessary to make such adjustment;

IT IS FURTHER ORDERED, That the waiver or refund shall be effectuated by Sea-Land within thirty (30) days of the date of service of this order, and Sea-Land shall within five (5) days thereafter notify the Commission of the date and manner of effectuation of the refund or waiver and file with the Commission an affidavit of compliance with the second and third ordering paragraphs above.

By the Commission.

(S) JOSEPH C. POLKING
Assistant Secretary

* If Sea-Land has collected all or part of the \$42,569.90 in freight charges it sought to waive, it is hereby granted permission to refund those monies.

FEDERAL MARITIME COMMISSION

DOCKET NO. 80-62

EUROTROPIC CORPORATION - VIOLATIONS OF
SECTION 16 INITIAL PARAGRAPH, SHIPPING ACT, 1916

NOTICE

October 16, 1981

Notice is given that no exceptions have been filed to the September 11, 1981 initial decision in this proceeding and the time within which the Commission could determine to review has expired. No such determination has been made and, accordingly, the initial decision has become administratively final.

(S) FRANCIS C. HURNEY
Secretary

FEDERAL MARITIME COMMISSION

DOCKET NO. 80-62

EUROTROPIC CORPORATION - VIOLATIONS OF SECTION 16 INITIAL PARAGRAPH, SHIPPING ACT, 1916

Held:

- (1) Where a close-held company operated by an uninformed grower and shipper, on the advice of its freight forwarder, sought out a carrier who could provide refrigerated containers, and where the carrier agreed to transport ferns from Jacksonville to Rotterdam at the same rates the company was then paying another carrier; the company did not "knowingly and wilfully" violate section 16, first, Shipping Act, 1916, where the cargo was actually shipped from Baltimore instead of Jacksonville under different tariff rates. The company's president was completely unaware of any wrongdoing and relied on a freight forwarder who himself believed there was no impropriety and consequently failed to so notify the company.
- (2) The phrase, "knowingly and wilfully," as used in the Shipping Act, means purposely and obstinately and is meant to describe a person who *intentionally* disregards the statute or is *plainly indifferent* to its requirements. *Plainly indifferent* means something more than casual indifference or ordinary negligence, and equates with a wanton disregard from which an inference can be drawn that the conduct involved was in fact purposeful. The evidence in this proceeding not only fails to establish such purposefulness, but rather indicates that in light of its lack of expertise, the Respondent acted reasonably and responsibly in employing and relying upon its freight forwarder.

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

Finalized October 16, 1981

This proceeding began with the Commission's Order of Investigation and Hearing, which was served on September 16, 1980. The Order states that:

* * * this proceeding is hereby instituted to determine: (1) Whether or not Respondent violated section 16, initial paragraph, by obtaining or attempting to obtain transportation by water, for property at less than the rates and charges which would otherwise be applicable by any unjust or unfair device or means; and (2) Whether penalties should be assessed against Respondent if found to have violated section 16, initial paragraph, and, if so, the amount of such penalties;

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

FINDINGS OF FACT

1. Eurotropic Corporation (Eurotropic) is engaged in the growing and shipping of ferns for the florist trade. Gunther F. Natvey is the President and sole stockholder of Eurotropic. (Tr. 71, 72)

2. In 1975 Eurotropic operated out of Mr. Natvey's apartment in Miami. Eurotropic bought products from various producers and marketed them in Europe. (Tr. 72, 73)

3. Initially, Eurotropic used air and water carriers for its shipments, but by 1975, because of high air costs, it was shipping almost all of its products by water from Jacksonville, Florida, via Sea-Land Service, Inc. (Sea-Land). (Tr. 30, 73, 74)

4. Sea-Land provided Eurotropic with refrigerated containers and trucked the cargo from Miami to Jacksonville. (Tr. 30, 74)

5. In the summer of 1975, Eurotropic began having difficulty with its shipments because Sea-Land was unable to provide the needed refrigerated containers. (Tr. 30, 31, 75, 76)

6. At that time Mr. Natvey inquired within the industry, and with his (Eurotropic's) freight forwarder, as to whether or not other services were available. (Tr. 31, 76)

7. Eurotropic's freight forwarder had worked for it since 1973 and informed Mr. Natvey that Polish Ocean Lines (POL) had refrigerated containers. (Tr. 24, 30, 103)

8. As a result, Mr. Natvey went to New York City to speak with Mr. Harold Holden, who represented Gdynia America Line (Gdynia), which in turn was an agent for POL. (Stip., paras. 2, 3; Tr. 77)

9. Initially, Mr. Holden told Mr. Natvey that POL shipped to Europe from Baltimore and quoted a figure that was much higher than what Eurotropic was paying Sea-Land. Mr. Natvey then stated that Eurotropic could not ship with POL because the rate was too high. (Tr. 79, 83, 97, 98)

10. Later, Mr. Holden proposed that Gdynia would charge Eurotropic the same rate it had been paying Sea-Land, but that the cargo would have to be trucked from Florida to Baltimore. At the beginning Mr. Holden agreed that Gdynia would pay for the truck and would provide a trucker who would come from Baltimore to Florida. (Tr. 79, 80, 83, 84, 98)

11. Eurotropic (Mr. Natvey) agreed to Gdynia's proposal and pursuant to it Eurotropic made seven (7) shipments on POL vessels. Five of the shipments were ferns which originated in Florida and two (2) were citrus fruit originating in Philadelphia. (Ex. 24)

12. In the shipments made by Eurotropic, Gdynia did not provide a trucker from Florida and Philadelphia to Baltimore. Instead, Eurotropic was asked by Gdynia to make arrangements for the truck movement of the cargo, and Gdynia would reimburse it. (Tr. 80, 81)

13. Pursuant to their agreement Eurotropic submitted a total of ten invoices to Gdynia for overland transportation costs and incidental expenses incurred by Eurotropic for moving cargo from Jacksonville and Philadelphia to Baltimore, and was paid a total of \$7,362.32 by Gdynia. (Exs. 1-15, 23; ² Tr. 54, 55, 81, 82)

14. With respect to the shipments referred to in paragraph 13, Eurotropic was told that Gdynia would issue a Jacksonville bill of lading, and, based upon this, Mr. Natvey so informed Eurotropic's freight forwarder who prepared the bills of lading. (Tr. 27, 28, 32, 93, 94, 95, 98)

15. The applicable tariff for Jacksonville-Rotterdam shipments was Polish Ocean Lines North Atlantic/Continental and South Atlantic/French Atlantic Tariff No. 22 (FMC No. 42). The applicable freight rate for cut ferns shipped from Jacksonville was \$84.50 per 40 cubic feet or ton of 2,240 pounds, whichever produced the greater revenue. (Tr. 47-49, Ex. 16)

16. The applicable tariff for Baltimore-Rotterdam shipments was Polish Ocean Lines North Atlantic Continental Tariff No. 26 (FMC-52). The applicable freight rate for cut ferns (NES) was \$195 per 40 cubic feet or ton. (Tr. 49, 50, 51; Ex. 16)

17. The actual freight charges assessed by POL on four shipments of cut ferns made by Eurotropic were based on rates applicable from Jacksonville, rather than the rates applicable from Baltimore, the actual port of loading. The total freight actually paid by Eurotropic was \$14,772.72 whereas the amount which would have been due under the Baltimore-Rotterdam rate was \$34,285.88. (Stip., para. 10; Tr. 57, 58; Ex. 24) ³

18. Eurotropic experienced difficulties with the shipments it made on POL, and Mr. Natvey went to the Department of Agriculture for relief. He was referred to the Federal Maritime Commission and contacted the Commission in November of 1977. That contact gave rise to an investigation which led to the proceeding here. Meanwhile, Eurotropic had sued POL, beginning in 1976, but lost the case because it was barred by limitations. (Tr. 60, 63, 85-91)

19. During the period of time Mr. Natvey was negotiating with Gdynia and POL, he was not aware that those negotiations or the ultimate agreement involved anything improper or illegal. He was primarily interested in the availability of refrigerated containers, and was willing to pay the same rate he had been paying to Sea-Land. He did not have any particular desire to ship out of Baltimore. (Tr. 31, 34, 36, 75, 76, 83, 84, 89, 92-95, 99, 104)

² Paragraph 8 of the stipulation submitted by the parties is incomplete and incorrect.

³ The first item shown on Exhibit 24 should be deleted since the parties agree it is barred by the statute of limitations.

20. Eurotropic's freight forwarder acted as its foreign freight forwarder representative on its ocean shipments through the port of Jacksonville. He prepared the bills of lading, the shipper's export declaration and the phytosanitary certificate for the U. S. Department of Agriculture. (Tr. 24, 32)

21. Eurotropic's freight forwarder did not believe it unusual practice for shipping lines to ship from one port and show another on the bill of lading. (Tr. 26, 27, 28, 32, 33, 37, 38)

22. Eurotropic's freight forwarder did not question the difference in rates on cut ferns between Jacksonville-Rotterdam and Baltimore-Rotterdam. (Tr. 34-36)

23. Eurotropic's forwarding agent never at any time informed Mr. Natvey that there might be improprieties in listing Jacksonville as the port of loading instead of Baltimore and never believed Mr. Natvey was doing anything illegitimate or fraudulent. (Tr. 36)

24. Mr. Natvey was not well informed of the pertinent provisions of the Shipping Act of 1916 or other shipping laws and relied heavily on Eurotropic's freight forwarder for advice and direction. (Tr. 94, 95, 98, 101, 103)

ULTIMATE FINDING OF FACT

25. The respondent, Eurotropic, did not knowingly and wilfully obtain or attempt to obtain transportation by water at less than the rates or charges which would otherwise be applicable. (Entire record)

DISCUSSION AND CONCLUSIONS

The Commission's Order of Investigation and Hearing, served on September 16, 1980, asks that a determination be made as to two basic questions. The first is whether or not the Respondent violated section 16, initial paragraph of the Shipping Act, 1916, and the second is if there was such a violation, whether or not any penalties should be assessed against the Respondent.

Section 16 provides in pertinent part:

That it shall be unlawful for any shipper, consignor, consignee, forwarder, broker, or other person, or any officer, agent, or employee thereof, *knowingly and wilfully*, directly or indirectly, by means of false billing, false classification, false weighing, false report of weight, or by any other unjust or unfair device or means to obtain or attempt to obtain transportation by water for property at less than the rates or charges which would otherwise be applicable. (Emphasis supplied.)

In this case the real question is whether or not there was "knowing and wilful" conduct within the meaning of section 16. The record is clear, and both parties agree, that the shipments of ferns involved here moved from the port of Baltimore to Rotterdam and not from the port

of Jacksonville to Rotterdam. They agree that the rates published in the tariffs differed and that the Respondent paid the lower of the two rates and was reimbursed for the trucking charges from Jacksonville to Baltimore. In view of the agreement of the parties there is no need to dwell further on these factual aspects of the case. Where the parties do disagree is in interpreting the Respondent's acts in terms of knowing and wilful conduct.

In its original brief Hearing Counsel admits that the Respondent did not accept Gdynia's proposal with "a determination with a bad intent" (page 6); that the Respondent's failure to be concerned about the propriety of Gdynia's proposal was merely the result of negligence or inadvertence and not a determination to circumvent or violate the Shipping Act (page 7); that the Respondent was totally unaware that its agreement with Gdynia might be illegal; that the Respondent relied upon its forwarding agent for such advice (page 7); that the Respondent did not benefit financially from the agreement with Gdynia since it paid exactly the same for the shipments on POL as it had been paying for its shipments on SeaLand vessels (page 8); that the Respondent was initially responsible for the investigation which disclosed the facts and precipitated this proceeding (page 8); and that "the culpability in this situation is clearly not that of Eurotropic," citing the fact that POL and the freight forwarder have paid penalties to the Commission, "for their complicity in the events underlying this proceeding."

Despite the above admissions, which Hearing Counsel states constitute "sufficient mitigating factors so as to preclude the assessment of any penalty against Eurotropic," it asserts that Eurotropic violated section 16, First, knowingly and wilfully. In doing so it relies on *Equality Plastics, Inc., et al.*, 17 F.M.C. 217 (1973), 19 S.R.R. 324, which it states reaffirmed the Federal Maritime Board's decision in *Misclassification of Tissue Paper as Newsprint Paper*, 4 F.M.B. 483, 486 (1954), that:

We agree that a persistent failure to inform or even attempt to inform himself by means of normal business resources might mean that a shipper or forwarder was acting knowingly and willfully in violation of the Act.

Hearing Counsel then proceeds to "paraphrase" the Commission's definition of the issue in *Equality Plastics, supra*, as "whether Eurotropic was in possession of sufficient facts to raise a doubt as to whether it was obtaining transportation by water at less than the rates or charges which should have been paid." It concludes that Eurotropic was in possession of sufficient facts to raise such a doubt.

Before commenting on the conclusions Hearing Counsel has made based on the facts of record it is necessary to discuss the case law which it cites in support of its argument. In the *Misclassification of Tissue Paper, supra*, the Commission had before it a shipper who conceded that it knowingly and wilfully misclassified napkin tissue as

newsprint. The Commission decision actually applied to the freight forwarder who was also accused of knowingly and willfully violating section 16. The forwarder defended by establishing that he came upon information that the cartons which were shipped were marked as containing napkins tissues, not newsprint and that he so informed the shipper on two occasions. When the shipper replied that regardless of the markings, newsprint was being shipped, the forwarder accepted the shipper's description of the cargo. The Public Counsel argued that the forwarder's conduct " * * * do not reveal that Tidewater (the forwarder), in the situation before us, has measured up to the standards imposed on forwarders by section 16 of the Act" (parenthesis supplied). In its holding the Board stated:

We believe, following the authority cited by Public Counsel, that the phrase "knowingly and willfully" means purposely or obstinately, or is designed to describe a carrier who intentionally disregards the statute or is plainly indifferent to its requirements. We agree that a persistent failure to inform or even to attempt to inform himself by means of normal business resources might mean that a shipper or forwarder was acting knowingly and willfully in violation of the Act. Diligent inquiry must be exercised by shippers and by forwarders in order to measure up to the standards set by the Act. Indifference on the part of such persons is tantamount to outright and active violation.

We are unable to find in this case, however, that Tidewater's action was purposeful, obstinate, indifferent, or lacking in diligence. A freight forwarder, in our judgment, is not required to be an expert on the uses to which the cargo he is handling may be put. Tidewater appears, on the basis of the record in this case, to have used reasonable means in the exercise of ordinary diligence to determine the proper classification for the paper involved in this case. * * *

In *Equality, supra*, once again a misdescription of cargo was involved. Various items were erroneously classified as "toys." In *Equality* both a consignee and freight forwarder/broker were held out as knowingly and willfully violating section 16, first. The facts indicated that both parties "for a considerable length of time * * * had no concern for the accuracy of descriptions or billings under the appropriate tariff." Even though the forwarder/broker filled out Bureau of Customs Consumption Entry forms with the proper commodity description, the Commission reversed the Administrative Law Judge who had held the forwarder/broker's conduct to be knowing and wilful. It stated:

All parties agree, and we concur, that the Administrative Law Judge applied the proper standard for determining whether a party has "knowingly and willfully" violated section 16. He relied primarily on *Misclassification of Tissue Paper*

as *Newsprint Paper*, 4 F.M.B. 483, 486 (1954), where it was stated:

[T]he phrase "knowingly and willfully" means purposely or obstinately, or is designed to describe a carrier who intentionally disregards the statute or is *plainly indifferent* to its requirements. We agree that a persistent failure to inform or even to attempt to inform himself by means of normal business resources might mean that a shipper or forwarder was acting knowingly and willfully in violation of the Act. [Emphasis added.]

To the Administrative Law Judge, Leading's failure to make "diligent inquiry" to insure that the bill of lading accurately described the goods shipped constituted "plain indifference" such as to constitute a knowing and willful violation of section 16.

We think the term "plainly indifferent," as used by our predecessors in *Misclassification of Tissue Paper, supra* [footnote omitted], means something more than casual indifference, and equates with a *wanton disregard from which an inference can be drawn that the conduct was in fact purposeful*; a standard somewhat analogous to the tort concept of "gross negligence." For this reason, we must disagree, in part * * * that the facts of the record demonstrate an intentional disregard of or plain indifference by respondents comparable to what our predecessors have described as "willful conduct tantamount to an outright violation." [Emphasis supplied.]

The Commission did find the consignee's conduct to be knowing and wilful stating:

* * * That a long-time importer of such low-priced merchandise in a highly competitive market would, without protest, pay additional charges implies to us a recognition that the shipments were improperly rated. * * *

Finally, in *Viking Importrade Inc. et al.*, 18 F.M.C. 1 (1974), a case which Hearing Counsel fails to mention, the Commission had before it a freight forwarder/broker and a consignee. Once again various items were misclassified as, "toys," and once again customs documents properly described the items while the bills of lading did not. In discussing the standard to be applied, the Commission cited the language quoted above in *Equality*. It held that the freight forwarder/broker had not acted knowingly and wilfully stating:

Under the test laid down by the Commission in its most recent pronouncement on the subject it does not appear that Lang can be found to have violated section 16 of the Act in the transactions here involved. Lang can only be charged with failure to make diligent inquiry into the correctness of the freight rates which it says it had no reason to make and indeed could not properly make under the regulations of the Customs

Bureau. However that may be, the evidence in any event falls short of establishing *gross negligence* on Lang's part.

As to the consignee it said:

It may be readily conceded that Viking's handling of these shipments was somewhat lax, casual and negligent. However, if we are to apply the same standard of accountability to Viking as we do to Lang—and it seems equitable that we should—in all the circumstances of this case [including the fact that some of the misclassifications carried a higher rate to be charged and paid than a more accurate classification would have required], it appears that inadvertent error, loose procedures and other types of ordinary negligence—as opposed to gross negligence—may account for the classification “errors” involved. This may be particularly true as it has not been shown that such misclassification was “persistent” or was involved in more than a minimal number of the large amount of commodity shipments handled by Viking. Nor does payment by Viking of a small amount of additional freight with regard to three of the seven misclassified shipments alter the result. There is no dispute that some of the items involved were misclassified. In some instances the freight charged for a particular item was too high, in some too low. *The fact that when the deficiencies were brought to its attention Viking paid additional freight in those cases where it acknowledged that additional freight was due does not establish that it wilfully and knowingly violated the Act.* [Emphasis supplied.]

In effect then, the two cases cited by the Respondent, and a third arising from them stand for the proposition that the term, “knowingly and wilfully” as used in section 16, means more than casual indifference or inadvertence. Instead it requires a finding of wanton disregard and of purposefulness which the Commission equates with “gross negligence” in tort cases. Further, in the three cases the Commission ultimately refused to make a finding of wilfulness where freight forwarders filed proper descriptions on custom's documents but failed to take any action regarding bills of lading containing misdescriptions which led to lower freight charges. Likewise, it also failed to hold consignees or shippers liable.⁴

As to the facts in this case they are clear and not in dispute. Eurotropic was a small business operated out of Mr. Natvey's apartment and he was devoid of any knowledge of the Shipping Act. He relied completely on his freight forwarder.⁵ At page 9 of its original brief Hearing

⁴ In *Equality*, *supra*, it did hold that the shipper acted “knowingly and wilfully” because it later paid the higher freight rates. In *Viking*, *supra*, it rejected that reasoning.

⁵ He testified:

We are not freight forwarders . . . I had never heard of the Shipping Act of 1916 . . . I assume that when I have a, a broker, such as Mr. Wilk . . . licensed by, by your agency . . . that we should have been informed. (Tr. 101)

Counsel states that, "he was essentially a farmer unsophisticated with respect to shipping laws, who trustingly relied upon his freight forwarder in the shipment of his agricultural products." The record establishes that the freight forwarder knew exactly what was transpiring but that he did not consider it wrong. Indeed, in commenting on the bill of lading that showed Jacksonville rather than Baltimore as the port of loading, he testified:

I would like to say this is not an unusual practice as far as steamship lines are concerned, as far as bills of lading. (Tr. 26)

And further, after stating that he knew POL did not offer a service out of Jacksonville:

Q Why weren't you concerned about including this information, as Jacksonville being the port of loading, when as a matter of fact, it wasn't?

A Common practice in the steamship business. Back in those years—well, and continuing on to this time—the steamship lines will not actually call, for instance, the port of Jacksonville, but will issue Jacksonville bills of lading, take receipt of the cargo at this port, and move particular cargo from this port to the port of loading, whether it be Savannah, Charleston, or wherever. (Tr. 32, 33)

As to the difference in rates from Jacksonville and from Baltimore, the freight forwarder testified:

Q Did you ever question the rates or have reason to?

A No, sir. It's my fault that I didn't do so.

Q How long have you been in the forwarding business?

A Myself, personally involved, since 1967.

Q Would you have been familiar with the rates from Jacksonville for cut ferns in 1974 and 1975?

A Yes, sir. With Sea Land Services because they were the carrier at that time that moved cut ferns from this port to Europe.

Q Would the rate of \$84.60 per 40 cubic feet, which is indicated on the bill of lading as the freight rate, applicable to Mr. Natvey's ferns, would that rate have been comparable to Sea Land's rates out of Jacksonville at the same time?

A Yes, sir.

Q Almost identical?

A I don't know if it was almost identical—I would have to look back at the records—but it was a competitive rate, I'm sure.

Q Is that possibly why you were not particularly concerned about the freight rate?

A I would not question that freight rate, no, sir. And I still would not today.

Finally, as to his informing Mr. Natvey of any wrongdoing, the freight forwarder stated:

Q I take it when you say you had no reason to question the freight rates being charged to Mr. Natvey for the type product he was shipping overseas, that you didn't actually check and see if the rates to Baltimore was the same?

A No, sir. No. I—but I would assume—usually the North Atlantic and South Atlantic rates are very close on some items. Other items there's a great disparity. But I had no reason to question that particular rate on those commodities.

Q Did you ever at any time as Mr. Natvey's forwarding agent alarm him that there might be improprieties insofar as listing Jacksonville as the port of loading - - -

A No, sir.

Q Did you have any reason at all to believe that he was doing anything illegitimate or fraudulent?

A No, sir.

Q In preparing these documents?

A No, sir.

As to Mr. Natvey's motives and intent, his testimony on these points was clear, straightforward, unequivocal and truthful. He testified as to why and how he came to talk with Gdynia, the negotiations between them, and why and how the cargo was shipped—all of which has been found as fact. On the crucial question of whether he knew of any wrongdoing he stated:

Q Now, during the period of time that you were actually dealing with Polish Overseas Lines and while you and Mr. Holden were negotiating your eventual agreement, did you ever think there was anything wrong with the proposal they were making you?

A No.

Q Did he ever tell you anything to the effect, now, this is sort of under the table, hush-hush - - -

A No.

Q - - - we are not supposed to be doing it but I will - - -

A It wasn't under the table, because we billed them very openly, you know. The invoices were available. If it were under the table I don't think we would have gone ahead and billed them on paper.

Q What was the primary desire or consideration in doing business or wanting to do business with Polish Overseas Lines?

A The only, the only reason why we even considered going through all the trouble of shipping with a non-American carrier and to, and through a port which was not close to the

producing area, was the unavailability of equipment in Jacksonville. That's the only reason.

(Tr. 92); and further:

Q All right, sir. I may have asked this question, but, at any time during your association with Polish Overseas Lines, did you ever knowingly, willfully, do anything wrong? Did you think there was anything improper about your relationship to them all?

A Not to my knowledge.

(Tr. 96)

Finally, in its original brief at page 9, Hearing Counsel states:

The demeanor of Mr. Natvey as a witness, as observed by Bureau Counsel and the Commission's investigator, emphatically dispelled any feeling or suspicion that Mr. Natvey was remotely aware of any wrongdoing.

Despite the above and the many admissions made by Hearing Counsel that have been previously noted, he still argues that Eurotropic knowingly and wilfully violated section 16, first. The argument must be rejected. It is based on a series of unwarranted, subjective conclusions as to the facts and a failure to properly apply the pertinent case law. As to the facts, Hearing Counsel avers that Mr. Natvey did not act reasonably in "persistently failing to inform himself by means of normal business resources." Such an averment ignores completely Mr. Natvey's employment of a freight forwarder, licensed by the Commission, and his reliance on that freight forwarder. What businessman lacking a knowledge of shipping laws would not follow the same course? To expect Mr. Natvey to abandon trust in his freight forwarder, seek independent counsel and inform himself of the technicalities of the Shipping Act of 1916, over a period of time encompassing thirty-five days and only seven shipments, is itself unreasonable and his conduct in choosing to pay an expert to do so can hardly be considered a "persistent failure to inform himself of the law."

Further, Hearing Counsel states that "Natvey had to know there was something unusual or irregular with the arrangement, especially when his total costs to ship out of Baltimore were the same as he had been paying for shipments out of Jacksonville." We submit that if every businessman undertook personally to analyze legally and critically every "unusual" or "irregular" transaction in which he was involved, business might never be transacted. Instead, as Mr. Natvey did here, any normal, reasonable, small businessman would hire an expert to counsel and advise him.

In applying the case law to the facts, even as he finds the facts to be, Hearing Counsel misinterprets, and in some cases misstates, that law. For example, in making the case that in *Equality, supra*, the consignee "was only a passive participant" he completely ignores the factual

determination that the consignee "for a considerable length of time * * * had no concern for the accuracy of descriptions or billings under the appropriate tariff." Also, Hearing Counsel asserts that:

The only thing Equality overtly did was to pay additional charges to the carriers when the misdescriptions were discovered. This action, said the Commission, "implies to us a recognition that the shipments were improperly rated." (Answering Brief, p. 6)

Yet, it fails to point out that in *Viking, supra*, the Commission rejected the idea that later payment connoted prior knowledge and wilfulness.

On a broader scale, Hearing Counsel fails to correctly describe the holdings in the prior cases by quoting portions of the decisions out of context. For example, it cites *Misclassification of Tissue Paper, supra*, as establishing the "knowing and wilful" standard in the statement:

We agree that a persistent failure to inform himself by means of normal business resources might mean that a shipper or forwarder was acting knowingly and wilfully in violation of the Act.

In citing the above statement Hearing Counsel fails to note first, that it was made while the Commission was finding that a freight forwarder/broker *was not* acting knowingly and wilfully. Secondly, Hearing Counsel neglected to quote the entire holding, previously quoted at page 7 of this decision, where the sentence immediately preceding the above quoted sentence sets forth the basic premise that "knowingly and wilfully" means purposely or obstinately, or is designed to describe someone who intentionally disregards the statute or is plainly indifferent to it. In its treatment of *Equality, supra*, Hearing Counsel never discusses the basic tenet of the case, set forth in the citation at page 8 of this decision. There the term "plainly indifferent" is defined to mean something more than casual indifference, something that is in wanton disregard and purposeful.

Given all of the above, it is almost inconceivable that anyone could seriously assert that Eurotropic knowingly and wilfully violated section 16, first of the Shipping Act, 1916. The factual record clearly presents the picture of a small, uninformed shipper seeking a reputable carrier who would furnish refrigerated containers and ship his products at the same rate he had been paying another carrier. Relying on his freight forwarder he entered into an arrangement openly with a carrier with the knowledge of the forwarder, not knowing or suspecting any wrongdoing or impropriety. Hearing Counsel agrees to these facts and points out that Eurotropic did not benefit financially from the arrangement, and even was responsible for the investigation which eventually disclosed the arrangement. It concluded with a statement with which we wholeheartedly agree:

The culpability in this situation is clearly not that of Eurotropic.

So here, we hold that Eurotropic did not violate section 16, first, Shipping Act, 1916, and therefore that no penalties are due and owing. In so holding we note that both the carrier and the freight forwarder have paid penalties for violations of section 16, first—which is exactly the right result. To ascribe “wilfulness” to Eurotropic’s actions under the facts here would be error. It would operate to negate the effect of the Commission’s holdings in the prior cases and would destroy the meaning of the term “knowingly and wilfully” as used in the statute and as intended by Congress.

(S) JOSEPH N. INGOLIA
Administrative Law Judge

FEDERAL MARITIME COMMISSION

46 C.F.R. PARTS 511 AND 512

[GENERAL ORDER 11, REVISED; AMENDMENT 1; GENERAL ORDER 5 (REMOVED);

DOCKET NO. 81-46]

FINANCIAL REPORTS OF COMMON CARRIERS BY WATER
IN THE DOMESTIC OFFSHORE TRADES

October 22, 1981

ACTION: Final Rule

SUMMARY: The Federal Maritime Commission hereby amends its rules governing the financial reporting requirements imposed on common carriers by water serving the domestic offshore trades of the United States. Part 511 of Title 46, C.F.R. has been eliminated and Part 512 of Title 46, C.F.R. has been amended to reduce the frequency and complexity of reporting requirements. This amendment will reduce the reporting burden on domestic offshore common carriers.

DATE: Effective October 28, 1981.

SUPPLEMENTARY INFORMATION:

In a proposed rule published in the *Federal Register* on July 22, 1981 (46 F.R. 37739), the Commission advised of its intent to eliminate Part 511 (General Order 5) and amend Part 512 (General Order 11, Revised), Title 46, Code of Federal Regulations. General Orders 5 and 11, Revised, comprise the Commission's regulations governing the financial reporting requirements applicable to vessel operating common carriers serving the domestic offshore trades of the United States.

General Order 11, Revised, was published in order to establish methodologies that the Commission would apply in evaluating the justness and reasonableness of rates filed by vessel operating common carriers serving the domestic offshore trades as well as to provide for the orderly acquisition of data necessary to such an evaluation. General Order 5 requires the submission by such vessel operating common carriers of reports containing company-wide financial and operational data. In its Notice of Proposed Rulemaking, the Commission indicated that it had reviewed the operation of General Orders 5 and 11, Revised, and that it believed that some relief from the regulatory burden imposed thereby was warranted. However, the Commission also emphasized therein the importance of the subject financial reporting require-

ments to the effective regulation of domestic rates. The final rules, therefore, lessen, to a reasonable degree, the regulatory burden imposed by General Orders 5 and 11, while maintaining the ability of the Commission to discharge its regulatory responsibilities.

Comments on the proposed rule were received from Puerto Rico Maritime Shipping Authority (PRMSA), Sea-Land Service, Inc. (Sea-Land), Matson Navigation Company, Inc. (Matson), Crowley Maritime Corporation (Crowley), United States Lines, Inc. (USL), Foss Alaska Line (Foss), American President Lines, Ltd. (APL), Tropical Shipping and Construction Co., Ltd. (Tropical), the Transportation Institute (TI) and the Joint Maritime Congress (JMC). These comments and the revisions that they have prompted will be discussed hereinafter. Although all comments were carefully reviewed and considered in formulating the final rule, not all of the minor comments, especially those which did not deal with substantive matters, are mentioned herein.

Section 512.2(b)

The Commission proposed to eliminate all General Order 5 reporting requirements. In their place, the Commission will now require that annual statements filed in accordance with General Order 11 be accompanied by a company-wide balance sheet and income statement having a time period coinciding with that of the General Order 11 report.

Crowley requests clarification of the proposed modification, inquiring whether the Commission will prescribe a specific format for the specified balance sheet and income statement. Crowley believes that it would be appropriate for the Commission to authorize the use of the same financial statements that are filed with the Maritime Administration.

The Commission will not prescribe such a specific format. This section is designed to allow a filing carrier the greatest possible degree of flexibility in compiling its reports. While it is mandatory that the requisite balance sheet and income statement be company wide, it will be permissible for a carrier to utilize any such report that it has available, irrespective of the form of that report. In order to lessen the regulatory burden imposed by this section, the Commission will not require the conversion of an existing balance sheet or income statement to a particular format. Reports submitted to other regulatory agencies, as well as those constructed for corporate purposes, will be acceptable.

Section 512.2(f)

This section previously mandated that in those instances in which a carrier files with the Commission an increase or decrease in rates that would affect not less than 50 percent of its tariff items in a particular Trade or that would result in an increase or decrease of not less than 3 percent in its gross revenues in that particular Trade, it must simultaneously file financial data in support of its proposed rate adjustment.

The Commission proposed to eliminate the reference to 50 percent of a carrier's tariff items, thus ensuring that a carrier will not be required to submit financial data in support of any rate adjustment that would occasion less than a 3 percent change in its gross Trade revenues.

Sea-Land, Crowley and Tropical suggest that this section be further refined by limiting its application to rate increases, as opposed to both rate increases and rate reductions. Both Sea-Land and Crowley point out that only competing carriers, not the shipping public, would be likely to object to a rate reduction and that if such an objection were received, the Commission would have authority under section 18(a) of the Shipping Act, 1916, and section 3(a) of the Intercoastal Shipping Act, 1933, to require the submission of financial data to determine whether the resulting rates were reasonable.

The Commission finds this argument to be persuasive. In this instance, the regulatory benefit to be derived by requiring the submission of financial data in support of rate reductions is outweighed by the burden that would thereby be imposed on a filing carrier. The Commission will exercise its statutory authority to require justification of decreases in rates in those instances in which it appears that such adjustments are unwarranted, but will not impose a general filing requirement applicable to all rate reductions. Therefore, the word "decrease" has been eliminated from this section.

PRMSA suggests certain modifications in the wording of this section that it believes will serve to further clarify the reporting requirement set forth therein. Specifically, PRMSA advocates revising this section so as to conform to the Commission's proposed amendment of section 512.2(h). Section 512.2(h) contains the certification that a carrier must submit if it does not file financial data in conjunction with a proposed rate adjustment. In its Notice of Proposed Rulemaking, the Commission advised of its intent to modify this certification so as to limit the number of rate adjustments that could be filed without supporting financial data. It proposed to do so by imposing a ceiling of a 9 percent change over a 12 month period in a carrier's gross Trade revenues that could result from such adjustments. PRMSA believes that this limitation should also be incorporated into section 512.2(f).

The Commission believes that there is merit in PRMSA's suggestion. Although the Commission intended only to limit the number of rate adjustments that could be filed annually without the submission of supporting data, not the number of rate adjustments that would occasion less than a 3 percent change in a carrier's gross Trade revenues, that intent was not clearly reflected in the proposed rules. Therefore, in order to clarify section 512.2(f), the Commission has incorporated therein language relating to the 9 percent ceiling.

Sea-Land suggests a further modification of the proposed amendment of this section. It is Sea-Land's position that section 512.2(f) should

reflect the governing statutory language (i.e., the Intercoastal Shipping Act, 1933's definition of a general increase in rates). In other words, Sea-Land advocates limiting the rate adjustments that must be accompanied by supporting financial data to those which would affect 50 percent or more of a carrier's rate items in a particular Trade and (1) which would occasion an increase in that carrier's gross Trade revenues of 3 percent or more or (2) which would occasion an increase in that carrier's gross Trade revenues of less than 3 percent but when aggregated with other like adjustments filed during the preceding 12 months would result in an increase in that carrier's gross Trade revenues of 9 percent or more.

Sea-Land's suggestion is well taken. In effect what Sea-Land is suggesting is that the 50 percent requirement contained in the existing rule be retained but that that requirement be applied conjunctively with the 3 percent limitation. Given the Commission's determination to impose a 9 percent ceiling on the across-the-board rate adjustments that can be filed without financial justification, adoption of Sea-Land's proposal is imperative. Absent such a modification of this section, it is conceivable that a carrier could file three across-the-board rate increases each of which would result in a 2.9 percent increase in its gross Trade revenues without being compelled to file supporting financial data, but would be required to file such data in conjunction with a subsequent individual commodity increase that occasioned only a .5 percent increase in its gross Trade revenues (i.e., $2.9\% + 2.9\% + 2.9\% + 0.5\% = 9.2\%$).

The Commission did not intend to require carriers to file extensive financial data in support of increases in individual tariff items. The Commission was concerned with across-the-board rate adjustments (i.e., adjustments affecting 50 percent or more of a carrier's tariff items). It was anticipated that a carrier would be compelled, for example, to justify the fourth rate adjustment of 2.9 percent that it filed within a twelve month period. Therefore, to eliminate the onerous possibility of a carrier being required to submit financial data in support of a rate adjustment impacting an insignificant number of tariff items, the Commission has modified this section to bring it into conformity with the statutory definition of a general rate increase. The final rule, therefore, also conforms to the filing requirements contained in Rule 67 of the Commission's Rules of Practice and Procedure, the procedural rule applicable to rate filings under the Intercoastal Shipping Act, 1933.

Section 512.2(g).

The Commission proposed to amend this section to allow a carrier to furnish its annual General Order 11 report for the fiscal year, in lieu of the schedules of actual data that otherwise would have to accompany a rate filing, if the subject rate adjustment were filed within 6 months of the end of that fiscal year. The existing rule limits such a substitution of

data to instances in which rate adjustments are filed within 150 days of the end of the preceding fiscal year.

Sea-Land suggests that the Commission rely solely upon the annual General Order 11 reports and dispense entirely with the requirement that schedules of actual data accompany general rate filings in some instances. It is pointed out by Sea-Land that often the requisite schedules of actual data overlap the period reflected in the General Order 11 report. Foss advocates, in the alternative, that the substitution of an annual General Order 11 report be allowed if a rate adjustment is filed within 12 months, as opposed to 6 months, of the end of the carrier's preceding fiscal year.

Sea-Land raised the same point it has raised herein in Docket No. 78-46, the rulemaking proceeding in which General Order 11 was previously revised. The Commission rejected Sea-Land's suggestion in that instance and does not endorse it in the present proceeding. It is the Commission's belief that the submission of actual data is necessary in specified instances to provide the Commission with a relatively current perspective from which to assess the justness and reasonableness of a carrier's rates. In this instance, the Commission believes that its need for current information in order to discharge its regulatory responsibilities outweighs the regulatory burden imposed upon a filing carrier.

Likewise, the Commission has not accepted Foss' alternative proposal. Extension of the time period in which substitute data may be relied upon to the extent advocated by Foss would deprive the Commission of the requisite current perspective.

Section 512.2(h)

As was noted previously, it was proposed by the Commission that the certification set forth in this section be amended to impose a ceiling of a 9 percent change over a 12 month period in a carrier's gross Trade revenues that could result from rate adjustments filed by that carrier without supporting financial data. Foss suggests that due to current high inflation rates and competitive pressures, a 12 percent ceiling would be more realistic.

The Commission has expanded to a considerable degree, the range of rate adjustments that may be filed without supporting financial data. However, the Commission is responsible for regulating rates in the domestic offshore trades of the United States and must, if it is to discharge this responsibility in an effective and efficient fashion, have access to financial data relating to such rates. The Commission believes that if it were to accept Foss' proposal, it would undermine its ability to fulfill its duties and responsibilities as a regulator. Therefore, Foss' suggested modification has not been incorporated into the final rules.

In order to simplify the certification process, the wording of this section has been amended to refer to section 512.2(f) rather than repeating the detailed limitations described therein.

Section 512.6(b)(1)

The Commission proposed to amend this section to remove from rate base vessels withdrawn from a service for the entire period for renovation or conversion. The existing rule did not expressly provide for such an exclusion.

PRMSA, Matson, Tropical, APL and JMC oppose the proposed modification. These commentators emphasize that this amendment could act as a deterrent to the renovation and conversion of vessels deployed in the domestic offshore trades and thereby serve as an obstacle to increased efficiency of service. Although acknowledging that the ratepayer should not be compelled to pay a return on assets not dedicated to the Service, these parties suggest that a vessel that has been employed in a given Service and that will return to that Service should be included in rate base even during a period of renovation or conversion. It is suggested that vessels that have been employed in a Service and that are withdrawn from that Service for renovation or conversion should be treated in the same manner as vessels temporarily out of service for drydocking and repairs.

The Commission finds some merit in these arguments. The Commission seeks to encourage, not discourage, efficiency of service in the domestic offshore trades. Clearly, a regulation that might discourage the necessary renovation or conversion of vessels operating in these trades would not encourage efficiency of service and, therefore, would not serve the public interest. However, the Commission does not believe that it is fair to burden the ratepayer by including in rate base those vessels, or any portion of the value thereof, that are withdrawn from the Service for renovation or conversion and that have not been and will not be dedicated exclusively to that Service. Therefore, the Commission will permit the inclusion in rate base of a vessel withdrawn from a Service for renovation or conversion for the entire period or any portion thereof if a carrier certifies that such a vessel *has been* employed exclusively in the Service for the twelve months immediately preceding withdrawal and *will be* so employed for at least twelve months immediately after the completion of the renovation or conversion. It is believed that such a rule is equitable to both the carrier and the shipping public. The exclusive employment of a vessel in a Service for the twelve month periods prior to and following the renovation or conversion of that vessel strongly suggests the requisite intent to dedicate that vessel to the Service and, therefore, justifies its continued inclusion in rate base.

PRMSA suggests that section 512.6(b)(1) be clarified in two respects. PRMSA believes that this provision is ambiguous in regard to the treatment of vessels that are employed in the Service for less than the entire period but that are not employed during that same period in Other Services. The Commission agrees that the existing regulation does not clearly distinguish between those vessels that are and those that are not dedicated to a single Service. Therefore, additional descriptive language has been included in the final version of section 512.6(b)(1)(i)(B) establishing its applicability to vessels employed in two or more Services. Section 512.6(b)(1)(i)(A) applies to vessels employed in only one Service.

PRMSA further asserts that section 512.6(b)(1)(i)(A) does not clearly allow the total Adjusted Cost of a vessel dedicated to a Service but laid-up for part of the period because of seasonal cargo fluctuations to be included in the assets that may be allocated to the Trade. The Commission does not believe that the wording of the cited provision need be clarified. Lay-ups due to seasonal cargo fluctuations fall within the category of "normal periodic lay-ups." Normal periodic lay-ups do not necessitate an exclusion on a pro-rata basis of the Adjusted Cost of a vessel dedicated to the Service. Therefore, the total Adjusted Cost of a vessel dedicated exclusively to the Service can be included in Trade rate base even though that vessel is laid-up for part of the period due to seasonal cargo fluctuations.

Finally, PRMSA advocates amending section 512.6(b)(1)(i)(A) to allow the assignment to the Service of 60 days of the period during which a vessel that had been employed in the Service is laid up pending disposition. It is submitted that the allowance of such an assignment would constitute a recognition that a carrier cannot dispose of a vessel instantly and ought to be provided a reasonable amount of time to effectuate the disposition of a vessel that has been employed in the Service.

The Commission agrees in part with PRMSA's suggestion. Assignment to the Service of 60 days of the period during which a vessel that has been employed exclusively in the Service is laid-up pending disposition would not impose an unfair burden on the ratepayers who have been served by that vessel. Further, as PRMSA notes, allowance of such an assignment would constitute a recognition that disposal of such a vessel is an aspect of the Service and hence properly assignable to the Trade. However, the Commission believes that allowance of a specified period for the disposition of a vessel is only warranted in those instances in which the vessel has been dedicated to the Service. Therefore, section 512.6(b)(1)(i)(A) has been amended to permit the assignment of 60 days of the period during which a vessel that has been employed exclusively in the Service for the preceding 12 months is

permanently withdrawn from the Service and laid-up pending disposition.

Section 512.6(c)(2)

This section was amended in the proposed rules to provide for the exclusion of depreciation and profit included in related company transactions from vessel operating expense. No such exclusion had been previously mandated.

Matson has expressed concern that the proposed modification creates certain ambiguities. Specifically, Matson believes that as drafted the proposed rules did not clearly sanction the like treatment of the depreciation expense of related companies and the depreciation expense of the carrier. Further, Matson submits that the amended language appears to require that the profits arising from related company transactions must be charged to the carrier as income, as well as a reduction in expense.

In order to remedy any possible ambiguity, the Commission has revised its proposed amendment in the final rules. The object of the proposed amendment was to eliminate depreciation and profit included in related company transactions from the calculation of Working Capital. In order to more clearly accomplish this aim, the Commission has eliminated the proposed additional language that had been incorporated into this section. In addition, the Commission has eliminated the reference to related company transactions in section 512.5(s) and amended section 512.6(c)(11), the provision governing the reporting of related company transactions, to assure that profits arising from related company transactions will not be included in a carrier's income. A new provision, section 512.2(p), has also been added. Section 512.2(p) mandates that related company assets and owned assets are to be reported in the same manner, and that other intercompany transactions are to be shown net of intercompany profit and reported on the appropriate schedules. The Commission believes that these modifications eliminate the ambiguities complained of by Matson.

No objections were received to the remaining modifications detailed in the Notice of Proposed Rulemaking. All commentators expressed their approval of these amendments and the attempt implicit therein to lessen the regulatory burden imposed on vessel operating common carriers serving the domestic offshore trades.

Pursuant to the Regulatory Flexibility Act (5 U.S.C. § 601 *et seq*), the Commission certifies that this rule will not have a significant economic impact on a substantial number of small entities. This rulemaking will affect only vessel operating common carriers which are not generally small entities within the meaning of 5 U.S.C. § 601(6).

In accordance with the Paperwork Reduction Act (44 U.S.C. § 3501 *et seq*), the amendments contained herein have been approved by the

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Office of Management and Budget for use through March 31, 1983 and assigned OMB No. 3072-0008.

Therefore, pursuant to 5 U.S.C. § 553, sections 18, 21 and 43 of the Shipping Act, 1916 (46 U.S.C. §§ 817, 820 & 841(a)) and sections 1, 2, 3(a), 4 and 7 of the Intercoastal Shipping Act, 1933 (46 U.S.C. §§ 843, 844, 845, 845(a) & 847), Parts 511 and 512, Title 46, Code of Federal Regulations, are amended by the Federal Maritime Commission as set forth hereinafter.

I. Part 512, Section 512.2 - General Requirements:

The filing address shown in paragraph (a) is revised to read:

Federal Maritime Commission
Bureau of Tariffs
1100 L Street, N.W.
Washington, D.C. 20573

Paragraph (b) is revised to read:

(b) Annual statements under this part shall be filed within 150 days after the close of the carrier's fiscal year and be accompanied by a company-wide balance sheet and income statement having a time period coinciding with that of the annual statements. A specific format is not prescribed for the company-wide statements.

Paragraph (d) is amended to eliminate the Federal Register notice of alternative data applications by removing the final sentence.

Paragraph (e) is amended to increase the waiver amount from \$5,000,000 to \$10,000,000.

The introductory text of paragraph (f) is amended to read:

(f) Whenever a carrier files with the Commission an increase in rates which would affect 50 percent or more of the rate items listed in all of its tariffs in a particular Trade and (1) which would result in an increase of not less than 3 percent in the carrier's gross revenues in that Trade or (2) which would result in an increase of less than 3 percent in the carrier's gross revenues in that Trade, but, when aggregated with other rate changes filed during the preceding twelve months which have also resulted in increases of less than 3 percent in the carrier's gross revenues in that Trade would result in an increase of 9 percent or more in the carrier's gross revenues in that Trade, it shall simultaneously file in duplicate:

Paragraph (f)(1)(i) is amended to change "fourteen (14) months" to "fifteen (15) months".

Paragraph (g) is amended to change "150 days" to "six (6) months".

Paragraph (h) is amended to change the certification to read:

CERTIFICATION

I, [type or print name of officer] of [name of reporting company], certify, under penalty of 18 U.S.C. § 1001, that the proposed rate increase submitted herewith is not required by section 512.2(f) of this part to be accompanied by the financial and operating data described therein.

Signature: _____

Title: _____

Date: _____

Paragraph (1) is revised to read:

(1) With respect to the annual statements required by this part, all data shown must conform or be reconciled to the figures listed in the balance sheet and income statement filed therewith.

Paragraph (p) is added to read:

(p) Related company assets employed in the Service shall be reported in the same manner as owned assets. Other intercompany transactions shall be shown net of Intercompany profit and reported on the appropriate schedule. Any calculations involving intercompany accounts shall be included in the working papers.

II. Part 512, Section 512.3 - Certification:

In the introductory text, the phrase "books, accounts and financial records" is amended to read "books of account and financial records".

In paragraph (a), the phrase "books and accounts" is amended to read "books of account".

III. Part 512, Section 512.5 - Definitions:

Paragraph (f)(2)(ii) is amended to change "Commonwealth of the Northern Marianas" to "Northern Marianas".

Paragraph (f)(2)(vii) is amended to change "State of Alaska" to "Alaska".

Paragraph (f)(2)(viii) is amended to change "State of Hawaii" to "Hawaii".

Paragraph (o) is revised to read:

(o) Vessel Operating Expense:

(1) For carriers required to file Form FMC-378: the total of Direct Vessel, Port, Terminal and Container/Barge Expenses, less Other Revenue.

(2) For carriers required to file Form FMC-377: the total of Direct Vessel and Other Shipping Operations Expenses, less Other Revenue.

Paragraphs (s), (t) and (u) are revised to read:

(s) *Trade Operating Expense* - The total of all expenses shown on Exhibit B (Income Account), including Federal income taxes.

(t) *Company Operating Expense* - The total of all expenses shown on the company-wide income statement, including Federal income taxes.

(u) *Operating Expense Relationship* - The ratio of Trade Operating Expense to Company Operating Expense.

IV. Part 512, Section 512.6 Forms:

Paragraph (a)(1), introductory text, is revised to read:

(1) The submission required by this Part shall be in the prescribed format and shall include General Information regarding carrier ownership and stockholders, as well as the following schedules as applicable:

Paragraph (a)(2) is revised to read:

(2) Statements containing the required exhibits and schedules are described in paragraphs (b), (c), (d), (e) and (f) of this section and are available upon request from the Commission. The required General Information, schedules and exhibits are contained in forms FMC-377 and FMC-378. For carriers required to file Form FMC-378, the statements are based on the Uniform System of Accounts for Maritime Carriers prescribed by the Maritime Administration and the Interstate Commerce Commission. For carriers required to file Form FMC-377, the statements are based on the accounts prescribed by the Interstate Commerce Commission for Carriers by Inland and Coastal Waterways. The schedules contained in these statements are distinguished from those contained in the Form FMC-378 statements by the suffix "A" (e.g., Schedule A-IV(A)).

Paragraph (b)(1) is amended to eliminate the reference to Forms FMC-63 and FMC-64 by removing the final sentence.

Paragraph (b)(1)(i)(A) is revised to read:

(A) For those cargo vessels employed exclusively in the Service for the entire period, inclusive of normal periodic lay-ups, the Adjusted Cost shall be included in the total to be allocated to the Trade. If a vessel is permanently withdrawn from the Service during the period and laid-up pending disposition and that vessel has been employed exclusively in the Service for the preceding 12 months, sixty days of the lay-up period may be assigned to the Service. If a vessel is withdrawn from the Service for renovation or conversion, and if the carrier certifies that that vessel has been employed exclusively in the

Service for the twelve month period immediately prior to withdrawal and will be employed exclusively in the Service for a period of at least 12 months after the renovation or conversion is completed, the Adjusted Cost shall be included in the total to be allocated to the Trade.

Paragraph (b)(1)(i)(B) is revised to read:

(B) For those cargo vessels employed in the Service for less than the entire period and in Other Services for any portion of the period, the Adjusted Cost shall be prorated between voyages in the Service and voyages in Other Services. The total number of days of service excludes lay-up days and is therefore likely to be less than the number of days in the reporting period. Lay-up days of vessels in this category will normally be allocated to the respective Services on the same basis used in allocating the Adjusted Cost of such vessels, i. e., active days. However, if one or more of the vessels normally employed in the Service has been diverted temporarily to Other Services in lieu of incurring lay-up expense, no assignment of lay-up time to Other Services is required. That portion of the Adjusted Cost of the vessels not allocated to Other Services shall be included in the total to be allocated to the Trade.

Paragraph (b)(2)(i) is amended to eliminate the reference to Forms FMC-63 and FMC-64.

Paragraph (b)(4)(i) is amended to eliminate the reference to Forms FMC-63 and FMC-64.

Paragraph (b)(4)(iii) is removed.

Paragraphs (b)(5) and (6) are revised to read:

(5) Working Capital (Schedule A-VI):

Working Capital for vessel operators shall be determined as average voyage expense. Average voyage expense shall be calculated on the basis of the actual expenses of operating and maintaining the vessel(s) employed in the Service (excluding lay-up expenses) for a period represented by the average length of time of all voyages (excluding lay-up periods) during the period in which any cargo was carried in the Trade. Expenses for operating and maintaining the vessels employed in the Trade shall include: Direct Vessel Expense, Port Expense, Terminal Expense, Container/Barge Expense, Administrative and General Expense and Interest Expense allocated to the Trade as provided in section 512.6(c)(2), (4) and (5). For this purpose, if the average voyage, as determined above, is of less than 90 days duration, the expense of hull and machinery insurance and protection and indemnity insurance (accounts 730 and 732, respectively) shall be determined to be 90 days, provided that such allowance for insurance expense shall not, in the aggregate, exceed the total actual insurance expense for the period.

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(6) *Working Capital (Schedule A-VI(A)):*

Working Capital for tug and barge operators shall be determined as the average monthly expense. Average monthly expense shall be equal to one-twelfth of the expense of the carrier during the relevant 12-month period, computed by adding gross Vessel Operating Expense, Administrative and General Expense-Net, Interest Expense and Inactive Vessel Expense, each as allocated to the Trade, and dividing the total by 12.

Paragraph (b)(7) is amended to eliminate the reference to Forms FMC-63 and FMC-64.

Paragraph (c)(3) is revised to read:

(3) *Vessel Operating Expense (Schedule B-II(A)):*

This schedule shall be submitted by tug and barge operators. Where multiple barge units are towed by a single tug, vessel expense shall be allocated on the basis of the cargo-cube relationship.

Paragraph (c)(9)(i) is amended to eliminate the reference to Forms FMC-63 and FMC-64.

Paragraph (c)(11) is amended to read:

(11) *Related Company Transactions*

Income account transactions with related companies shall be shown net of intercompany profit on the appropriate schedule and allocated to the Trade on the same basis as other items in that schedule.

Paragraphs (e)(2) and (f)(2) are amended to change "books, accounts and financial records," to "books of account and financial records".

V. *Part 511*

Part 511 is removed.

By the Commission.

(S) FRANCIS C. HURNEY
Secretary

FEDERAL MARITIME COMMISSION

DOCKET NO. 80-65

**DANIEL F. YOUNG, INC. - INDEPENDENT OCEAN
FREIGHT FORWARDER LICENSE NO. 656**

NOTICE

October 29, 1981

Notice is given that no exceptions have been filed to the September 22, 1981 initial decision in this proceeding and the time within which the Commission could determine to review has expired. No such determination has been made and, accordingly, the initial decision has become administratively final.

(S) FRANCIS C. HURNEY
Secretary

FEDERAL MARITIME COMMISSION

DOCKET NO. 80-65

DANIEL F. YOUNG, INC. - INDEPENDENT OCEAN
FREIGHT FORWARDER LICENSE NO. 656

An investigation was begun to determine whether past payment of "excess compensation" from two ocean carriers to respondent freight forwarder shows that respondent had violated sections 15 and 16 of the Shipping Act, 1916, regarding the possible existence of unapproved agreements or the obtaining of transportation at less than applicable charges, whether, as a result, respondent is fit to retain its license, and whether civil penalties should be assessed. With the cooperation of respondent, a record was developed which supports approvability of a negotiated settlement and which demonstrates that respondent is eminently fit to retain its license.

There is evidence that respondent did receive compensation different from that published in two carriers' tariffs; however, this practice terminated in early 1977, respondent never passed such compensation on to shippers in violation of anti-rebating law and never allowed the practice to interfere with its strict fiduciary duties to its shipper customers.

In lieu of continuing with expensive litigation, respondent and the Commission's Hearing Counsel have negotiated a settlement agreement by which respondent will pay \$100,000 in lieu of assessment of penalties and will institute strong internal measures to ensure strict compliance with law. The settlement meets all applicable standards of reasonableness as developed by the Commission and is approved.

The record strongly supports a finding that respondent is fit to retain its license. The record shows that respondent has long enjoyed a fine, unblemished record for excellence in its field and has earned numerous commendations for its unique services which have saved the U.S. Government and other shippers considerable money. Respondent has behaved impeccably in this proceeding and has shown convincingly that it will scrupulously adhere to applicable laws and regulations. Under the circumstances, revocation or suspension of its license would be a gross travesty of justice. Moreover, rejection of the settlement would adversely affect future enforcement efforts by discouraging cooperation with the Commission's staff and provoking needless, expensive litigation instead of the prompt, efficient resolution of regulatory problems which the present settlement has achieved.

Elias Rosenzweig for respondent Daniel F. Young, Inc.

John Robert Ewers, Joseph B. Slunt, and William D. Weiswasser for The Bureau of Hearings and Field Operations, Office of Hearing Counsel.

INITIAL DECISION ¹ OF NORMAN D. KLINE,
ADMINISTRATIVE LAW JUDGE*Finalized October 29, 1981*

This is an investigation begun by the Commission's Order of Investigation and Hearing, served September 19, 1980. The Commission began this investigation because, as stated in the Order, its staff had developed information which allegedly indicated that respondent Daniel F. Young, Inc., an ocean freight forwarder licensed by the Commission, or its officers had received sums of money from two unnamed ocean carriers in excess of the compensation normally paid by such carriers to forwarders as published in the carriers' tariffs for certain shipments occurring between 1975 and 1977. The Commission questioned whether receipt of such "excess compensation" constituted action which violated the Shipping Act, 1916 (the Act). Specifically, the Commission questioned whether it may have reflected an agreement between Young and certain carriers which required approval under section 15 of the Act, may have resulted in Young's receiving transportation for less than applicable rates or charges if Young passed the alleged "excess compensation" to its shipper principals, in violation of section 16, Initial Paragraph, or even if not passing on such compensation to its shippers, may nevertheless have enabled Young to obtain transportation for less than applicable charges, also in violation of that provision of law. Finally, the alleged receipt of "excess compensation" from carriers caused the Commission to question whether civil penalties should be assessed against Young under section 32(e) of the Act and whether Young's license should be suspended or revoked on a finding of unfitness because of wilful violations of the law cited or even because the alleged conduct occurred without regard to whether it violated law.²

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

² The precise language of the Commission's Order framing the issues described is as follows:

1. Whether DFY violated section 15 of the Shipping Act, 1916, by entering into and carrying out without Commission approval any agreement providing for the receipt of payments from ocean carriers in excess of the amount of ocean freight forwarder compensation specified in the ocean carriers' applicable tariffs;
2. Whether DFY violated section 16, Initial Paragraph, of the Shipping Act, 1916, by directly or indirectly passing on any portion of monies received by it or its officers from ocean carriers in excess of authorized ocean freight forwarder compensation to its shipper principals thus obtaining transportation - on behalf of its principals - at less than the applicable rates or charges;
3. Whether DFY violated section 16, Initial Paragraph of the Shipping Act, 1916 - even if it did not pass any or all of monies received by it or its officers from ocean carriers in excess of authorized ocean freight forwarder compensation to its shipper principals - by obtaining transportation by water at less than the applicable rates and charges;
4. Whether civil penalties should be assessed against DFY pursuant to section 32(e) of the Shipping Act, 1916, for violations of the Shipping Act, 1916, and/or the Commission's

Continued

As in the case of several other forwarder investigations, all involving alleged receipt of "excess compensation" from certain carriers, the background of this investigation stems from information the Commission had received some time before January 18, 1979, which indicated that certain carriers may have paid such compensation to several forwarders. On the basis of this information, the Commission issued an order under section 21 of the Act directing employees of Young and some 15 other forwarders to provide more information concerning this "excess compensation." Young and several other forwarders asked the Commission to reconsider this order on various procedural and substantive grounds without success and thereafter four forwarders including Young requested review of the order by the United States Court of Appeals for the District of Columbia Circuit. After the matter had been briefed but prior to argument, however, the Commission withdrew its order and moved for voluntary dismissal of the pending Court proceedings, stating that the Commission had obtained information which made further responses unnecessary. The Court granted the Commission's motion on January 2, 1980. Thereafter the Commission initiated formal investigations against Young and at least three other forwarders involved in the section 21 proceedings. (See discussion in *Behring International, Inc. - Independent Ocean Freight Forwarder License No. 910, 23 F.M.C. 973*). As noted above, this investigation of Young began formally on September 19, 1980.

Shortly after commencement of the formal investigation, both Hearing Counsel³ and respondent Young began prehearing discovery under the Commission's rules. In response to Hearing Counsel's discovery requests, Young offered to make all of its records available for inspection and copying. Hearing Counsel and the Commission's investigators availed themselves of Young's offer. Because of the volume of materials to be inspected at respondent's office, some time elapsed before the process could be completed. Meanwhile the parties began to enter into discussions concerning a possible settlement. To facilitate settlement, Young conceded that it would accept as true, for the purposes of this

Rules and Regulations, and, if so, the amount of any such penalty which should be imposed;

5. Whether DFY's independent ocean freight forwarder license should be suspended or revoked pursuant to section 44(d) of the Shipping Act, 1916:
 - (a) if the investigation shows that DFY engaged in wilful violations of sections 15 and 16 of the Shipping Act, 1916; or
 - (b) if the Commission finds that the conduct described in Paragraphs 1-3 hereof has occurred and, though not violative of sections 15 and 16 of the Act, is conduct which renders DFY unfit to carry on the business of forwarding in accordance with section 510.9(a) of General Order 4.

³ The complete title of this office of the Commission is now the Bureau of Hearings and Field Operations, Office of Hearing Counsel. Previously the office was designated as the Bureau of Investigation and Enforcement. In the Commission's Order of Investigation and Hearing it was designated as the Bureau of Hearing Counsel.

proceeding only, the factual allegations set forth in the Commission's Order of Investigation and the specifications of instances of payment of "excess compensation" by Young detailed by the Commission's sources without conceding that they constituted violations of law. With the cooperation of Young, Hearing Counsel was able to build a record sufficient to determine the reasonableness of the proposed settlement which was finally formulated and to determine the question of respondent's fitness to retain its license. This record contains not only the text of the settlement and related promissory note but supporting documents and exhibits consisting of detailed tabulations of 278 shipments on which "excess compensation" was paid, a 22-page affidavit of Mr. Joseph G. Kearns, respondent's President, with 11 attachments containing laudatory letters and commendations from shippers, carriers, and other persons, and other relevant documents supporting the statements contained in the affidavit. Finally, the record contains a stipulation between Hearing Counsel and respondent establishing other facts concerning respondent's cooperation with Hearing Counsel and its past clean record before the Commission. It is this package which is now before me. My task is to determine, first, whether the proposed settlement should be approved under applicable standards of law, and, second, whether the record shows that respondent is unfit to retain its license. Both Hearing Counsel and respondent urge approval of the proposed settlement on the basis of the record developed. They cite, among other things, respondent's implementation of measures designed to prevent recurrence of the past activities in question and to ensure compliance with law, termination of the practices a long time ago, and payment of a significant amount of money in lieu of assessment of penalties as a further deterrent against recurrence. Both parties similarly urge me to find that respondent is fit to retain its license without suffering suspension or revocation because of many facts and considerations, among which are the voluntary termination of the practices, respondent's cooperation with the Commission's staff, and respondent's unblemished record and evidence that it has acted as one of the most respected, innovative, and helpful forwarders in the industry whose services have continually benefited the commerce and economy of the United States in unique ways. As I discuss below, I find that the record developed shows that the proposed settlement is worthy of acceptance by the Commission and furthermore shows that respondent is eminently fit to retain its license without suspension or revocation. A brief description of the settlement agreement would be helpful before I explain my reasoning.

DESCRIPTION OF THE PROPOSED SETTLEMENT

Very briefly, the essential terms of the proposed settlement are as follows: ⁴ Respondent will pay the sum of \$100,000 in full settlement of claims for civil penalties, such sum to be paid in five installments of \$20,000 each over a period of 24 months following Commission approval of the proposed settlement. In addition to this payment, respondent agrees to preserve and maintain through June 30, 1984, bills of lading relating to all instances of the payment of excess compensation shown in the record and to allow unimpeded access to these materials to Commission representatives. Furthermore, respondent agrees to take all reasonable measures designed to prevent receipt of non-tariff compensation from carriers in the future, including the submission by respondent's Chief Executive Officer of an annual statement to the Commission made under oath certifying that Young had not received non-tariff compensation during the preceding year, the institution of reviews of procedures and periodic audits, and the furnishing of notices to all of Young's directors, officers, and field managers of the settlement agreement. Respondent agrees to bind itself to the settlement agreement and not to interpose any defenses relating to the statute of limitations in case of breach of the agreement and commencement of Commission action prior to July 1, 1986, concerning receipt of non-tariff compensation.

APPROVABILITY OF THE PROPOSED SETTLEMENT

Both respondent and Hearing Counsel urge me to find that the proposed settlement is fair and reasonable and comports with applicable standards of law which the Commission has followed in its previous decisions and in its relevant regulations. Respondent traces the development of settlement law in recent years before the Commission showing that the Commission has made clear that settlements can and should be approved unless they violate some statutory provision, that they are approvable under all provisions of the Shipping Act, and that, consistent with the general body of settlement law, there is no need to make findings of violations of law if a fair and reasonable settlement can be approved. Respondent cites the Commission's regulations implementing Public Law 96-25, the law which gave the Commission authority to compromise or assess civil penalties, which regulations were not intended to impede settlements nor to require findings of violations of law. Respondent then cites applicable criteria by which the Commission has evaluated the reasonableness of settlements namely, litigative possibili-

⁴ The brief description of the proposed settlement agreement which follows is an outline and is not all-inclusive. For a description of the entire agreement and its implementing provisions, the reader should consult the complete text shown in the appendix.

ties, cost of collecting the claim, and effect on the Commission's enforcement policies, and in each instance shows how the proposed settlement comports with the particular criterion. Young points out that the question as to the legal significance of non-tariff or "excess compensation" paid by carriers to forwarders is novel and without clear decision from the Commission, that there is no evidence that Young passed through any such compensation to shippers, and that the previous instances in which "excess compensation" was paid by two carriers do not necessarily show that there was an unapproved section 15 agreement in existence at the time. Respondent also contends that continuation of the investigation by means of formal discovery, hearing, initial decision, exceptions, etc., would merely cause the Commission greater expense, not to mention the costs imposed on Young which would have been far more than the sums of money originally received by way of "excess compensation." Finally, Young explains that the settlement package which calls for payment of \$100,000 and institution of internal controls to prevent recurrence of the conduct in question has removed any element of profit from this past conduct, will prevent recurrence, and will act as a deterrent both to Young and other forwarders, thereby aiding the Commission's enforcement policies. As to the question of fitness, Young points out a number of considerations which demonstrate that it has acted as a responsible, respected member of the forwarding industry for many years, has many achievements to its credit, employs almost 400 people and expects to double in size in the next few years, has provided unique services to American exporters which have benefited the commerce and economy of the United States, has cooperated fully with the Commission's staff, has long ago terminated the practices in question which have never been decided to be violative of law in the first place, and has a long, unblemished history of honesty, so that revocation or suspension would be drastic punishment far out of proportion to the factual situation. Young submits "that the factual record in this proceeding, assessed in terms of the legal criteria governing license revocation, establishes that Young continues to be fit to serve as a licensed independent ocean freight forwarder." (Respondent's Memorandum in Support of Settlement, p. 22.)

Hearing Counsel similarly urge approval of the proposed settlement agreement, stating that it follows the decisions in forwarding cases in which similar settlements were approved as well as the Commission's regulations governing settlements. Hearing Counsel cite numerous decisions of the Commission in which the Commission has approved settlements arising under virtually every provision of the Shipping Act, 1916, in which, furthermore, it was not necessary that findings of violations of law be made. Hearing Counsel have likewise applied the various criteria applicable to approvability of settlements and have considered a number of mitigating factors such as the nature of the violations al-

leged, the lack of clear precedent which would hold that the conduct in question was contrary to law, the time in which the conduct occurred, its extent, its cessation by respondent, the amount of income generated by the questionable practices, how the money was distributed, the impact of the conduct in question on Young's performance as a forwarder, and Young's cooperation with Hearing Counsel and the Commission's staff. (See Hearing Counsel's Memorandum in Support of Proposed Settlement, p. 6.) Hearing Counsel have considered, furthermore, that the amount of the payment by Young in lieu of assessment of penalties (\$100,000) removes any profit from the transactions, acts as a deterrent, and is reasonable compared to the net amount of revenue derived from the "excess compensation" after taxes and legal fees had been expended by Young. The internal controls to be instituted by Young, according to Hearing Counsel, will further ensure that there will be no recurrence of the questionable practices which terminated years before the investigation began anyway. In brief, considering the whole context of Young's past behavior and its present complete cooperation and the considerable savings to the Commission resulting from termination of lengthy, costly formal litigation in favor of the proposed settlement, Hearing Counsel believe there is sound reason to accept the proposed settlement and, in addition, to find that Young is fit to retain its license without suffering suspension or revocation.

I find that both respondent's and Hearing Counsel's statements in support of the proposed settlement are convincing and that the record they have developed fully supports a finding that the proposed settlement is fair and reasonable and ought to be approved. A brief explanation of the law of settlements and recent Commission decisions in this area will demonstrate the validity of this finding.

HOW THE PROPOSED SETTLEMENT IS SUPPORTED BY GOVERNING PRINCIPLES OF LAW AND BY RELEVANT COMMISSION DECISIONS

There have been a great multitude of Commission decisions approving various settlements in freight forwarder as well as other cases under the Act especially in the last few years and under the new legislation, P.L. 96-25, authorizing the Commission to compromise or assess civil penalties. The development of this body of law, which corresponds with the general policy in American jurisprudence strongly favoring settlements over expensive litigation, has been discussed in some detail in two recent decisions, *Behring International, Inc.*, 23 F.M.C. 973, 975 and in Docket No. 80-20, *Kuehne & Nagel, Inc. - Independent Ocean Freight Forwarder License No. 1162*, 24 F.M.C. 315 (1981) 325-328. See also *Old Ben Coal Co. v. Sea-Land Service, Inc.*, 21 F.M.C. 506, 511-515 (1978) 1091-1095. As the discussion in these cases and the cases cited in

these decisions demonstrate, both the Commission and the courts strongly encourage settlements and follow the policy that they are presumed to be fair, correct, and valid. This policy has, furthermore, been embodied in the Administrative Procedure Act (APA) which intended settlements to be an important part of the administrative process. Indeed, even before enactment of P.L. 96-25 and the issuance of the Commission's implementing regulations, General Order No. 30, 46 C.F.R. 505, the Commission had incorporated the language of the APA pertaining to offers of settlement in its own Rule 91, 46 C.F.R. 502.91.

The discussion in *Kuehne & Nagel, Inc.* and *Behring*, cited above, refer to other guiding principles which the Commission and courts have employed in evaluating proffered settlements. Thus, the amount of payment in settlement of claims is viewed to be reasonable if it falls within a zone that represents neither an attempt to extract excessive sums of money from respondents not justified by the strength of the case that the government is likely to prove nor an obvious "throw-away" of a good case for a pittance. Moreover, presiding judges are not supposed to rubberstamp proffered settlements but are expected to evaluate them in consideration of the criteria enumerated in the Commission's regulations as well as other criteria which might be relevant under the circumstances. For example, the judge is supposed to be mindful of the cost-savings advantages to settlement which conserve scarce resources of the litigating parties and obtain for these parties concessions which are more economical to accept than to continue to expend time and money in continued litigation in the hopes of winning complete vindication. An important consideration which a judge should weigh is the strength of the case which a plaintiff or the government is likely to present balanced against the amount offered in settlement or, in other words, the prudence in accepting a particular amount of money and other concessions in settlement after consideration of the risks which the plaintiff or government would experience in trying to prove its case in formal trials or hearings subject to further appeals and judicial review. In penalty settlement cases and cases involving the question of whether a forwarder's license should be suspended or revoked, furthermore, the Commission, as the cases cited show, has given careful consideration to mitigating factors.

In the present case, the record clearly shows that both parties have paid attention to relevant criteria established by the Commission in its previous decisions and relevant regulations as well as case law generally. Thus, consider the factors enumerated in the Commission's regulations (4 C.F.R. 103, incorporated by 46 C.F.R. 505.1, General Order No. 30 revised). The three factors cited by respondent are litigative possibilities (i.e., risk of litigation), cost of collecting the claim, and effect on enforcement policy, 4 C.F.R. 103.3, 103.4, and 103.5, respectively. The first factor refers to the presence of bona fide factual and

legal disputes, difficulty of proof, availability of witnesses and "related pragmatic considerations." As respondents and Hearing Counsel acknowledge, there are bona fide disputes concerning the legal significance to be attached to the receipt of "excess compensation" by a forwarder from carriers as far as section 15 or section 16, Initial Paragraph, are concerned. As was noted in *Behring*, 23 F.M.C. at 988, "the law relevant to the transactions in question is open to dispute and lacks a clear, definitive decision from the Commission or the courts." ⁵ There is, moreover, no evidence developed by Hearing Counsel showing that any "excess compensation" was passed through to shipper clients of Young nor is there any decision of which I am aware which holds that even without a pass-through of such compensation, a forwarder can be found to have violated section 16, Initial Paragraph, of the Act. Indeed, the evidence developed, which Hearing Counsel do not refute, indicates persuasively that Young did not pass any of this compensation through to shippers and that receipt of such compensation from the two carriers did not influence Young in any way to depart from the best interests of its shipper clients.

As to cost of collecting the claim, as respondent points out, continuance of formal discovery and hearings and the rest of the stages of formal litigation would entail considerable time and money for both sides, a cost to Young far out of proportion to the amount of non-tariff compensation which Young had received. As Hearing Counsel point out, furthermore, acceptance of the approval of the settlement agreement would terminate needless litigation expense, save scarce Commission resources, and allow the Commission to allocate such resources to proceedings which are being contested and need attention, and would, moreover, obtain for the Commission a settlement which has tangible public benefits in terms of deterrence and the Commission's enforcement policies. As both parties point out, the amount of the settlement payment (\$100,000) represents approximately 60 percent of the amount of so-called "excess compensation" which Young received, which amount, after deducting income taxes and legal fees from the \$173,000 received, removes any profit and acts as an effective deterrent against any possible recurrence of the practice, which in any event terminated in early 1977. Of course, as part of the settlement, Young also agrees to institute internal controls which will provide further assurance against recurrence.

⁵ The relevant freight forwarder regulation, General Order No. 4, 46 C.F.R. 510.24(f), seems to require oceangoing common carriers to pay compensation in accordance with their published tariffs but does not specifically state that receipt of non-tariff compensation by the licensed forwarder is prohibited. The new freight forwarder regulations to be effective on October 1, 1981, however, clearly specify that licensees cannot accept compensation different from that provided in the carriers' tariffs. See 46 C.F.R. 510.33(f), General Order No. 4, Revised, Docket No. 80-13, slip opinion, p. 49. See also *Independent Ocean Freight Forwarders*, 19 S.R.R. 353, 357-358 (1979).

I have given consideration to two additional factors in finding the proffered settlement to be fair and reasonable. The first relates to the fact that, as Hearing Counsel acknowledge, this settlement is modeled after that approved by the Commission in *Behring*, a very similar case. The second relates to a number of factors in mitigation which are also relevant in determining the question of Young's fitness to retain its license. As to the first consideration, it is readily apparent that this case bears striking similarities to *Behring*. In both cases a forwarder having a long and respected reputation in the industry had received so-called "excess compensation" from only a very few carriers several years ago and in both cases the practices were discontinued long before the Commission's investigations commenced. In both cases, similarly, the forwarders cooperated with Hearing Counsel and the Commission's staff, making records available and helping to develop evidence. Also in both cases the entire case hinged upon the question of legality of receipt of this "excess compensation" from carriers under section 15 and section 16, Initial Paragraph, and in both cases there was no evidence that the forwarder had passed any portion of such compensation through to its shipper clients or that it had acted against the best interests of its shipper clients because a few carriers chose to pay "excess compensation." The settlement agreements in both cases are virtually identical and appear to conform to the models set forth in the Commission's regulations. (See 46 C.F.R. 505.7 and model agreement and promissory note, S.R.R. Current Service, § 144:7.) The only difference between the settlement agreements in the two cases appears to be in the amount of payment in lieu of assessment of penalties. In this case, Young agrees to pay the sum of \$100,000 in installments over a period of two years. In *Behring*, the amount was \$70,000 over the same period of time. However, in *Behring* the amount of "excess compensation" received by *Behring* totalled something like \$115,000 whereas in this case the amount received by Young approximated \$173,000 from only two carriers for shipments occurring during the period from September 1975 through January 1977, after which time such practices were terminated.

As to the second factor, I have considered a variety of facts such as the nature of the practices, their voluntary discontinuance, the amount of income generated, the uncertainty as to applicable law, and the effect on Young's duties to its shipper clients. Although these factors are perhaps more relevant to the issue of fitness, they also justify the limitation of the amount of payment to be made by Young to \$100,000 rather than imposition of unrealistic statutory maxima (\$25,000 for each violation of section 16, Initial Paragraph; \$1,000 per day for violation of section 15, which penalties, if applied liberally, would amount to several millions of dollars, probably enough to bankrupt Young). In brief, even if the conduct, which Young has admitted for purposes of this

proceeding, could ultimately be found to have been violative of the cited provisions of law, Young terminated the practices some time ago (in early 1977) and at the time that the two carriers made such payments of "excess compensation" there was no clear legal decision of the Commission holding that forwarders' receipt of such compensation was unlawful. Therefore, tailoring the amount of payment in settlement of claims for penalties in terms of deterrence and removal of any possible profit seems a sound approach and, indeed, was the approach taken in the *Behring* settlement. (See 20 S.R.R. at 1035.)

I conclude, therefore, that the proposed settlement agreement meets governing standards and, as was the case in *Behring*, deserves approval. Such approval, moreover, will continue the pattern begun in *Behring* which provided a model for future cases and has already apparently encouraged forwarders to cooperate with the Commission's staff rather than to engulf the Commission in protracted litigation.

THE QUESTION OF FITNESS

The question of fitness of Young to continue to operate under its license without suspension or revocation now remains for determination. This is the last issue (No. 5) framed in the Commission's order (p. 3). As decided in previous Commission cases, the issue of fitness in freight forwarder cases cannot be settled by the parties. See *Behring*, 23 F.M.C. 989; *Independent Freight Forwarder's License—E. L. Mobley, Inc.*, Order, 18 S.R.R. 451 (1978); Docket No. 80-20, *Kuehne & Nagel, Inc.*, 24 F.M.C. at 341. Consequently, both parties have developed an evidentiary record and have taken positions so as to enable me to determine the question.

Both parties urge me to find that Young is fit to retain its license without suffering revocation or suspension and find considerable support in the record for their positions. Young cites the fact that it has been in business since the early 1900's, has offices in seven cities, employs almost 400 people and expects to double its size in the next few years. Young also points to evidence showing the unique services it has provided, its unblemished record, and its cooperation with the Commission's staff. It contends that the activities in question which gave rise to this proceeding relate solely to receipt of so-called "excess compensation" which at the time had not been found to be unlawful by the Commission and indeed which the Commission's regulations even now do not clearly prohibit. (As noted above, the revised regulations will change this situation, effective October 1, 1981.) Under these circumstances Young argues that it can hardly be found to have "willfully" violated law. Young cites previous Commission decisions in which the Commission has made clear that it will fashion reasonable remedies in consideration of all mitigating factors and will not merely impose drastic sanctions of revocation or suspension when they are

unnecessarily punitive. Young concludes by arguing that revocation of its license would destroy a business that has been in operation for decades and has become a significant factor in the industry, harm its many employees, and deprive the shipping public of its valuable services.

Hearing Counsel also urge me to find Young fit and argue against imposition of the drastic sanctions of revocation or suspension of its license. Hearing Counsel recognize that the Commission is careful to impose sanctions only after considering the context in which the questioned conduct occurred and after considering all mitigating factors. Hearing Counsel also recognize that in this case there are numerous mitigating factors and legitimate questions as to whether the conduct in question was violative of law and in view of the uncertain status of the particular question of law, even whether the past conduct could be characterized as having been "wilful." Hearing Counsel give full credit to Young's cooperation with the Commission's staff in this proceeding and to its manifest willingness to prevent recurrence of the practices in question and, after considering the entire record, express their belief that Young can be trusted to abide by applicable law. Hence, Hearing Counsel contend that the record will not support revocation of Young's license.

As in *Behring*, I find that the record amply demonstrates that Young is a substantial and reputable company which has provided and will continue to provide a variety of useful services, that it has behaved commendably in this proceeding, has enjoyed an unblemished record in the past, and that in view of these and other considerations, even a suspension, much less a revocation of Young's license, would, in my opinion, constitute a gross travesty of justice. I now explain.

The similarities between this case and *Behring* are striking, as I have noted above. In *Behring*, the record demonstrated clearly that the forwarder was eminently fit to continue operating its forwarding business without suffering suspension or revocation of its license. The similarities both in fact and law between *Behring* and Young are so remarkable that the discussion in *Behring* explaining why revocation would be grossly unwarranted considering the nature of the past conduct under investigation and the convincing evidence of fitness bears re-reading. See *Behring*, 23 F.M.C. at 990-994. As in *Behring*, Young has enjoyed a long history of providing excellent service to American exporters and has made unique contributions to American commerce. Also, as in *Behring*, the only conduct of Young's which has been questioned involves the fact that during 1975 to early 1977 two carriers saw fit to pay Young compensation different from that specified in their tariffs. There is no indication that Young suggested this practice to the carriers but in any event Young ceased receiving such compensation in early 1977, long before this investigation commenced. As the evidence

in this case shows, moreover, and as was shown in *Behring*, Young never passed any of the compensation in question through to its shipper clients nor departed from its strict fiduciary duties towards its shipper customers because of the peculiar practice of the two carriers. In view of the uncertainty of applicable law at the time of the practices in question, moreover, it is difficult to argue that Young "wilfully" violated law when it received the compensation. See *Behring*, 23 F.M.C. at 990-994. If so, revocation or suspension would be of doubtful legality under the Administrative Procedure Act and its "second-chance" doctrine. *Behring*, 23 F.M.C. at 992-993. But regardless of whether the past conduct of Young was "wilful," the record in this case, as in *Behring*, strongly supports a finding of Young's fitness. Indeed, there is even more evidence here than in *Behring* that Young has been a credit to the forwarding industry. The affidavit of Mr. Joseph G. Kearns, President of Daniel F. Young, Inc., is extremely enlightening. It shows a long history of exemplary service to American shippers and unique benefits which Young has provided the American economy. Mr. Kearns explains Young's long history going back to the early 1900's and its excellent reputation. He discusses Young's involvement in the use of modern computer technology and shows how it has aided shipments of huge projects on behalf of the U.S. Army Corps of Engineers and other shippers. On a different level, Young has assisted in the shipment of priceless art treasures such as the movement of Michelangelo's *PIETA* from the Vatican to the New York World's Fair in 1964, for which Young received letters of commendation from no less than Francis Cardinal Spellman and Bishop McEntegart of Brooklyn. The evidence is convincing that Young never allowed receipt of "excess compensation" from the two carriers to influence it in the selection of carriers for its shipper clients nor in any way to cause Young to act in other than in the shippers' best interests. Moreover, Young has shown that because of its own efforts, certain procedures involving shipments out of the Great Lakes to India have been changed so as to save the U.S. Government over one hundred million dollars. This was done by arranging for U.S. Department of Agriculture relief shipments to move via Indian-flag vessels which could be paid out of U.S.-held rupees rather than in dollars. Moreover, while saving the U.S. Government considerable dollars on these shipments, Young suffered a loss of brokerage since the Indian carriers paid less brokerage to forwarders than third-flag carriers operating out of the Great Lakes. Mr. Kearns recites an impressive list of accomplishments in which Young has negotiated lower rates for relief and charitable cargoes even though, once again, such negotiations resulted in lower brokerage paid to Young. Attached to Mr. Kearns' affidavit, furthermore, are letters of commendation from various government and private shippers as well as from the aforementioned Cardinal and Bishop. These letters were written at various times in the past

without regard to the present investigation and were mostly if not all unsolicited. They are impressive and give proof of the high character, integrity, and magnificent service which Young has continually provided to the American shipper.

As noted, both Hearing Counsel and Young cite previous Commission decisions in freight forwarder cases in which the Commission has stated its belief that the freight forwarder law is essentially remedial, not punitive, and that the Commission will refrain from extreme sanctions such as revocation or suspension when the circumstances demonstrate that much less drastic action can serve valid regulatory purposes. In *Behring*, 23 F.M.C. at 993, the Commission stated:

Moreover, the Commission has continually considered mitigating factors when fashioning sanctions and has attempted to tailor just and reasonable solutions to the facts in each case in the belief that section 44 (the Freight Forwarder Law) and its regulations are based on remedial, not punitive purposes, avoiding the drastic sanction of revocation or harmful suspension of licenses when possible to achieve regulatory purposes short of such action.

The Commission proceeded to cite supporting language in two previous cases (*E. L. Mobley, Inc.*, 21 F.M.C. 845, 846-847, (1979), and *E. Allen Brown*, 22 F.M.C. 583, 597 (1980)). For a similar discussion of this doctrine of fashioning reasonable remedies which the Commission has continually followed, see also *Docket No. 80-20, Kuehne & Nagel, Inc.*, 24 F.M.C. 315.

In the instant case, as in *Behring*, there is considerable evidence of mitigating circumstances and of Young's fitness to continue serving shippers without revocation or suspension of its license. Not only has there been a long history of unblemished service by Young as well as a voluntary termination of the questionable practices some time ago, complete cooperation with the Commission's staff, etc., but, as shown by the settlement agreement, Young intends to take measures to ensure that no such practices recur. In view of Young's splendid history and reputation and its demonstrated commitment to prevent any deviation from applicable law, this record shows that Young easily meets the standards of fitness established in previous Commission decisions especially with regard to its demonstration that it will abide by all applicable Commission rules and policies. If the totality of circumstances show that a forwarder can be trusted to comply fully with Commission regulations and the high standards expected of all forwarders, the Commission has found the forwarder to be fit and has refrained from revoking or suspending licenses even in some cases when the forwarder has been found to have violated law in the past. See discussion in *Docket No. 80-20, Kuehne & Nagel, Inc.*, 24 F.M.C. 315.

ULTIMATE CONCLUSIONS

I conclude, therefore, that this record shows persuasively that Young is not only fit to continue providing its fine forwarding services to the shipping public but, as in *Behring*, it persuasively shows that revocation or suspension of its license would be grossly unwarranted sanctions. As in *Behring*, furthermore, I find that the proposed settlement agreement deserves approval and that implementation of the terms of that agreement will amply satisfy all regulatory purposes. Rejection of the settlement, however, would, as noted in *Behring*, thrust the proceeding back into uncertain litigation, chill future efforts of the Commission's staff to encourage forwarders and other regulated persons to cooperate with the Commission, and substitute needless, expensive litigation and unnecessary antagonism for prompt, effective resolution of regulatory problems such as that achieved by the present settlement.

(S) NORMAN D. KLINE
Administrative Law Judge

APPENDIX

BEFORE THE FEDERAL MARITIME COMMISSION

DANIEL F. YOUNG, INC.,
INDEPENDENT OCEAN FREIGHT

DOCKET NO. 80-65

FORWARDER LICENSE NO. 656

PROPOSED SETTLEMENT OF CIVIL PENALTIES

This Proposed Settlement has been entered into between the Bureau of Investigation and Enforcement ("Bureau") of the Federal Maritime Commission ("Commission") and Respondent Daniel F. Young, Inc. ("Young"). It is submitted to the Presiding Administrative Law Judge for approval pursuant to Rule 162 of the Commission's Rules of Practice and Procedure, 46 C.F.R. 502.162, and Section 505.3 of the Commission's General Order 30, 46 C.F.R. 505.3, and is to be incorporated into the Final Order in this proceeding, if so approved.

WHEREAS, by Order of Investigation and Hearing served September 19, 1980 ("Order") the Commission instituted the present proceeding to determine whether Young had violated Sections 15 and 16, Initial Paragraph, of the Shipping Act, 1916, 46 U.S.C. §§ 814 and 815), and whereas the Order includes the issue of whether civil penalties should be assessed for any violations of Sections 15 and 16, Initial Paragraph, of the Shipping Act, 1916., so found; and

WHEREAS, the Order alleges that Young may have violated Sections 15 and 16, Initial Paragraph, of the Shipping Act, 1916; and

WHEREAS, Young, without admitting that there is any validity in the claims asserted by the Commission in the Order or any illegality or impropriety in any of the past practices or acts of Young, its officers and employees or any of them, is entering into this stipulation in order to avoid the uncertainty, inconvenience and expenses that would be incurred in the protracted litigation of this proceeding and, to that end, consents and agrees that for the purposes of this proceeding alone, and for no other purpose, the allegations of the Order that Young received from oceangoing common carriers compensation in excess of the rates specified in the carriers' tariffs ("non-tariff compensation") and the specifications of such allegations contained in Appendices I and II hereto, such non-tariff compensation having allegedly been paid in the form of cash, shall be taken to be true and treated as facts for the purposes of the factual record in this proceeding; and

WHEREAS, Young has indicated its willingness to cooperate with the Commission in other investigations involving the payment of non-tariff compensation by oceangoing common carriers, and whereas Young's failure to so cooperate will constitute a breach of this Agreement; and

WHEREAS, Young, since long prior to the Order, has not received any non-tariff compensation and has instituted and has indicated its willingness and commitment to maintain measures designed to eliminate, discourage and prevent the future receipt of non-tariff compensation; and

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

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

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

1. Young hereby agrees, as a condition of the settlement agreement, to pay a monetary amount of One Hundred Thousand (\$100,000) Dollars, of which Twenty Thousand (\$20,000) Dollars shall be payable thirty (30) days following approval by the Commission of this Proposed Settlement, and Eighty Thousand (\$80,000) Dollars shall be payable according to the terms of the Promissory Note attached hereto as Appendix III in the following installments:

Twenty Thousand (\$20,000) Dollars, plus interest, shall be paid on or before six (6) months following approval by the Commission of this Proposed Settlement;

Twenty Thousand (\$20,000) Dollars, plus interest, shall be paid on or before twelve (12) months following approval by the Commission of this Proposed Settlement;

Twenty Thousand (\$20,000) Dollars, plus interest, shall be paid on or before eighteen (18) months following approval by the Commission of this Proposed Settlement; and

Twenty Thousand (\$20,000) Dollars, plus interest, shall be paid on or before twenty-four (24) months following approval by the Commission of this Proposed Settlement.

2. Except as provided in Paragraph "7" below, this Agreement shall forever bar the commencement or institution of any civil action or

other claim for recovery of civil penalties from Young arising from or related to the subject matter of this proceeding or any facts set forth and described in Appendices I and II hereto, or elsewhere in the record in this proceeding. It is understood by Young that this Agreement shall not serve as a bar or defense to any criminal prosecution or civil litigation by the Commission or any other department or agency of the United States Government for any conduct engaged in by Young which is not comprehended within or fairly to be inferred from the factual record submitted in this proceeding.

3. Young agrees to preserve and maintain, through June 30, 1984, copies of all underlying oceangoing common carrier bills of lading applicable to the shipments listed in Appendices I and II in this proceeding and, upon reasonable notice, to allow appropriate Commission representatives unimpeded access to such bills of lading and to allow the removal of such bills of lading specifically requested by such Commission representatives.

4. Young agrees to take all reasonable measures designed to discourage, prevent and eliminate the receipt by it of non-tariff compensation unless the Commission or the courts find, or Congress establishes, that it is lawful. These measures shall include, but need not be limited to, the following:

(i) Young's Chief Executive Officer will submit annually to the Commission a statement made under oath certifying that, to the best of his knowledge based upon inquiry, Young had not received non-tariff compensation during the preceding year.

(ii) Young will review its administration and procedures and modify both to the extent necessary to safeguard, through periodic audits or other methods of control, against the occurrence of practices by Young, its officers, employees and agents, which would result in the receipt of non-tariff compensation.

5. Young agrees that it will not wilfully violate any provision of the Shipping Act, 1916, as amended, or regulation of the Commission thereunder applicable to the conduct of Young's business as an ocean freight forwarder.

6. Young agrees that within thirty (30) days following the approval of this Proposed Settlement, it will either furnish copies of this Agreement or will give affirmative notice of the terms and provisions thereof to all of its directors, officers and field managers.

7. Young hereby agrees as a condition of this Agreement that if it breaches this Agreement it will not interpose the Statute of Limitations as a bar or a defense in any action or proceeding instituted prior to July 1, 1986, by or on behalf of the Commission, to recover civil penalties for violations of the Shipping Act, 1916, arising from and applicable to

the receipt of non-tariff compensation, as disclosed in Appendices I and II or elsewhere in the factual record submitted in the present proceeding. In the event of such a breach by Young, if such noncompliance shall not have been explained to the Commission's satisfaction within thirty (30) days after written notice to Young by the Commission, the Commission shall have the option to seek enforcement of all terms and conditions of this Agreement, or to declare this Agreement null and void; provided, however, that in either case Young's waiver of the Statute of Limitations under this paragraph shall remain in full force and effect. In the event the Commission declares this Agreement null and void and such determination is not reversed by a court of competent jurisdiction, any monies paid to the Commission shall remain the property of the United States, and Young will not interpose any defense based on the Statute of Limitations in any action which the Commission may institute to recover civil penalties arising out of the conduct set forth in the factual record submitted in the present proceeding.

8. In the event changes in law or other circumstances occur during the term of this Agreement which Young believes warrant modification or mitigation of the Agreement, Young may petition for this purpose.

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

10. The undersigned counsel for Young represents that he is properly authorized and empowered to execute this Agreement on behalf of Young and to fully bind Young to all of the terms and conditions herein.

(S) JOHN ROBERT EWERS, DIRECTOR
*Bureau of Investigation and
Enforcement*

(S) JOSEPH B. SLUNT,
Attorney

(S) WILLIAM D. WEISWASSER,
Attorney

(S) Elias Rosenzweig,
Attorney for DANIEL F.
YOUNG, INC.

PROMISSORY NOTE

For value received, Daniel F. Young, Inc. (Young) promises to pay to the Federal Maritime Commission (Commission) the principal sum of One Hundred Thousand Dollars (\$100,000), to be paid at the offices of the Commission in Washington, D.C., by bank cashier's check in the following installments:

Twenty Thousand Dollars (\$20,000) on or before thirty (30) days following the approval by the Commission of the Proposed Settlement in FMC Docket No. 80-65;

Twenty Thousand Dollars (\$20,000) on or before six (6) months following the approval by the Commission of the Proposed Settlement in FMC Docket No. 80-65;

Twenty Thousand Dollars (\$20,000) on or before twelve (12) months following the approval by the Commission of the Proposed Settlement in FMC Docket No. 80-65;

Twenty Thousand Dollars (\$20,000) on or before eighteen (18) months following the approval by the Commission of the Proposed Settlement in FMC Docket No. 80-65;

Twenty Thousand Dollars (\$20,000) on or before twenty-four (24) months following the approval by the Commission of the Proposed Settlement in FMC Docket No. 80-65.

In addition to the principal amount payable hereunder, interest on the unpaid balance thereof shall be paid with each installment. Such interest shall accrue from the date upon which the Commission approves the Proposed Settlement in FMC Docket No. 80-65 and be computed at the rate of twelve percent (12%) per annum on the unpaid balance.

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

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

DANIEL F. YOUNG, INC. - INDEPENDENT OCEAN
FREIGHT FORWARDER LICENSE NO. 656

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

DANIEL F. YOUNG, INC.

BY _____
President

DATE: _____

FEDERAL MARITIME COMMISSION

SPECIAL DOCKET NO. 771

APPLICATION OF LYKES BROS. STEAMSHIP CO., INC.
FOR THE BENEFIT OF TEXAS TURBO JET, INC.

Permission to refund a portion of the freight charges collected from the shipper must be denied where the carrier did not perform the service contemplated by the tariff upon which the refund would be based.

REPORT AND ORDER

October 30, 1981

BY THE COMMISSION: (ALAN GREEN, JR., *Chairman*; THOMAS F. MOAKLEY, *Vice Chairman*; RICHARD J. DASCHBACH AND JAMES V. DAY, *Commissioners*) *

The proceeding is before the Commission upon its determination to review the Supplemental Decision of Administrative Law Judge William Beasley Harris granting Lykes Bros. Steamship Co., Inc. (Lykes) permission to refund to Texas Turbo Jet, Inc. (TTJ) the amount of \$21,950.53 with interest.

The relevant facts as developed from Lykes' application and supporting documents are as follows: Lykes operates both an all-water port-to-port service from Italian and other Mediterranean ports to United States South Atlantic and Gulf ports under the tariff of the Med-Gulf Conference, as well as an individual intermodal joint water-rail service¹ from Mediterranean and Black Sea ports to United States Railroad Destination Terminals in several states, including Texas.

Lykes' Dallas sales office entered negotiations with TTJ for the transportation of aircraft engines from Leghorn, Italy, to Dallas, Texas, in two 40-foot containers at the rate of \$3,600 per container plus a \$320 per container energy surcharge. Subsequently, the following internal telex was sent to Lykes' New Orleans personnel:

Please relay the flwg msg. via teletype . . .

We will quote the following rate for aircraft engines microbridge from Italy to Dallas.

Aircraft engines, \$3600 lump sum/40 ft. cntr.

Bunker surcharge, 320 lump sum total 3920

* Commissioner James J. Carey did not participate.

¹ Lykes Bros. Steamship Co., Inc. Import Joint Freight Tariff No. LYKU - ICC #310, FMC No. 99.

Our agents in Leghorn are Coe & Clerici SPA . . .
Pls advise us of next shipment as these rates will
only be filed upon receiving a firm booking.

Although Lykes alleges, by subsequent affidavit, that "a formal commitment was extended to TTJ," Lykes' Sales Department and Mediterranean Traffic Department failed to communicate any details of the arrangement to Lykes' Mediterranean representative in Genoa.

On or before July 9, 1980 the shipment was delivered to the carrier in Leghorn, as evidenced by the bill of lading. The shipper's agent in Leghorn booked the shipment and Lykes accepted the shipment for a port-to-port Leghorn/Houston, all-water movement under the Med-Gulf Conference tariff at the rate of \$192.00 W/M, subject to a Port and Terminal Service Charge, Open Top Container Charge, Bunker Adjustment Factor and Congestion Surcharge. Moreover, in lieu of two 40-foot containers, Lykes placed the cargo in four 20-foot containers which resulted in a total cost of transportation of \$29,760.53.² Upon notification of the cargo's arrival in Houston, TTJ accepted the cargo, paid the charges in full and filed a complaint with Lykes requesting an explanation for the overcharge. Subsequently, Lykes filed the present application, asking permission to refund a portion of the freight charges on the ground that the failure to file the agreed upon rate was due to inadvertent administrative error.

In his first Initial Decision the Presiding Officer recognized that certain questions remained unanswered, but nevertheless concluded that the application met the requirements of section 18(b)(3) of the Shipping Act, 1916,³ and granted Lykes permission to refund the requested amount of \$21,950.53 to TTJ.

² Lykes' invoice to TTJ shows charges in the amount of \$29,818.07, or a difference of \$57.54 attributed to wharfrage.

³ Section 18(b)(3) reads in part:

No common carrier by water in foreign commerce . . . shall charge or demand or collect or receive a greater or less or different compensation for the transportation of property 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: *Provided, however,* that the Federal Maritime Commission may in its discretion and for good cause shown permit a common carrier by water in foreign commerce or conference of such carriers to refund a portion of freight charges collected from a shipper or waive the collection of a portion of the charges from a shipper 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 and that such refund or waiver will not result in discrimination among shippers: *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: *Provided further,* That the carrier or conference agrees that if permission is granted by the Federal Maritime Commission, an appropriate notice will

Continued

On review of the Initial Decision, the Commission, by Order served May 27, 1981, determined to remand the proceeding to the Presiding Officer for the purpose of further developing the record on the following points:

(1) whether the parties had in fact reached an agreement on the negotiated rate and, if so, the manner in which that arrangement was communicated and accepted by TTJ;

(2) whether the shipment in question actually moved to Dallas, and if so, who arranged and paid for the inland transportation;

(3) whether the inland transportation was provided by rail and/or motor carriers named as participants in Lykes' intermodal tariff and, if so, at what rates;

(4) whether the substitution of four 20-foot containers for the two offered 40-foot containers was caused by an error of the type contemplated in section 18(b)(3) of the Shipping Act, 1916; and

(5) whether (if it is ascertained that the parties had established an agreed rate for the shipment) the use of 20-foot containers for the shipment bars refund based on the new tariff filed with Lykes' application in this proceeding.

On remand, the Presiding Officer found that:

(1) the parties had an agreement on the rate to be charged by Lykes for the transportation from Leghorn, Italy, to Dallas, Texas;

(2) due to Lykes' failure to file an amendment to its intermodal tariff reflecting the agreement, the shipment moved from Leghorn to Houston under the port-to-port tariff of the Med-Gulf Conference of which Lykes is a member;

(3) after taking delivery of the shipment at Houston, TTJ arranged for its transportation to Dallas by motor carrier and paid \$2,455.84 for such transportation;

(4) the motor carrier employed by TTJ was not a participant in Lykes' intermodal tariff;

(5) the use of four 20-foot containers instead of the promised two 40-foot containers was caused by an error of the type contemplated in section 18(b)(3) of the Shipping Act, 1916. The Presiding Officer reasoned that the loading of the "wrong" containers in this instance was the carrier's fault just as the overloading of a container was found to be the carrier's error in *Old Ben Coal, Inc. v. Sea-Land Service, Inc.*, 21 F.M.C. 506 (1978). Accordingly, he concluded that the wrongful substi-

be published in the tariff, or such other steps taken as the Federal Maritime Commission may require, which give notice of the rate on which such refund or waiver would be based, and additional refunds or waivers as appropriate shall be made with respect to other shipments in the manner prescribed by the Commission in its order approving the application: *And provided further*, That application for refund or waiver must be filed with the Commission within one hundred and eighty days from the date of shipment. 46 U.S.C. 817(b)(3).

tution of 20-foot containers for the promised 40-foot containers was a "further result of Lykes' inadvertent failure to file the agreed rate"; and

(6) the refund, if granted, will not have any effect on the land portion of the through rate.

Based on the foregoing, the Presiding Officer concluded that Lykes' failure to file the rate agreed upon in its tariff was due to inadvertence within the meaning of section 18(b)(3) of the Act and granted Lykes permission to refund \$21,950.53 of the \$29,650.53 collected from TTJ.

DISCUSSION

A threshold question in considering a request for relief under section 18(b)(3) is whether the carrier performed the service for which it seeks permission to apply a rate not on file in its tariff at the time of shipment.

In this instance, while Lykes had apparently agreed to move the shipment from Leghorn to Dallas, its failure to perform that service is fatal to the instant application. Lykes' port-to-port bill of lading issued under the Conference tariff provided for delivery of the cargo to the shipper at Houston to the exclusion of any further land transportation. TTJ, and not Lykes, arranged and paid for the carriage by motor carrier to Dallas. Consequently, Lykes did not perform the transportation service contemplated in its agreement with TTJ and for which it now asks permission to apply a special rate.

Furthermore, the tariff which Lykes seeks to apply is a joint ICC/FMC tariff in which certain rail and motor carriers have agreed to participate, at rates or "divisions" which are set forth in the tariff. None of those rail or motor carriers participated in this movement. Thus, the conclusion reached by the Presiding Officer, that a refund here will not affect the land portion of through rate, has no meaning in this case. The rail and motor divisions of the through rate have not and cannot be paid because the service was not performed.

As a remedial statute section 18(b)(3) needs to be liberally construed.⁴ The Commission, however, may exercise its discretionary powers only within the limits permitted by statute. In this instance, Lykes filed a tariff⁵ covering a service it had not performed and then applied for permission to refund a portion of the charges collected not under its own tariff, but under the Conference's tariff. Moreover, the tariff sought to be applied to this shipment reflects a service that would clearly contradict the terms of the bill of lading under which this cargo moved.

⁴ *Nepera Chemical, Inc. v. Sea-Land Service, Inc.*, 662 F.2d 18 (D.C. Cir. 1981).

⁵ The tariff upon which the refund would be based is required by section 18(b)(3). 46 U.S.C. 817(b)(3).

There are at least two other obstacles to granting this application which were not recognized by the Initial Decision. First, the substitution of four 20-foot containers for two 40-foot containers, while permissible under the conference tariff which was applied to this shipment, is not permitted under Lykes' intermodal tariff, which is sought to be applied. The reason for this distinction is that the rail and motor divisions in the intermodal tariff vary depending upon the size of container carried. Thus, even if Lykes had properly filed the agreed upon rate in its intermodal tariff, that rate could not have been applied to the instant shipment.

Second, the "agreement" between Lykes and TTJ indicated that the "rates will only be filed upon receiving a firm booking." Since there was no applicable rate in Lykes intermodal tariff previous to the shipment, the agreed upon rate would be a new or initial rate which, under the terms of section 18(b)(2) of the Shipping Act (46 U.S.C. 817(b)(2)), would have to be filed at least thirty days prior to its effectiveness. It is apparent from the record in this case that the booking was not made at least thirty days prior to shipment. Thus, once again, even if Lykes had filed the agreed upon rate, it could not have been applied to the instant shipment.⁶

Therefore, the decision of the Presiding Officer granting Lykes Bros. Steamship Co., Inc. permission to refund \$21,950.53 of the freight charges collected from Texas Turbo Jet, Inc. is reversed. The application of Lykes Steamship Co., Inc. is denied and the proceeding is discontinued.

It is so ordered.

(S) FRANCIS C. HURNEY
Secretary

⁶ There is a mechanism under section 18(b)(2) under which the Commission may, "in its discretion, and for good cause," allow new or initial rates to become effective upon less than thirty days' notice. Since no such application was filed by Lykes, we can only speculate on whether it would have been granted. However, it would certainly stretch the meaning of words to find that Lykes' apparent desire not to publicize its arrangement with TTJ until the cargo was booked constituted "good cause" to waive the statutory notice requirement.

FEDERAL MARITIME COMMISSION

DOCKET NO. 80-76
HEIDELBERG EASTERN, INC.

v.

CONTAINER OVERSEAS SERVICES, INC. AND
CONTAINER OVERSEAS AGENCY, INC.

ORDER REOPENING AND REMANDING PROCEEDING

November 5, 1981

On June 26, 1981, Chief Administrative Law Judge John E. Co-grave's Initial Decision in this proceeding was adopted by the Commission. That decision awarded Complainant \$9,794.00 in reparations from Respondents Container Overseas Agency, Inc. (Agency) and Container Overseas Services, Inc. (Services) for a freight overcharge which violated section 18(b)(3) of the Shipping Act, 1916 (46 U.S.C. 817).¹ This proceeding is now before the Commission upon Agency's Petition for Reconsideration, requesting that the complaint against it be dismissed on the ground that Agency should not have been made a party to the proceeding.

Agency argues that the Commission lacks jurisdiction over it in a section 18(b)(3) proceeding. Agency asserts that it and Services were separate and distinct corporations, that only Services was a carrier, and that Agency "was merely a terminal, at best." Agency's President had previously failed to respond to the notice of this litigation, Agency explains, "because he knew that he was not a carrier."²

In its Reply to the Petition, Complainant argues that Agency should have raised the jurisdictional question during the course of the litigation, and has not provided new information not available at the time of the initial determination. Complainant also alleges that, contrary to Agency's contention, Agency was not a separate entity from Services, and cites correspondence suggesting substantial participation by Agency in the carrier business.³ Complainant additionally requests that

¹ The Commission reviewed the Initial Decision for the purpose of awarding interest on the grant of reparations.

² Agency did not participate in the proceeding. Services requested an extension for filing an answer, but failed to participate in the proceeding beyond that. Both Respondents ignored the Presiding Officer's procedural notice requesting memoranda.

³ Complainant cites a letter from Services' Vice President explaining that Services "ceased business September 19, 1980 and gave the entire business over" to Agency. That letter further states:

Continued

the Commission "impose appropriate fines and sanctions against Agency for its conduct" and that Complainant be awarded \$2,400.00 in attorney's fees.

DISCUSSION

Agency's Petition was not timely filed, and it has therefore requested a waiver of the Commission's Rule 261 (46 C.F.R. 502.261) requiring that petitions for reconsideration be filed within 30 days of a final decision. Because the subject of Agency's belated Petition is jurisdiction, a challenge to which cannot be dismissed as untimely,⁴ the Commission will waive its rule and entertain the Petition.

The present record is insufficient to permit the Commission to make any determination on the jurisdictional issue raised. Nor are there tariffs on file or other information of which the Commission could take official notice, which would aid in such a determination.

The Commission has determined, therefore, to reopen the proceeding and remand it to the Presiding Officer to take additional evidence on the matter, and to determine whether Agency is indeed subject to the Shipping Act, 1916 in the context of this proceeding. This will afford all parties the fullest opportunity to address the jurisdictional issue raised in Agency's Petition.

THEREFORE, IT IS ORDERED, That this proceeding is reopened and remanded to the Presiding Officer for further action consistent with this Order.

By the Commission.*

(S) FRANCIS C. HURNEY
Secretary

[A]ll sales and marketing, stuffing, receiving, trucking and rate making negotiations in the U.S. were handled by the Agency company. Container Overseas Services, Inc. was the financing part of the NVOCC business since it had credit with steamship lines and borrowing power to advance monies which "Agency" did not have.

* * * * *

Your clients (sic) claim against "Services" was unfortunately (sic) out of my control as we have little or no defense because it was the employees of "Agency" in New Jersey who did all the negotiations and reaped the benefit.

Agency's reply to Complainant's submission was rejected by the Commission's Secretary, as constituting a reply to a reply not permitted by the Commission's Rules of Practice and Procedure. 46 C.F.R. 502.74(a).

⁴ *Laffey v. Northwest Airlines, Inc.*, 367 F.2d 429, 474 (D.C. Cir. 1976), cert. den. 434 U.S. 1086 (1978).

* Commissioner James J. Carey did not participate in this matter.

FEDERAL MARITIME COMMISSION

DOCKET NO. 81-44

VIRGINIA PORT AUTHORITY (PETITION FOR DECLARATORY ORDER)

Agreement No. T-3896 does not authorize the parties to adjust rental payments for occupancy which occurred prior to Commission approval.

J. Stanley Payne, Jr., for Virginia Port Authority.

Robert L. McGeorge and Richard D. Gluck, for Portsmouth Terminals, Inc.

REPORT AND ORDER

November 6, 1981

BY THE COMMISSION: (ALAN GREEN, JR., *Chairman*; THOMAS F. MOAKLEY, *Vice Chairman*; JAMES JOSEPH CAREY, RICHARD J. DASCHBACH, AND JAMES V. DAY, *Commissioners*)

The Commission has before it the Petition for Declaratory Order of the Virginia Port Authority (VPA) and the Reply of Portsmouth Terminals, Inc. (PTI), arguing for different interpretations of a lease arrangement between VPA and PTI for the operation of marine terminal facilities in Portsmouth, Virginia.

BACKGROUND

Two section 15 agreements are at issue. The second of these agreements, Agreement No. T-3896, was approved on November 14, 1980 for a further term expiring April 30, 1985. Prior to November 14, 1980, the parties had leased the same facilities under Agreement No. T-2558.¹ Agreement No. T-2558 had a ten-year term which expired December 31, 1979, but permitted PTI to hold over on a month-to-month basis at the previous rental amount.² Because negotiation of the second lease was not completed until February 26, 1980, PTI occupied the premises and paid rent under the holdover provisions of the first agreement until FMC approval could be obtained.

¹ Agreement No. T-2558 was originally between PTI and the Portsmouth Port and Industrial Commission and dates back to January 1, 1970—although occupation of the premises was not lawful under the Shipping Act until Commission approval was obtained on October 26, 1971. VPA succeeded to the interests of the Portsmouth Port and Industrial Commission on April 1, 1971.

² PTI also had an option of first refusal to negotiate with VPA for an additional ten-year term at a newly agreed upon rental amount.

The instant dispute concerns the amount of rent due VPA for the first ten and one-half months of 1980. Agreement No. T-3896 provides for a lower rental than did Agreement No. T-2558 for the volume of cargo actually handled by PTI during 1980. VPA states that the T-3896 formula is inapplicable to any cargo handled before November 14, 1980—the date of Commission approval—whereas PTI believes the reduced amount applies retroactively to cover all of its 1980 cargo, in part because of language in Agreement No. T-3896 stating that its term would run for 64 months beginning on January 1, 1980. Approximately \$104,000 seems to be involved, an amount withheld by PTI from its December, 1980 rental payment.³

POSITION OF THE PARTIES

VPA alleges that: (1) the parties intended that T-3896 rental payments would begin at the time of Commission approval and not on January 1, 1980; (2) the January 1, 1980 date appears in section 2.1 of Agreement No. T-3896 in order to establish a definite termination date of May 1, 1985 and not a retroactive commencement date;⁴ (3) section 2.1.5 of Agreement No. T-3896 and Exhibit C thereto, when read together, clearly indicate that rent shall commence upon approval by the Commission;⁵ (4) the Commission's Order approving Agreement No. T-3896 states, at page 3, that: "the rental formula contained in Exhibit C reflects [the parties'] understanding that the agreement will not become effective prior to Commission approval;" (5) Agreement No. T-3896 changes several of the parties' obligations in addition to the rental amount and there is no basis for construing the rental formula differently from the Agreement's other provisions; and (6) the courts and the Commission have construed section 15 as forbidding the retroactive approval of agreements.⁶

PTI argues that the Commission should either dismiss or deny the Petition because: (1) declaratory order procedures are unavailable in

³ See PTI Reply at 15-16, 27; Petition at 2. The parties have not disclosed their accounts to the Commission.

⁴ Section 2.1 provides that:

The term of this Lease shall be for a period of five (5) years and four (4) months commencing at midnight, January 1, 1980 and ending at midnight, April 30, 1985.

⁵ Section 2.1.5 provides that:

This Lease shall be submitted for approval by the Federal Maritime Commission and the parties will cooperate in their efforts to have it approved at an early date. The parties agree that the date of approval shall not be considered as an act which will extend the initial term of this Lease beyond May 1, 1985.

Exhibit C provides, in pertinent part, that:

Rent for the period January 1, 1980, or upon such date as this lease is approved by the Federal Maritime Commission through December 31, 1982, shall be as follows. . . .

⁶ *River Plate & Brazil Conference v. Pressed Steel Car Co.*, 227 F.2d 60 (2d Cir. 1955); *Pacific Coast European Conference v. Federal Maritime Commission*, 439 F.2d 514 (D.C. Cir. 1970); *Agreement No. T-2138*, 12 F.M.C. 126 (1968); *Mediterranean Pools Investigation*, 9 F.M.C. 264 (1966).

this instance because VPA is not seeking an interpretation of the leases which would allow it to "act without peril;"⁷ (2) VPA refused to participate in good faith negotiations regarding 1980 rents as required by Section 13.1 of Agreement No. T-3896;⁸ (3) the Petition is procedurally defective because all relevant provisions of the lease are not attached and because it does not include a plain statement of exactly how the annual rental formula would be applied to tonnages handled during periods of less than one year; (4) the rental charges established by Agreement No. T-3896 are mere "landlord/tenant" transactions, not subject to Commission regulation; (5) Section 3.1 expressly refers to a "total annual rent"⁹ and thus reflects the parties' intention that all 1980 rents were to be calculated under the new formula if Agreement No. T-3896 were approved any time during calendar year 1980; (6) the Commission has allowed adjustments in revenue pools to cover past voyages when it could find that such adjustments would have only a prospective effect upon the parties' operations;¹⁰ (7) application of the new formula to all 1980 cargo would not have a retroactive effect because both the new and the old formulae are based upon the total annual tonnage and the parties could not have altered their behavior prior to approval; (8) because the parties could submit an appropriate amendment to Agreement No. T-3896 which would accomplish the result sought by PTI, it would not violate section 15 to construe the new rental formula as applying to all 1980 cargo; (9) Agreement No. T-3896 is ambiguous, was drafted by VPA, and reflects VPA's superior bargaining power, and, because of these circumstances, Virginia law requires that it be construed against VPA;¹¹ (10) public policy favors

⁷ PTI claims that VPA's objective is to coerce PTI into paying additional rent and that the Petition therefore does not comply with section 502.68(b) of the Commission's Rules which states, in pertinent part, that:

The procedures of this section shall be invoked solely for the purposes of obtaining declaratory rulings which will allow persons to act without peril upon their own view. Controversies involving an allegation of violation by another person of statutes administered by the Commission, for which coercive rulings such as payment of reparation or cease and desist orders are sought, are not proper subjects of petitions under this section. 46 C.F.R. 502.68(b).

⁸ Section 13.1 provides that:

Should a dispute arise between the parties as to the interpretation of any of the provisions or the performance of either party of any of the obligations undertaken by this Lease Agreement, the matter in question shall be settled by the parties which shall meet and confer within five (5) days after receipt of written notice from one to the other of an issue that is in dispute. The foregoing language shall not deprive either party of their legal rights under the terms and conditions of this Lease.

⁹ Section 3.1 provides that:

PTI covenants and agrees to pay for the demised premises the total annual rent to VPA in accordance with the formula set forth in Exhibit C, attached hereto and made a party hereof. The annual rent consists of (a) the minimum guarantee (hereinafter referred to as the "basic rent"), and (b) the additional rent for tonnage handled in excess of 400,000 tons per year.

¹⁰ *E.g., Agreement No. 9847-3*, unreported, November 29, 1977.

¹¹ PTI claims that it developed a successful terminal business under the first lease where none previously existed and that VPA has unfairly attempted to appropriate certain aspects of this business by

Continued

adjustments in terminal lease rentals because they provide little opportunity for anticompetitive results.

Finally, PTI claims that if the Commission declines to rule in PTI's favor it must institute an evidentiary hearing to allow PTI to prove disputed facts and develop supplementary facts now in VPA's possession.

DISCUSSION

PTI's technical defenses to VPA's Petition must fail. The question raised by VPA concerns whether the rental provisions of T-3896 can apply to the 10 1/2 month period which preceded the Commission's approval of that agreement. VPA has asked the Commission to construe a section 15 agreement subject to federal, and not state, jurisdiction under the Shipping Act, 1916. *See California v. United States*, 320 U.S. 577 (1944), *rehearing denied*, 321 U.S. 802 (1944). Even if VPA wished to excuse PTI from the disputed rental payments, it could not lawfully do so unless such an action were contemplated by Agreement No. T-3896.¹² Consequently, the question before the Commission is "what was the Commission's understanding regarding the application of Agreement No. 3896's rental formula to cargo handled by PTI prior to November 14, 1980?" This question is a proper subject for a declaratory order and the Petition describes the controversy with sufficient clarity to permit the submission of meaningful reply comments and reasoned evaluation by the Commission.¹³ There is no authority for separating the rental provisions of a terminal lease from other provisions expressly found to govern Shipping Act conduct as a means of removing the former from Commission jurisdiction.¹⁴

Although the rental provisions of Agreement No. T-3986 are not free from ambiguity, the question of the Agreement's effective date was addressed by the Commission in its Order of Approval. The Commission noted that section 2.1 provided for a January 1, 1980 commencement date and stated that:

delaying renewal of the lease while a Virginia Legislative Study Commission prepared a report. This report recommended that a five--rather than ten--year renewal lease be negotiated and that PTI sell certain real property it owns within Portsmouth Marine Terminal to VPA. The State of Virginia has recently enacted legislation requiring VPA operation of all Virginia terminals upon the expiration of any outstanding leases with private operators.

¹² The Shipping Act, 1916, provides for civil penalty of not more than \$1,000 per day for engaged in concerted activities subject to section 15 which have not been approved by the Commission. 46 U.S.C. 814.

¹³ Complete copies of the documents being construed were considered by the Commission in approving Agreement No. T-3896 and are lodged in its public files.

¹⁴ *See Pouch Terminal, Inc. v. Port Authority of New York and New Jersey*, 20 F.M.C. 753 (1978). The November 14, 1980 "Order of Approval" held that Agreement No. T-3986 was not exempt from section 15 as a "mere lease of realty" because it obligated PTI to join the Terminal Operator Conference of Hampton Roads and to establish rates and practices comparable to those of other Virginia marine terminals.

. . . the Commission . . . cannot effect a retroactive approval under section 15. The proponents have advised that they recognized that this is the case, and submit that Section 2.1.5 and the rental formula set forth in Exhibit C on page 28 of the agreement clearly reflect their understanding that the agreement will not become effective prior to Commission approval.

The statement from the Proponents to which the Commission referred is a letter dated September 22, 1980 from Robert L. McGeorge, counsel for PTI, to Edward Hawkins of the Office of Agreements.¹⁵ This letter states that:

. . . the agreement, as it stands, implicitly and explicitly provides that the agreement cannot become effective prior to Commission approval. [Section 2.1.5 and Exhibit C] clearly reflect [this intent]. You can rest assured that there is no incentive for the parties to claim that Commission approval would legitimize activities undertaken prior to the approval date.

At all times PTI has lawfully operated the Portsmouth Marine Terminal—first pursuant to the original Commission-approved lease between the parties and then from January 1, 1980, to the present pursuant to the month-to-month holdover tenancy clause of that agreement.

There was no reason to believe that this representation was intended to exclude the amount of rent paid for PTI's occupancy prior to approval. Accordingly, the rental formula of Agreement No. T-3896 is construed as applying only to cargo handled on or after November 14, 1980.¹⁶

THEREFORE, IT IS ORDERED, That the "Petition for Declaratory Order" of the Virginia Port Authority is granted to the extent indicated above.

By the Commission.

(S) FRANCIS C. HURNEY
Secretary

¹⁵ This letter is especially significant in light of PTI's assertion that VPA drafted Agreement No. T-3896 and forced its terms upon PTI.

¹⁶ PTI asserts that the Agreement does not specify an exact method for implementing the new formula on a "partial month" basis given the requirement that progress payments be made on the first of each month in advance (1/12th of the basic rent described in Sections 3.1-3.4). The parties may use any reasonable method of prorating the November, 1980 rent, as may be determined by good faith negotiation. December rent would be based entirely upon the T-3896 formula.

FEDERAL MARITIME COMMISSION

INFORMAL DOCKET NO. 493(1)
ORGANIC CHEMICALS (GLIDDEN-DURKEE)
DIVISION OF SCM CORPORATION

v.

"K" LINE (KAWASAKI KISEN KAISHA, LTD.)

INFORMAL DOCKET NO. 718(1)
THE STOP & SHOP COMPANY, INC.,
BRADLEES DIVISION

v.

BARBER BLUE SEA LINE AND BARBER
STEAMSHIP LINES, INC.

PARTIAL ADOPTION OF DECISIONS OF SETTLEMENT OFFICER

November 9, 1981

On August 17, 1981, Settlement Officer Roland C. Murphy awarded \$480.34 reparation at 6.4 percent interest¹ to Organic Chemicals (Glidden-Durkee) Division of SCM Corporation for violation by "K" Line (Kawasaki Kisen Kaisha, Ltd.) of section 18(b)(3) of the Shipping Act, 1916 (46 U.S.C. 817(b)(3)). On August 27, 1981, he awarded \$176.00 reparation at 8.44 percent interest² to The Stop & Shop Company, Inc., Bradlees Division for violation by Barber Blue Sea Line and Barber Steamship Lines, Inc. of section 18(b)(3).

In regulations recently promulgated,³ the Commission has declared that in cases involving the misrating of cargo arising under section

¹ The Settlement Officer derived the 6.4% figure from the average monthly rates quoted in the secondary market for U.S. Treasury notes for 1978. The accrual period used for the calculation of interest was the period between the dates of the shipments and December, 1979, "since the case was resolved at that point."

² The Settlement Officer derived the 8.44% figure from the average monthly rates quoted in the secondary market for U.S. Treasury notes for its six-month bills for the period between September, 1977, when the overcharge was paid, to December, 1979, "since the case was resolved at that point." The accrual period was also from September, 1977 to December, 1979.

³ 46 C.F.R. 502.253; Docket No. 81-22, *Interest in Reparations Proceedings*, 24 F.M.C. 145 (1981).

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18(b)(3), except in certain situations: (1) simple interest will be included as part of any award of reparations; (2) the interest will accrue from the date of payment of freight charges to the date reparations are paid; and (3) the rate of that interest will be calculated by averaging the monthly rates on six-month U.S. Treasury bills commencing with the rate for the month that freight charges were paid to the latest available monthly Treasury bill rate at the time reparations are awarded. This regulation mandates the award of interest in this proceeding in the amount therein provided.

THEREFORE, IT IS ORDERED, That the Decisions of the Settlement Officer are adopted except as indicated; and

IT IS FURTHER ORDERED, That, in Informal Docket No. 493(I), Organic Chemicals (Glidden-Durkee) Division of SCM Corporation is awarded \$353.62 plus 8.9 percent simple interest per annum on the April 27, 1976 shipment and \$126.72 plus 9.5 percent simple interest per annum on the February 7, 1977 shipment. On both such shipments, the interest shall accumulate from the month in which freight charges were paid through the month in which reparation is made; and

IT IS FURTHER ORDERED, That, in Informal Docket No. 718(I), the Stop & Shop Company, Inc., Bradlees Division is awarded \$176.00 plus 10.3 percent simple interest per annum, accruable from the month in which freight charges were paid through the month in which reparation is made; and

IT IS FURTHER ORDERED, That these proceedings are discontinued.

By the Commission.*

(S) FRANCIS C. HURNEY
Secretary

Commissioner Richard J. Daschbach's separate opinion.

I am not participating because I do not believe that the Commission should review the decisions of Settlement Officers in informal docket proceedings. Under Subpart S of the Commission's Rules of Practice and Procedure (46 C.F.R. 502.301), parties consent to waive the rights and obligations associated with normal adjudicatory proceedings for the express purpose of receiving prompt consideration of a small claim. Commission review precludes the inexpensive and expeditious handling of small claims which is the foundation of the informal docket process. The Settlement Officer's decisions in informal dockets do not have precedential value. Commission review therefore imposes unnecessary expense and delay in an arbitration process designed to settle minor commercial disputes in a prompt and responsive manner.

* Commissioner Richard J. Daschbach did not participate and issues the attached statement.

FEDERAL MARITIME COMMISSION

INFORMAL DOCKET NO. 493(1)

ORGANIC CHEMICALS (GLIDDEN-DURKEE) DIV OF SCM
CORPORATION

v.

“K” LINE (KAWASAKI KISEN KAISHA, LTD.)

DECISION OF ROLAND C. MURPHY, SETTLEMENT
OFFICER ¹

Partially Adopted November 9, 1981

Reparation Awarded

Organic Chemicals Glidden-Durkee, Division of SCM Corporation (Complainant), claims \$480.34 from “K” Line (Carrier) for alleged freight overcharges on two shipments of industrial chemicals from Savannah, Georgia and Jacksonville, Florida, to Tokyo, Japan.

The first shipment consisted of 29 drums of Myrcene-85, 65 drums of Intermediate Linalool-95, and 25 drums of Intermediate-750. This shipment moved from Savannah, Georgia to Tokyo, Japan on April 27, 1976, via the *New Jersey Maru*. The second shipment consisted of 6 drums of Hydroxycitronellal Pure and 37 drums of Intermediate-750; shipped February 7, 1977, from Jacksonville, Florida to Tokyo, Japan via the *Verrazano Bridge*.

The transportation charges assessed by the carrier, on the two shipments, was based upon a total measurement of 1842 cubic feet declared by the complainant and shown on the applicable bills of lading. The total cubic measurement of the shipments was based upon a measurement of 11.66 cubic feet per drum. Complainant asserts that the correct total cubic measurement of the shipments should have been 1680 cubic feet based on a measurement of 10.715 cubic feet per drum.

The complainant contends that the declared cubic measurements were unintentionally incorrectly assessed and resulted from an erroneous application by complainant of Rule No. 2(b) of the governing tariff ² which provides in part as follows:

(b) *Measurement Cargo:*

¹ Both parties having consented to the informal procedure as set forth in the Commission's Rules of Practice and Procedure (46 C.F.R. 502.301 et seq.), this decision will become final unless the Commission elects to review it within 30 days of the date of service.

² Far East Conference Tariff No. 27, FMC No. 10.

Cargo freighted on a measurement basis shall be assessed rates on the gross or overall measurement of individual pieces or packages when the cargo is delivered to the carrier, and shall be computed in accordance with 'Tweed's Accurate Tables,' except as may be otherwise provided in paragraphs (c), (d), (e), (f) of this rule, subject to the following rule with respect to disposition of fractions of inches:

All fractions UNDER one-half inch are dropped.

All fractions OVER one-half inch are extended to the next full inch.

Where there is a fraction of one-half inch on ONE dimension, it is extended to the next full inch.

Where there are fractions of one-half inch on TWO dimensions, the one on the small dimension is extended to the next full inch and the other dropped. If these dimensions are equal, drop one and increase the other to the next full inch.

Where there are fractions of one-half inch on THREE dimensions, those on the largest and smallest dimensions are extended to the next full inch and the other dropped.

The complainant computed the cubic measurement of a drum by increasing all three dimensional fractions to the next full inch instead of dropping the two fractions of less than one-half inch and increasing only the one remaining fraction of over one-half inch to the next full inch. A drum measures $23 \frac{1}{2}$ " x $23 \frac{1}{2}$ " x 34". Complainant computed the cube of a drum by multiplying 24" x 24" x 35" for a total of 20,160 cubic inches or 11.66 cubic feet per drum (1,728 cubic inches equal one cubic foot), instead of multiplying 23" x 23" x 35" which equals 18,515 cubic inches or 10,715 cubic feet per drum.

Complainant in support of his claim submitted the following:

1. An affidavit signed by complainant's Director of Purchasing. This document declares that all 55-gallon drums used by complainant conform to the United States Department of Transportation Specification 17 E (DOT-17E) published in 49 C.F.R. 178.116; and that the drums are procured from one or the other of the following three sources: Florida Steel Drum Company, Inc. (Florida Drum), Pensacola, Florida; Inland Steel Container-Division of Inland Steel Company (Inland Steel), New Orleans, Louisiana; and Rheem Manufacturing Company (Rheem), Savannah, Georgia.
2. *A copy of American National Standard Specifications for 55-Gallon Tight-Head Drums (DOT-17E) (ANSI).* In pertinent part, this publication reveals that the ocean shipping cube of

the drums covered thereby is 10.715 cubic feet. The figure contained in the standard shows the drums to measure 23 $1\frac{5}{32}$ " in diameter over rolling hoops and 34 $\frac{3}{4}$ " in overall height. Based upon these dimensions, the resultant ocean shipping cube of a drum is 10.715 cubic feet. (23 $1\frac{5}{32}$ " x 23 $1\frac{5}{32}$ " x 34 $\frac{3}{4}$ " or in conformity with Rule 12(a) of the conference tariffs 23" x 23" x 35" equals 18,515 cubic inches, divided by 1,728 cubic inches per cubic foot, equals 10.715 cubic feet.)

3. A copy of the specification sheet of Florida Drum, Inland Steel and Rheem. These specification sheets indicate that the ocean shipping cube of the drums manufactured and sold by these companies is, respectively, 10.72 cubic feet; "conform to ANSI Standards", and "1%—meaning 10 $\frac{1}{12}$, or 10.75 cubic feet."

4. A brief prepared by attorneys for complainant.

The Commission in considering claims involving disputes as to the nature of cargo, if the cargo has left the custody of the carrier before the claim is brought and the cargo cannot be reexamined, has traditionally imposed a heavy burden of proof on complainant. In Informal Docket 283(I), *Western Publishing Company, Inc. v. Hapag Lloyd A.D.*, Order served May 4, 1972, the Commission stated:

. . . the test is what claimant can now prove based on all the evidence as to what was actually shipped, even if the actual shipment differed from the bill of lading description. In rating a shipment the carrier is not bound by shipper's mis-description appearing on the bill of lading. *Likewise, claimant is not bound at least where the misdescription results from shipper's unintentional mistake or inadvertence.* But where the shipment has left the custody of the carrier and the carrier is thereby prevented from personally verifying claimant's contentions, the claimant has a heavy ultimate burden of proof to establish his claim. (emphasis added)

It is readily apparent there could have been no intent, purpose or motivation of ultimate gain or advantage in the claimant/shipper's perpetration of the error underlying the claims. Since the shipper's error was an unintentional mistake, he is not bound by his erroneous declaration of cubic measurement.

On the shipment of 29 drums of Myrcene-85, 65 drums of Intermediate Linalool-95, and 25 drums of Intermediate-750, complainant was assessed:

$$1388\frac{3}{40} \text{ cu.ft.} = 34.7 \text{ cu.ft.} \times \text{Rate of } \$123.00 \text{ M} = \$4268.10$$

Correct Assessment

$$1273\frac{3}{40} \text{ cu.ft.} = 31.825 \text{ cu.ft.} \times \text{Rate of } \$123.00 \text{ M} = \$3914.48$$

OVERCHARGE IS \$353.62

On the shipment of 6 drums of Hydroxycitronellal Pure and 37 drums of Intermediate-750, complainant was assessed:

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$45\frac{1}{4}_0$ cu.ft. = 11.35 cu.ft. x Rate of \$137.00 M = \$1554.95

Correct Assessment

$41\frac{7}{4}_0$ cu.ft. = 10.425 cu.ft. x Rate of \$137.00 M = \$1428.23

OVERCHARGE IS \$126.72

TOTAL OVERCHARGE \$480.34

Complainant seeks an adjustment in freight charges which were assessed by the carrier based on an unintentional and erroneous declaration by complainant of the cubic measurement of the cargo. Therefore, the heavy burden of proof requirement applies. It is believed complainant has met this requirement.

In Docket No. 78-2, decided on June 11, 1979, the Commission found that Organic Chemicals had sustained its burden of proving freight overcharges against different carriers but involving the same facts and issues that are set forth in the instant Informal Docket. It was found that the freight overcharges by the carriers resulted from erroneous statements on the measurements of the cargo in the bills of lading by Complainant.

Complainant has supplied detailed specifications and data sufficient to establish the dimensions of the 55-gallon drums it utilizes and the correct ocean shipping cube of 10.715 cubic feet. It was also determined that the declared excess cubic measurement was erroneous and unintentional. Complainant is therefore awarded reparation in the amount of \$480.34.

Consistent with the Commission's present practice, the Settlement Officer will award Organic Chemicals (Glidden-Durkee), Division of SCM Corporation interest in the amount of 6.4 percent per annum, from August, 1976 through December 1979 on the first shipment, and March, 1977 through December, 1979 for the second shipment. The year 1978 was used to obtain the rate of 6.4 percent since it is the only period that is readily available reflecting the average monthly rates quoted in the secondary market for U.S. Treasury notes. The month of December, 1979, was used as the cut-off date for the calculation of the interest since the case was resolved at that point. It is considered reasonable in the circumstances. So ordered.

(S) ROLAND C. MURPHY
Settlement Officer

FEDERAL MARITIME COMMISSION

INFORMAL DOCKET NO. 718(1)

THE STOP & SHOP COMPANY, INC., BRADLEES DIVISION

v.

BARBER BLUE SEA LINE AND BARBER STEAMSHIP LINES,
INC.

DECISION OF ROLAND C. MURPHY, SETTLEMENT OFFICER ¹

Partially Adopted November 9, 1981

Reparation Awarded

On July 23, 1979, the Stop and Shop Company, Inc., Bradlees Division, (Complainant) ² filed a complaint which alleges that Barber Blue Sea Line and Barber Steamship Lines, Inc. (Respondent), applied an incorrect rate to a shipment consigned to the Complainant, which resulted in a \$176.00 overcharge. The Complainant also alleges that the Respondent's action constitutes a violation of section 18(b)(3) of the Shipping Act, 1916 (46 U.S.C. 817).

The shipment, which consisted of 137 cartons of Paper Mache Bank, moved on the Respondent's vessel *Tamara* under bill of lading C-23, dated August 19, 1977, from Keelung, Taiwan to Boston, Massachusetts. The shipment moved on a freight collect basis.

The complainant alleges that the applicable tariff for the shipment in question is Barber Blue Sea Freight Tariff FMC-44, and that the carrier's basis for rating the shipment was Item No. 2000. Claimant alleges that the Respondent erred by assessing a rate effective January 1, 1978, whereas the shipment in question moved on August 19, 1977. The rates and charges were billed as follows:

	Measure- ment		Rate	Amount
OCEAN FREIGHT	11.00 M3	x	\$80.00 M3	\$880.00
CFSDC	11.00 M3	x	\$ 4.00	\$ 44.00
TOTAL				\$924.00

¹ Both parties having consented to the informal procedure of the Commission's Rules of Practice and Procedure (46 C.F.R. 502.301-304), this decision will be final unless the Commission elects to review it within 30 days from the date of service thereof.

² The complaint was filed on behalf of the Stop and Shop Company, Inc., Bradlees Division, by Agent Jerome B. Silverman.

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LINE AND BARBER STEAMSHIP LINES

Claimant contends that the shipment should have been rated on the basis of tariff Item No. 2000 applicable to the rate in effect on August 19, 1977, and states that the rates and charges should have been billed as follows:

	Measure- ment		Rate	Amount
OCEAN FREIGHT	11.00 M3	x	\$64.00	\$704.00
CFSDC	11.00 M3	x	\$ 4.00	<u>\$ 44.00</u>
TOTAL				\$748.00

The alleged overcharge was in the amount of \$176.00. Claimant, through its agent, filed an overcharge claim but the Respondent declined the claim on the basis of tariff Rule No. 50, which limits the time in which overcharges may be filed, to not less than six months after date of shipment. It is well settled that such a tariff rule cannot act to bar recovery of an otherwise legitimate overcharge claim in such cases with the Commission pursuant to section 22, Shipping Act, 1916.³

In support of the claim, claimant has submitted a bill of lading, overcharge claim No. 450784, appropriate tariff pages and a paid freight bill with cancelled check indicating that freight charges were paid in the amount of \$924.00.

The basic question at issue then is what was the applicable rate to be assessed on the subject shipment at the *time* it was transported from Keelung to Boston. This Settlement Officer's review of Barber Blue Sea Freight Tariff FMC-44 indicates that on August 19, 1977, the date that the shipment moved, the published effective rate on Paper Mache Bank was \$64.00 per M3, with a CFSDC charge of \$4.00 per M3. Thus, the correct freight charge for the shipment should have been \$748.00.

Therefore, reparation of \$176.00 is awarded to the Complainant based on the computation as aforementioned.

Consistent with the Commission's present practice, Claimant shall also receive a per annum interest rate of 8.44 percent accruing as from September 1977, the month in which the overcharge was paid, through December 1979. This rate reflects the average monthly rates quoted in

³ The claim was filed with the Commission within two (2) years of the date which the cause of action occurred.

the secondary market for U.S. Treasury notes for its six months' bills for the period September 1977 through December 1979. December 1979 was used as the cutoff date for the calculation of the interest since the case was resolved at that point. It is considered reasonable in the circumstances. So ordered.

(S) ROLAND C. MURPHY
Settlement Officer

FEDERAL MARITIME COMMISSION

DOCKET NO. 81-8

ROHM & HAAS COMPANY

v.

ITALIAN LINE

ORDER

November 13, 1981

The proceeding is before the Commission on appeal by Respondent Italian Line to a Ruling¹ of Administrative Law Judge Norman D. Kline, served June 10, 1981, allowing Complainant Rohm & Haas Company (Rohm & Haas) to amend its complaint filed January 26, 1981 to indicate that the action is being brought on behalf of its foreign subsidiary, Rohm & Haas Italia S.p.A. - Milan (RHI).² The amendment, which would be filed beyond the two-year period of limitation provided in section 22 of the Shipping Act, 1916, would relate back to the date of filing of the original complaint.

BACKGROUND

The complaint filed by Rohm & Haas, a Delaware corporation, alleges that Respondent Italian Line collected freight charges in excess of those provided in its tariff on two shipments described in the bills of lading as "Drums Flammable Solid N.O.S. (contains toluene solvent)." Because freight was paid not by the Complainant but by its wholly-owned subsidiary, RHI, the Presiding Officer, before proceeding into the merits of the claim, directed the parties by Order served March 31, 1981 to brief separately the following jurisdictional issues:

1. Whether Complainant had standing to claim reparation in view of the fact that freight was paid by its foreign subsidiary; and
2. If not, whether an amendment to the complaint filed now could relate back to the date of its original filing.³

¹ Because the Ruling is said to depart from established Commission precedent and to raise a question of policy, the Presiding Officer allowed an immediate appeal pursuant to Rule 153 of the Commission's Rules of Practice and Procedure, 46 C.F.R. 502.153.

² Complainant moved to amend the complaint to note participation on its own behalf and on behalf of Rohm & Haas Italia S.p.A. - Milan.

³ The additional question of whether the complaint had been filed within the two-year statutory period was answered by Complainant to the satisfaction of the Presiding Officer.

In his March 31 Order, the Presiding Officer called the attention of the parties to current Commission case law holding that: (1) a complainant seeking reparation for freight overcharges must show that it either paid the freight charges or has validly succeeded to the claim,⁴ and (2) the filing of an assignment of the claim or of an amendment to the complaint to add or substitute a new party has been held to be a new complaint effective as of the date of filing.

Addressing the issues raised in the March 31 Order, Rohm & Haas maintained that it has standing to bring the complaint as a party to the contract of carriage and as the American representative of its foreign subsidiary in actions litigated before United States agencies, just as RHI would have standing in a proceeding brought in Italy on behalf of its United States parent. Complainant pointed out that it derives benefits from the profits and ultimately bears the losses of its subsidiary. Referring to the Commission decisions in *C.S. Greene & Co. v. Sea-Land Service, Inc.*, 20 S.R.R. 374 (1980) and *Gladish & Associates v. Sea-Land Service, Inc.*, 23 F.M.C. 280 (1980), Complainant argued that it would be incongruous for the Commission to entertain reparation claims by freight forwarders merely because they paid the freight for their shippers and deny similar standing to the consignor or consignee who actually bore the ultimate financial burden of the overcharge.⁵ Finally, Complainant submitted that the Commission's Rules permit an amendment to the complaint to reflect Rohm & Haas' representation of its foreign subsidiary.⁶

Italian Line disagreed with Complainant, maintaining that the complaint is jurisdictionally defective and should be dismissed as a matter of law. Respondent contended that Commission precedent mandates that result because a complainant who has not paid the freight charges has no standing to claim reparation unless it obtains a valid assignment of the claim within the two-year limitation period provided in section 22

⁴ *Sanrio, Inc. v. Maersk Line*, 19 S.R.R. 907 (1979), and *3M v. Hapag Lloyd*, 23 F.M.C. 533 (1981).

⁵ Complainant distinguishes the holdings in *Ocean Freight Consultant v. Bank Line, Ltd.*, 9 F.M.C. 211 (1966); *Carton - Print, Inc. v. The Austasia Container Express Steamship Co.*, 20 F.M.C. 30 (1977); *Trane Company v. South African Marine Corp.*, (N.Y.), 19 F.M.C. 374 (1976); *Mine Safety Appliances Co. v. South African Marine Corp.*, 21 F.M.C. 619 (1978), on the basis that none of these proceedings involved both the parent of the company that originally paid the freight charges and the consignor of the shipment. Complainant also relies on *Spiller v. Atchison, T. & S.F. Ry. Co.*, 253 U.S. 117 (1920), where the Supreme Court stated:

The provisions of the act giving redress, compensatory in its nature, to persons sustaining pecuniary injury through the violation of public duty by the carrier, must receive a reasonably liberal, and not a narrow, interpretation. (at 253 U.S. 135).

⁶ Complainant refers to Rule 43 (46 C.F.R. 502.43) which permits the Commission or the Presiding Officer to "order an appropriate substitution of parties"; to Rule 70 which permits amendments to any pleadings; and to Rule 1 which directs that rules be "construed to secure the just, speedy, and inexpensive determination of every proceeding." Also cited is *Chr. Salvesen & Co., Ltd. v. West Michigan Docket & Market Corp.*, 12 F.M.C. 135 (1968), where because no new cause of action was created and the same relief was requested, joinder of the injured entity was permitted with the amendment relating back to the date of the filing of the complaint.

of the Shipping Act or, within such time, amends the complaint to bring in the proper party.⁷ Respondent also noted that under Rule 26 of the Commission's Rules (46 C.F.R. 502.26), corporations may not appear before the Commission on behalf of other corporations.

The Presiding Officer's June 10 Ruling granted Complainant's motion to amend the complaint and permitted the amendment to relate back to the date of filing of the original complaint.⁸

The Presiding Officer explained that the failure to file an assignment or the denial of permission to amend the complaint is too technical and narrow a ground for dismissing a complaint and preventing a claim to be decided on its merits.⁹ In reaching this conclusion, he relies on earlier Commission statements¹⁰ and on the decision in *Interconex, Inc. v. Federal Maritime Commission*, 572 F.2d 27 (2d Cir. 1977), where the Second Circuit characterized the Commission's dismissal of the complaint with prejudice on procedural grounds as a "drastic remedy which should be applied only in extreme circumstances."

Finally, the Presiding Officer could find no sound basis for permitting forwarders to recover under an agency theory, as was the case in *C.S. Greene & Co. v. Sea-Land Service, Inc.*, and *Gladish & Associates v. Sea-Land Service, Inc.*, while denying a complainant the same relief when it attempts to recover on behalf of its foreign subsidiary.

On appeal from the Presiding Officer's Ruling, Respondent reargues essentially the same contentions advanced before the Presiding Officer

⁷ In addition to the cases mentioned in note 4, *supra*, finding complainants to lack standing to claim reparation when the freight charges were paid by someone else, Respondent cites: *Colgate-Palmolive Co. v. Grace Line, Inc.*, 11 S.R.R. 982 (1970); *E.S.B. Inc. v. Springbok Line, Ltd.*, 19 S.R.R. 1342 (1980); *FMC Corp v. Argentine Line*, 22 F.M.C. 814 (1980). Respondent also relies on *Southern Pacific Co. v. Darnell-Taenzler Lumber Co.*, 245 U.S. 531 (1918), where the Court held that the initial rather than the ultimate payor has standing to seek reparation.

Respondent points out that in those instances where the Commission allowed freight forwarders to claim reparation in their own name, they had initially paid the charges, had preexisting authority to recover reparation, and were directed to reimburse their principals the amounts so recovered. Respondent further contends that those few instances in which the courts have permitted the tolling of the statute of limitations are narrow exceptions warranted by legislative intent, and that the Federal rules permitting liberal amendments to pleadings, such as Rules 15(c) and 17(a) of the Federal Rules of Civil Procedure apply only to proceedings in federal courts and have not been adopted by the Commission.

⁸ The Presiding Officer noted that although it has not adopted the federal rules, the Commission refers to those rules in instances where its own rules do not provide specific guidance. Docket No. 78-51, *Agreement No. 10349 - A Cargo Pooling and Sailing Agreement - Argentina/United States Atlantic Trade*, Order served April 19, 1979. He finds further support for his action in an early Supreme Court case, *Missouri, K. & T. R. Co. v. Wulf*, 226 U.S. 570 (1913), where the Court allowed an amendment changing a plaintiff's status from that of one suing as an individual to one suing in a representative capacity, although the statute of limitations had run.

⁹ The Presiding Officer also stated that "to deny a simple amendment and to hold that such amendment is something brand-new and outside the two-year period, is similarly exceedingly technical and out of step with modern views of justice."

¹⁰ *Oakland Motor Car Co. v. Great Lakes Transit Corp.*, 1 U.S.S.B.B. 308, 311 (1934) and *City of Portland v. Pacific Westbound Conference*, 5 F.M.B. 118, 129 (1956), where it was stated that a regulatory body ought not to be hampered by the strict rules of pleading which govern courts of law.

in response to the March 31 Order, concluding that the complaint should be dismissed as a matter of law because Complainant could not show that *it* suffered injury.

DISCUSSION

Section 22(a) of the Shipping Act, 1916 provides, in relevant part:

That *any* person may file with the board [Commission] a sworn complaint setting forth any violation of this Act by a common carrier by water . . . and asking reparation for the injury . . . caused thereby. . . . The board, *if the complaint is filed within two years after the cause of action accrued, may direct the payment . . . of full reparation to the complainant for the injury caused by such violation.* 46 U.S.C. 821(a). (Emphasis added.)

That section therefore clearly gives "any" person standing to file a complaint alleging a violation of the Shipping Act, and asking reparation for the injury caused thereby.¹¹ The sole jurisdictional requirement for awarding reparation is that the complaint be filed within two years after the cause of action accrued.¹²

In order to recover reparations under section 22, however, a complainant must have suffered injury. The proof of injury, like any other element of the Complainant's case on the merits, is a matter of evidence which has no relation to the issue of standing or to the time limitation for filing the complaint.¹³ Whatever action the complainant may have to take in the course of the proceeding to prove its right to recovery, including the perfecting of its claim, relates to the burden of proof a complainant must sustain in order to prevail, and is not, therefore, subject to the two-year period of limitations.

That the complaint in this case was filed within the two year statutory period is not disputed. Consequently, in order to bring the proceeding to a decision on the merits, Complainant Rohm & Haas must demonstrate that it has been injured as a result of Respondent's alleged overcharge. In order to provide Rohm & Haas an opportunity to accomplish this, it will be allowed 60 days from the date of this Order to obtain an assignment of the claim from its subsidiary Rohm & Haas

¹¹ "The language of a statute controls when sufficiently clear in its context." *Ernst & Ernst v. Hochfelder*, 425 U.S. 185, 201 (1976).

¹² The filing of the complaint gives the respondent notice of the charges raised against it and of the remedy requested. In this instance, RHI had requested from Respondent an adjustment of the freight charges paid on the two shipments even before the filing of a formal complaint. When the complaint was later filed, Respondent was well aware that it raised the same claim, related to the same occurrence, and asked the same relief which had been the subject of negotiations between RHI, Respondent and subsequently the Complainant.

¹³ Statutes of limitations are directed against the claims sought to be asserted, not to the parties seeking to assert them. *McCloskey & Company v. Wright*, 363 F. Supp. 223 (E.D. Va. 1973).

Italia S.p.A.¹⁴ Should it fail to do so within the time specified, the complaint will be dismissed for failure to prosecute.

In view of the broad language of section 22,¹⁵ and in light of the Second Circuit decision in *Interconex, Inc., supra*, a dismissal of the complaint on procedural grounds would appear to be unwarranted. Although Respondent has not inaccurately characterized the Commission's past decisions, these precedents must be viewed in light of the particular circumstances of each case. To the extent past Commission decisions conflict with the Commission's action here, they are hereby overruled.¹⁶

THEREFORE, IT IS ORDERED, That this proceeding is remanded to the Presiding Officer for further action consistent with this Order.

By the Commission.*

(S) FRANCIS C. HURNEY
Secretary

¹⁴ Such an assignment renders unnecessary the amendment of the complaint.

¹⁵ The Shipping Act, 1916 is a remedial statute and as such must be liberally construed. One of the purposes of section 22 of that Act is to provide a procedure for granting relief to shippers who have been assessed freight rates higher than those otherwise legally permissible. The decision reached here furthers this purpose. See *Tcherepin v. Knight*, 389 U.S. 332 (1967).

¹⁶ Policies may and must be adjusted where the regulatory purpose of the statute so requires. *American Trucking Assns. v. Atchison Topeka & S.F. Ry. Co.*, 387 U.S. 397, 416 (1967); *Consolidated Gas Supply Corporation v. F.P.C.*, 520 F.2d 1176, 1187 (D.C. Cir. 1975).

* Commissioner Carey did not participate.

FEDERAL MARITIME COMMISSION

DOCKET NO. 81-10

SEA-LAND SERVICE, INC., TRAILER MARINE TRANSPORT CORPORATION, GULF CARIBBEAN MARINE LINES, INC., PUERTO RICO MARITIME SHIPPING AUTHORITY
PROPOSED GENERAL RATE INCREASES IN THE PUERTO RICO AND VIRGIN ISLANDS TRADES

ORDER DENYING PETITIONS FOR RECONSIDERATION

November 13, 1981

Sea-Land Service, Inc. (Sea-Land) and Trailer Marine Transport Corporation (TMT) have petitioned the Commission to reconsider its decision served September 25, 1981 in the above-captioned proceeding. Sea-Land seeks reconsideration on the basis that: a) the Commission failed to consider the impact of its order directing Puerto Rico Maritime Shipping Authority (PRMSA) to reduce its rate increases on the other carriers in the proceeding; b) the Commission erred in accepting the estimated 7% average interest cost for the reference group of corporations used to derive a benchmark rate of return for the carriers, and; c) the Commission erred in utilizing PRMSA's last known fuel cost in projecting its fuel cost in the test year.* TMT also seeks reconsideration on the basis of the impact of PRMSA's reduced rate increases on the other carriers in the proceeding and further alleges that the Commission erred in excluding from its cost projections management commissions representing an allocation of the home office expenses of its parent corporation. PRMSA has filed a reply supporting the petitions. The Government of the Virgin Islands, Puerto Rico Manufacturers Association, the Drug and Toilet Preparation Traffic Conference, Inc. and the Commission's Bureau of Hearings and Field Operations have filed in opposition to the petitions.

The Commission finds that the petitions fail to raise matters which warrant reconsideration of its Order of September 25, 1981. First, while Commission regulations permit the consideration of the effect which disapproval of a carrier's rates will have on other carriers in the trade, they do not *require* such consideration. 46 C.F.R. 512.1(c). Moreover, the effect which disapproval of a carrier's rates will have on other carriers in the trade was not included as an issue in the Order of Investigation and, accordingly, cannot be considered at this stage of the

* Sea-Land also requests oral argument on its petition.

PROPOSED GENERAL RATE INCREASES IN THE PUERTO RICO AND VIRGIN ISLANDS TRADES 435

proceeding. Docket No. 79-48 - *TMT - Proposed General Increases in Rates*, 22 F.M.C. 178-179 (1979), *aff'd per curiam sub nom., Government of the Virgin Islands v. F.M.C.*, No. 80-1027 (D.C. Cir., Jan. 30, 1981).

Second, the balance of the contentions advanced in the petitions, "merely elaborate upon or repeat arguments made prior to the decision" and therefore are not proper subjects of a petition for reconsideration under the Commission's Rules of Practice and Procedure. 46 C.F.R. 502.261(a). Further, these arguments were fully considered and disposed of by the Commission in its September 25 decision and the Commission sees no reason to alter that decision. Petitioners' request for reconsideration and for oral argument will therefore be denied.

THEREFORE, IT IS ORDERED, That the request for oral argument on the Petition for Reconsideration filed by Sea-Land Services, Inc. is denied, and,

IT IS FURTHER ORDERED, That the Petitions for Reconsideration filed by Sea-Land Service, Inc. and Trailer Marine Transport Corporation are denied.

By the Commission.**

(S) FRANCIS C. HURNEY
Secretary

** Commissioner Carey did not participate. Commissioner Daschbach will issue a separate dissenting opinion.

DOCKET NO. 81-10

SEA-LAND SERVICE, INC., TRAILER MARINE TRANSPORT
CORPORATION, GULF CARIBBEAN MARINE LINES, INC.,
PUERTO RICO MARITIME SHIPPING AUTHORITY
PROPOSED GENERAL RATE INCREASES IN THE PUERTO
RICO AND VIRGIN ISLANDS TRADES

ORDER DENYING PETITIONS FOR RECONSIDERATION

Commissioner Richard J. Daschbach, dissenting.

The Commission should grant Sea-Land Service, Inc. (Sea-Land) and Trailer Marine Transport Corporation's (TMT) petitions for reconsideration in the above-captioned proceeding and use these petitions as a vehicle for re-examining the logic and propriety of its entire September 25, 1980 decision in Docket No. 81-10.

The most glaring error in that decision was the Commission's finding that the rates of the Puerto Rico Maritime Shipping Authority (PRMSA) were unjust and unreasonable, a determination contrary to Administrative Law Judge Kline's July 20, 1981 finding that PRMSA's rates were just and reasonable.

The September 25 determination that PRMSA's general rate increase was unreasonable and should be "rolled back" was based on a series of conclusions on a wide range of disparate issues, including both specific projections and abstract methodological matters. The cumulative effect of these findings resulted in a determination that PRMSA's rate of return was unacceptably high, a classic case of losing sight of the forest for the trees.

It is baffling that the Commission could conclude that a corporation which lost over \$4 million in its most recent fiscal year ending June 28, 1981, earned an excessive return on its rate base. However, that is precisely the finding that the Commission made regarding PRMSA.

The Commission has ordered that PRMSA, the government shipping line of Puerto Rico, plunge deeper into debt by refunding nearly \$3 million, with interest, to its customers. The growing insolvency of PRMSA, which exists to serve the people of Puerto Rico, can only hurt these same residents of Puerto Rico, including shippers, who we are allegedly attempting to protect.

The Commission's decision in Docket No. 81-10 may be forcing the FMC to suspend proposed rate filings which it might otherwise have approved, as occurred in the Commission's open meeting of November 12, 1981.

The Commission is also ignoring the fact that rate parity in the domestic trades is a commercial reality. The Commission's finding in Docket No. 81-10 that PRMSA's rate increase was unjust and unrea-

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sonable not only has adverse consequences for the citizens of Puerto Rico, but also for PRMSA's competitors in the U.S./Puerto Rico trades. This is the point being stressed in the Sea-Land and TMT petitions for reconsideration, and one of the major reasons why they should be granted.

Where the FMC is statutorily mandated to exercise broad regulation, such as the domestic trades, it is essential that it exercise fundamental fairness, sound judgment, and good business sense. It is therefore incumbent upon the Commission to utilize the opportunity afforded by the instant petitions to reconsider a decision in which it stated that a company which is losing money is at the same time earning too much.

FEDERAL MARITIME COMMISSION

DOCKET NO. 71-29

BATON ROUGE MARINE CONTRACTORS, INC.

v.

CARGILL, INCORPORATED

ORDER

November 18, 1981

On May 4, 1981, the United States Court of Appeals for the District of Columbia Circuit vacated the Commission's April 19, 1979 Report and Order in the above-captioned proceeding in which the Commission found that the charge levied against stevedores by Cargill, Incorporated for services and facilities at Cargill's grain terminal at the Port of Baton Rouge had not been shown to be unjust or unreasonable. Because the Court could not itself determine the question of the reasonableness of a charge in the first instance (*see e.g., Indiana Port Comm'n v. FMC*, 521 F.2d 281, 287 (D.C. Cir. 1975); and generally, *SEC v. Chenery Corp.*, 332 U.S. 194, 196-197 (1947); *Harborlite Corp. v. ICC*, 613 F.2d 1088, 1092-1093 (D.C. Cir. 1979)), it remanded the case to the Commission for further proceedings consistent with its opinion.

The Court found that the Commission's Report and Order was not supported by substantial evidence justifying the charge. The allocation of terminal costs imposed upon stevedores for benefits provided to them by the shipping gallery and other Cargill facilities was rejected in light of the "sharp disproportion to costs allocated to others [*i.e.*, the vessel and cargo interests] who may reap equal or greater benefit . . ." (slip opinion, page 16). This finding was based upon the standard articulated in *Volkswagenwerk v. FMC*, 390 U.S. 261, 281-282 (1968) that there must be a reasonable correlation of benefits to the charge that is imposed. On the other hand, the Court noted that the Commission could depart from the *Volkswagenwerk* comparative benefit standard if it adequately set forth the reasons why "a departure is justified under the statutory scheme and is consistent with the public interest" (slip opinion page 16).

Because this is a complaint proceeding, rather than a Commission-instituted investigation, it is the responsibility of the complainant, Baton Rouge Marine Contractors, Inc. (BARMA) to determine if and how it wishes to proceed. Once BARMA's choice is made, Cargill will be given an opportunity to respond and indicate what it wishes to present

by way of argument and/or evidence in this proceeding. In making these determinations, the parties should bear in mind that as the Court explained, if support for the charge against stevedores is sought in "prevailing practices at unregulated elevators," the record must permit the Commission to determine, from substantial evidence, "whether free market forces are operative," and to give an "exposition of the similarities in costs and benefits between Cargill's elevator and those compared with it." (Slip opinion, page 16). After receipt of statements from the parties the Commission will be in a position to structure such further proceedings as may be necessary.

THEREFORE, IT IS ORDERED, That within 30 days from date of service of this order, Complainant, Baton Rouge Marine Contractors, Inc. (BARMA) shall file with the Commission and serve upon Cargill a statement indicating if it wishes to proceed with its complaint and, if so, what issues of fact or law it wishes to pursue and what procedures it feels are appropriate to such course of action; and

IT IS FURTHER ORDERED, That within 30 days after service of the statement of Complainant, Cargill shall file with the Commission and serve upon Complainant a response indicating, if appropriate, what issues of fact or law they wish to pursue and what procedures they feel are appropriate to such course of action; and

IT IS FURTHER ORDERED, That any request by any party for further evidentiary hearings shall be accompanied by a detailed recital of the facts the party intends to prove at the hearing and a description of evidence intended to be used to prove those facts; and

IT IS FURTHER ORDERED, That this order be published in the *Federal Register* and a copy thereof be served on all parties of record; and

IT IS FURTHER ORDERED, That all documents submitted by any party of record in this proceeding be filed in accordance with Rule 118 of the Commission's Rules of Practice and Procedure (46 C.F.R. 502.118) as well as being served directly on all other parties of record.

By the Commission.

(S) FRANCIS C. HURNEY
Secretary

FEDERAL MARITIME COMMISSION

DOCKET NO. 81-24

I.T.O. CORPORATION OF NEW ENGLAND

v.

**PORT OF BOSTON MARINE TERMINAL ASSOCIATION
AND MASSACHUSETTS PORT AUTHORITY**

NOTICE

November 17, 1981

Notice is given that no appeal has been taken to the October 22, 1981 dismissal of the complaint in this proceeding and that the time within which the Commission could determine to review has expired. No such determination has been made and, accordingly, the dismissal has become administratively final.

(S) FRANCIS C. HURNEY
Secretary

FEDERAL MARITIME COMMISSION

DOCKET NO. 81-24

I.T.O. CORPORATION OF NEW ENGLAND

v.

PORT OF BOSTON MARINE TERMINAL ASSOCIATION
AND MASSACHUSETTS PORT AUTHORITY

DISMISSAL OF PROCEEDING

Finalized November 27, 1981

This case brings into question a provision of the tariff of the Massachusetts Port Authority which requires that users of the facilities covered by the tariff indemnify the terminal for all losses, claims, etc., arising out of the users' operation except those which stem solely from the gross negligence or wilful and wanton act of the terminal.

By stipulation signed by all the parties, Complainant has asked for dismissal of the complaint with prejudice. In view of the Complainant's position there is no alternative but dismissal. Of course the Commission itself should it deem it necessary could investigate the tariff provision in issue.

The proceeding is dismissed.

(S) JOHN E. COGRAVE
Administrative Law Judge

FEDERAL MARITIME COMMISSION

DOCKET NO. 79-72

CARGILL, INC.

v.

WATERMAN STEAMSHIP CORPORATION

ORDER PARTIALLY ADOPTING INITIAL DECISION

November 30, 1981

BY THE COMMISSION: (ALAN GREEN, JR., *Chairman*; THOMAS F. MOAKLEY, *Vice Chairman*; JAMES V. DAY AND RICHARD J. DASCHBACH, *Commissioners*) *

This proceeding was instituted by the July 16, 1979 complaint of Cargill, Inc., a processor and seller of bulgur and other grain products in domestic and international markets.¹ Cargill's processing plant is located in Dallas, Texas, closer to some U.S. Gulf ports than to some Mississippi River ports. Cargill has historically sold bulgur to the U.S. Agricultural Stabilization and Conservation Service (ASCS) for foreign distribution under the Food for Peace Program (P.L. 480 program). In ASCS transactions, title to the grain passes upon delivery at designated U.S. ports. Government relief agencies selected by ASCS, not Cargill, are the ocean shippers in this controversy.

The complaint alleges that Waterman Steamship Corporation was and is violating sections 16 First and 17 of the Shipping Act, 1916 (46 U.S.C. 815 First and 816) by charging lesser amounts for the transportation of bulgur from U.S. Mississippi River ports to India than it charges from U.S. Gulf Coast ports to India.² Full reparations for the damage allegedly suffered by Cargill was initially requested, as was injunctive relief, but Cargill later withdrew its claim for monetary damages [Tr. at 734]. The complaint emphasizes the preferential effect of the lower river rate. There is no allegation that the higher Gulf rates are unreasonably high within the meaning of section 18(b)(5) of the Shipping Act, 1916 (46 U.S.C. 817(b)(5)).

* Commissioner James Joseph Carey did not participate.

¹ Bulgur is roasted and dehulled whole grain wheat. It may also be fortified by the addition of soy grits. Cargill sells both soy fortified and regular bulgur to the U.S. Agricultural Stabilization and Conservation Service and the term "bulgur" is used to refer to either or both varieties unless otherwise indicated.

² Only that portion of section 17 which prohibits "unjust discrimination" against ports is at issue.

Intervention rights limited to the section 17 "port discrimination" issue were granted to the Lake Providence Port Commission, Helena Port Terminal, and Mid-South Terminals Corporation (December 28, 1979) and the Greater Baton Rouge Port Commission (March 10, 1980).³

On September 21, 1979 Waterman moved to dismiss the complaint for failure to state a cause of action cognizable under section 16 or 17. This motion stressed the fact that Cargill was not itself a bulgur shipper. It was denied on November 5, 1979 by Chief Administrative Law Judge John E. Cogrove. In denying the Motion to Dismiss, the Presiding Officer held that: (1) Cargill could prosecute an action on *behalf of* shippers, localities or types of traffic protected under sections 16, or ports protected under section 17;⁴ and (2) section 16 protects "persons" as well as "localities" and "descriptions of cargo" against undue prejudice, and Cargill is a person.

The record before the Commission consists of 1058 pages of oral testimony gathered during April, 1980 and 38 Hearing Exhibits which exceed 1000 pages in total length.⁵

An Initial Decision was issued on December 23, 1980 denying the complaint on the ground that Cargill had not proven that Waterman's rate differential was causing it to lose ASCS business. The Presiding Officer also concluded that: (1) Cargill was not a person "protected" by section 16 First;⁶ (2) Cargill had not made out a *prima facie* case of undue prejudice; (3) Waterman's rate differential is justified on the basis of costs and competitive factors; and (4) Baton Rouge had not demonstrated that Waterman's rates had diverted bulgur shipments from its port.

Exceptions were taken from that decision by Cargill and by the Greater Baton Rouge Port Commission (Complainants). Replies to Exceptions were submitted by Waterman and by Helena Port Terminal, Inc., and Mid-South Terminals Corp. (Respondents). A "Motion to Strike" pages 7 through 19 of the joint Helena/Mid-South Reply was

³ The Intervenors operate terminals on the Mississippi River at Lake Providence, Louisiana; Helena, Arkansas; Memphis, Tennessee; and Baton Rouge, Louisiana, respectively. Despite its location 200 miles upriver from the Gulf of Mexico, Baton Rouge has traditionally been treated as a "Gulf" port by Waterman and other ocean carriers. Baton Rouge is further from Dallas than the River port of Lake Providence. See Appendix "A" for a map of the area involved.

⁴ 46 U.S.C. 821 states, *inter alia*, that:

. . . any person may file . . . 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.

⁵ Cargill introduced Exhibits C-1 through 17 and C-17A through 22 and presented four witnesses. Waterman introduced Exhibits WS-1A (confidential) and WS-1 through 11 and presented three witnesses. Intervenors introduced Exhibits I-1 through 3, but presented no witnesses. Lake Providence did not participate in the hearing or file a brief.

⁶ The Presiding Officer did not hold that Cargill lacked "standing" to bring this action, but only that Cargill itself, as a nonshipper, was not entitled to relief under section 16 First.

filed by Cargill alleging that this material relates to section 16 prejudice against shippers and not to the section 17 port discrimination issue.⁷

BACKGROUND INFORMATION

ASCS issues monthly bid invitations for bulgur purchases. Waterman began a nonconference LASH barge service to the River ports of St. Louis and Memphis in July, 1977, at the time of ASCS Invitation No. 55.⁸ Waterman serves Gulf ports as a member of the India, Pakistan, Bangladesh, Ceylon, and Burma Outward Freight Conference (FMC No. 7690) and also uses LASH barges to call at outports in that range, although breakbulk vessels have been employed to carry bulgur as well.⁹ Barges from Waterman's River and Gulf services are both loaded aboard the same mother ship at New Orleans—or occasionally Houston. Except for the six and one-half month period between February 1 and August 15, 1978, Waterman's River rates were lower than its Gulf rates. During February to August, 1978, Waterman's River rates to the Indian baseports of Bombay and Calcutta were higher than its Gulf rates, but its River rates to Indian outports such as Madras were lower. In 1979, Waterman also began serving the River ports of Helena and Lake Providence. *In September, 1979 service to St. Louis was dropped because that port lost its ASCS designation.* Lake Providence is the dominant River bulgur port and handles over 50% of ASCS's India bulgur shipments.

ASCS seeks bulgur bids on a Free Along Side (FAS) basis which means that persons selling bulgur to ASCS must pay all inland transportation costs and handling charges to the port of embarkation designated by ASCS. ASCS makes its own arrangements for ocean transportation and its bulgur purchases are made on a "lowest landed cost" basis which factors the estimated cost of ocean transportation into the purchasing decision. The objective is to minimize the cost of the entire amount of bulgur procured in each bid cycle for all destinations and not necessarily the cost of each individual quantity for which bids are sought. Suppliers do not submit bids for particular shipments or destinations although bids are described in terms of specific quantities to specific locations.

⁷ Helena/Mid-South were allowed to intervene only with regard to the latter issue. Those portions of the Reply relating to Cargill's ability to market bulgur will be stricken as beyond the scope of the Presiding Officer's Intervention Order.

⁸ The first 30 months of Waterman's River service cover ASCS's bid Invitation Nos. 55-85.

⁹ The Conference serves U.S. Atlantic and Gulf ports and has four member lines: Farrell Lines, Inc.; Scindia Steam Navigation, Ltd.; Shipping Corp. of India; and Waterman. Waterman is the only LASH operator in the Conference. Farrell Lines operates an intermodal container service via U.S. South Atlantic ports and does not call at U.S. Gulf ports. A fifth carrier, Central Gulf Lines, participated in the Conference until July 21, 1980.

The plants of Cargill's principal competitors are located in Seattle, Los Angeles, Crete (Nebraska) and Abilene (Kansas);¹⁰ all are located further from the three lower River ports than is Cargill's Dallas plant. However, the River ports of Helena, Memphis and St. Louis are further from Dallas than the West Gulf ports usually bid by Cargill (Lake Charles and Corpus Christi). During the 30-month period from July, 1977 through December, 1979, the Nebraska and Kansas operators (Lauhoff and ADM) were more successful than Cargill in attracting ASCS business for India bulgur delivered to River and Gulf ports, but Cargill was also the least successful bidder during the 30 months prior to July, 1977 [Ex. WS-11, C-22, C-10]. Cargill did not begin bidding at the River until April, 1979 and had reasonable success there during the rest of that year.

The cost of wheat and the cost of inland transportation are major factors in marketing bulgur. There are thousands of wheat shipping points and wheat prices change hourly. Rail rates are complex and change frequently. The large number of variables makes exact comparison of marketing costs impossible.¹¹ Only general trends can be ascertained.

Wheat is generally more expensive at markets closer to the Gulf (e.g., Texas and Oklahoma markets). A variety of rail transportation rates are available, with the most common being "flat" export rates from mill to port and "transit" rates from grain purchase point to mill and then from mill to port. Flat rates from Crete and Dallas to Lake Providence favor Cargill over Lauhoff by about \$0.031/cwt. The flat rate to St. Louis favors Lauhoff by almost \$1.00/cwt. Flat rates to Helena and Memphis are about the same for Cargill and Lauhoff. Lauhoff prefers to use flat rates, but Cargill prefers to use transit rates.¹² Cargill cannot always make these preferred arrangements on River shipments.¹³ When it cannot, it believes it faces a competitive disadvantage in bidding against Lauhoff and ADM.

¹⁰ These are the plants of Fisher Mills, Inc.; California Milling Company; Lauhoff Grain Company; and Archer-Daniels-Midland (ADM), respectively.

¹¹ A Cargill Vice President testified that "anything can be done" in terms of reaching certain markets, depending upon the price of wheat, its origin, destination and available transportation arrangements [Tr. at 223-224]. See also testimony of Mr. Tucker to the effect that an intelligent shipper has to be in a flexible position and use whatever rate structure that produces the maximum profit margin at the point where the sale is going to be made [Tr. at 1002].

¹² Lauhoff has had difficulty establishing transit rates to the River via Crete, but can obtain comparable rate arrangements to St. Louis and Memphis. [See Tr. at 675-677]. Lauhoff typically ships bulgur on a truck-in/flat rate out basis and uses transit rates for less than 20% of its River shipments [Tr. 601-603]. All but one of Lauhoff's transit shipments were delivered to St. Louis. [Id.] Cargill can more readily obtain transit rates to the River and uses them for the majority of its shipments [Ex. C-1 at 14-15, Tr. at 1003-1015].

¹³ The record does not permit accurate measurement of the tonnage Cargill can move to River ports under transit rates or a finding that Cargill purchases any particular percentage of its bulgur wheat in any particular locality. The Commission does not rely upon the Presiding Officer's finding that Cargill purchases 80% of the wheat it ships to River ports at points in Oklahoma.

POSITION OF THE PARTIES

Cargill contends that the Initial Decision inaccurately and unfairly treats the law and the facts and "violates virtually every mandate of the Administrative Procedure Act," especially that requiring a statement of the reason or basis for all material findings and conclusions made by the Presiding Officer.¹⁴ 5 U.S.C. 557(c)(A). The following specific exemptions have been taken:

Exception No. 1 - It was incorrectly held that Cargill lacks standing under sections 16 First and 17 because it is not a shipper.

(A) *Arguments advanced by Cargill and Baton Rouge*

- (1) Shipping Act section 22 allows "any person" to file a complaint alleging violations of any section of the Shipping Act. *E.g., Anglo-Canadian Shipping Co. v. Mitsui S.S. Co.*, 4 F.M.B. 535, 543 (1954), where the Commission stated that: "Although a complaint need not be filed by an injured party, it must allege facts amounting to discrimination against or prejudice to a person whom the statute, in terms, purports to protect."
- (2) Section 16 First plainly applies to "persons" and not just shippers. The statute is not limited to complainants "directly affected" by the alleged violations and also authorizes the Commission to act on its own motion to prevent injury to the public. *Isthmian S.S. Co. v. United States*, 53 F.2d 251, 253-254 (S.D.N.Y. 1931).
- (3) A person need not be in privity of contract with an ocean carrier to be damaged under sections 16 First or 17, provided that the person is closely connected with the discriminatory transportation. *Merchants Warehouse Co. v. United States*, 283 U.S. 501, 508-509 (1931); *Southern Ry. Co. v. United States*, 186 F.Supp. 29, 42 (N.D. Ala. 1960).
- (4) The Government of Puerto Rico pursued section 16 and 17 allegations based upon terminal charges assessed against Puerto Rican trade cargo. *Agreement No. T-2336*, 15 F.M.C. 259 (1972).

(B) *Arguments advanced by Waterman*

- (1) Cargill may file and prosecute the instant complaint on behalf of others, but it is not a person protected under section 16 First or section 17. The Initial Decision was correct in its handling of this point. Cargill is merely a person which does business with a shipper and has no relationship at all with the complained of ocean transportation. The cases cited by Cargill are all distinguishable.

¹⁴ Cargill also notes that the Initial Decision includes no citations to the record.

Exception No. 2 - It was incorrectly held that Cargill did not make a *prima facie* showing of undue preference.

(A) *Arguments advanced by Cargill and Baton Rouge*

- (1) Once a *prima facie* section 16 First or section 17 port discrimination case is presented, the burden of justifying different rates or charges shifts to the respondent. See *Commodity Credit Corporation v American Export Isbrandtsen Lines, Inc.* 15 F.M.C. 173, 191 (1972); *North Atlantic Mediterranean Freight Conference - Rates on Household Goods*, 11 F.M.C. 202, 219, n.29.
- (2) It is not the Complainant's responsibility to prove that transportation circumstances are identical, but merely to show the absence of "obvious differences." *Rates Affecting High-Pressure Boilers*, 19 F.M.C. 441, 457 (1966). This is particularly true in light of the fact that the Respondent generally possesses the relevant evidence regarding transportation circumstances.

(B) *Arguments advanced by Waterman*

- (1) Cargill must show more than a mere difference in rates. To the extent the *High-Pressure Boilers* decision, *supra*, depends upon a presumption of similar transportation factors," it is inapplicable to the instant section 16 First/section 17 port discrimination proceeding. *High-Pressure Boilers* arose under Shipping Act section 18(b)(5).
- (2) Similarity of transportation conditions is a necessary element of any section 16 First or 17 violation and is not an affirmative defense for the carrier. *Intercoastal Cancellations*, 2 U.S.M.C. 397, 401 (1940); *Philadelphia Ocean Traffic Bureau v Export S.S. Co.*, 1 U.S.S.B. 538, 541-542 (1938); *Atlantic Refining Co. v. Ellerman & Bucknall S.S. Co.*, 1 U.S.S.B. 242, 249-250 (1932), citing *United States v. Illinois Central R.R.*, 263 U.S. 515, 524 (1924).

Exception No. 3 - The Presiding Officer failed to find that transportation conditions favor lower bulgur rates for Gulf ports.

(A) *Arguments advanced by Cargill and Baton Rouge*

- (1) Waterman carries the same cargo on the same LASH mother ship from New Orleans to India under identical circumstances at different rates. This alone establishes a *prima facie* violation of sections 16 First and 17. *Rates, Etc. of General Atlantic Steamship Corporation*, 2 U.S.M.C. 681, 686 (1943). The River and Gulf barges are an integral part of a single LASH system and Waterman seeks the same minimum revenue for barges on the River and the Gulf (WS-1, p. 6; Tr., pp. 803-810). The distance between River ports and India is greater than the distance between

Gulf ports and India, and costs increase with distance traveled.

- (2) The Presiding Officer placed too much emphasis on costs. Costs alone cannot justify a rate differential. *Port Differential Investigation*, 1 U.S.S.B. 61, 69 (1925). All transportation factors must be considered, including competition, volume of traffic and distance. *Rates from Jacksonville*, 10 F.M.C. 376, 386 (1967); *American Great Lakes - Mediterranean Eastbound Freight Conference*, 7 F.M.C. 458, 461-462 (1962).
- (3) The Presiding Officer's finding that Waterman has higher costs on the Gulf is not supported by substantial evidence. Average total cost is the only pertinent inquiry, but Waterman has provided only selected cost comparisons. This failure to explore its entire cost picture warrants a presumption that the Gulf service has a cost advantage. *International Union (UAW) v. NLRB*, 459 F.2d 1329 (D.C. Cir. 1972).

The cost of tows varies considerably. There are no towage charges at those Gulf ports where mother ships call and the cost of a two-way tow between Baton Rouge and New Orleans is less than for any River port. (Compare WS-1A with Tr. at 870). Costs at Baton Rouge are closely akin to those at River ports.

There is also no showing that stevedoring and port services are similar at River and Gulf ports. Certain cleaning, preparation and Customs charges are assessed at River ports in addition to stevedoring and fleeting costs.

The Presiding Officer was mistaken to find that some barges are not cleaned and that, to the extent cleaning is necessary, separate cleaning charges would be applicable at Gulf as well as River ports. Testimony from Memphis and Helena officials indicated that all barges were cleaned (Tr. 538-540; 576-578) and this testimony is entitled to more weight than the self-serving statements of Waterman's employee. There was no evidence regarding cleaning charges at the Gulf.

Fleeting expenses may be lower per day on the River, but the length of holding time may be greater there—an average of 10 days (Tr., 861 864). In Baton Rouge, barges need not wait for even a day.

- (4) Costs of service are higher on the River because bulgur is virtually the only traffic moving and about 80% of Waterman's barges move upstream empty (Tr. at 826, 827). Thus, bulgur alone must defray the capital costs of the barges acquired especially for the River services (WS-1 at 7-8). Gulf barges carry primarily commercial cargoes of

greater value than bulgur which reduce the per ton cost of carrying bulgur (Tr. at 916-918 and 951-952). It was inappropriate for the Presiding Officer to compare the cost of two-way tows on the River and on the Gulf because the presence of inbound Gulf traffic means that the Gulf rate for bulgur only needs to recoup the cost of a one-way tow. Waterman has a 1,000 ton minimum on its River service and not on its Gulf service because its costs of carrying bulgur are higher on the River.

- (5) The FMC should take official notice of Waterman's advertised mother ship calls at Houston during the winter of 1980-1981. Vessel calls at Houston mean that towing charges are less from Texas ports. Inadequate attention was given to Houston calls in examining transportation conditions (e.g., distances and towing costs).
- (6) Waterman's towing costs generally increased in proportion to distance from New Orleans. Previous section 4 of the Interstate Commerce Act (now 49 U.S.C. 10726), prohibits lower rates from long hauls which subsume a shorter one because such conduct is a *per se* violation of sections 2 and 3. *United States v. AT&SF R. Co.*, 234 U.S. 476 (1941); *Reconstruction Finance Corp. v. Akron C. & Y. Ry. Co.*, 287 I.C.C. 353, 381 (1952).
- (7) Sections 16 First and 17 require a reasonable relationship between benefits and charges. *Volkswagen Aktiengesellschaft v. Federal Maritime Commission*, 390 U.S. 261, 282 (1968). Waterman has inequitably allocated mother ship operating expenses such as fuel surcharges and port congestion surcharges to the Gulf rather than River service. Fuel increases have occurred in the Conference tariff since 1977 (Tr. at 936-946). It is irrelevant to compare Waterman's River service to the Conference breakbulk operation because Waterman is the only carrier which transports bulgur under both rates.
- (8) The Presiding Officer failed to understand that the issue is one of favoritism and not the development of LASH services. His concern that LASH service be stifled is equally applicable to the Gulf Coast which is being deprived of the full benefits of this system—at least as to bulgur shipment. Moreover, even if the River and Gulf rates were equal, in some instances Lauhoff and ADM might bid low enough to receive bulgur awards at the River, as happened in the February - August, 1978 period when the River rates were slightly higher for Bombay and Calcutta (Ex. C-1 at 7-8; Ex. C-9; C-10 at 5-6). The use of LASH to move bulgur from River ports requires Cargill to backhaul its product from Dallas to the River (Tr. 299-301) and is thus the type of unreasonable cargo

diversion prohibited in *North Carolina State Ports Authority v. Dart Container Line*, 21 F.M.C. 1129-1130 (1979), *aff.d Dart Container Line v. Federal Maritime Commission*, 639 F.2d 808 (D.C. Cir. 1980).

(B) *Arguments advanced by Waterman*

- (1) The Presiding Officer correctly found that Gulf-origin bulgur travels further than River-origin bulgur under Waterman's itinerary and that all relevant transportation factors in the Gulf and River services militate in favor of higher Gulf rates. Cargill ignores the fact that vessel types, cargo volume, competition, stevedoring costs, and towing costs are different in the two services. The *Jacksonville* and *American Great Lakes* cases, *supra*, were section 18(a) proceedings where the burden of proof was on the carrier.
- (2) No bulgur originates at New Orleans so towing and other costs at that port are irrelevant. Corpus Christi is one of Cargill's base ports on the Gulf and it is further from New Orleans than are Lake Providence, Helena or Memphis. Only St. Louis is further than Corpus Christi and it is no longer approved by ASCS. Moreover, the distance from Dallas to the River ports is no greater than from Dallas to the Gulf so that the *North Carolina State Ports Authority* decision, *supra*, is inapplicable.
- (3) Whatever Waterman's exact costs for serving each River and Gulf port, the record shows that there is relatively little variance in the stevedoring and fleeting expenses incurred at the three currently used River ports (less than \$2.00 per long ton). There are much greater differences between the Gulf ports. The Conference must set its bulgur rate at a uniform level which covers even small loads at relatively high cost ports.¹⁵ There is no inbound traffic at Corpus Christi [Tr. at 868] and neither Corpus Christi nor Lake Charles are regular Waterman ports of call [Tr. at 909]. More barges can be towed on the River at one time, thereby reducing per barge costs [Tr. at 895]. The cost difference between a call to Corpus Christi and Lake Providence can be as great as \$10.32 per long ton in favor of the latter [Ex. WS-1A at 2-3 and Appendix D; Tr. at 860]. Waterman would use a breakbulk vessel to pick up less than 1,000 tons of bulgur at a Gulf port because of the three barge tow requirement [Tr. at 913-914]. Breakbulk vessels are costlier to operate per ton. Waterman operates five breakbulk vessels in the Gulf/India trade and the Conference bulgur rate is designed for service by

¹⁵ There is no volume minimum in the Conference tariff.

such vessels. The Conference also sets its fuel and port surcharges on a breakbulk basis and LASH may not involve comparable cost increases. LASH isn't usually affected by port congestion because the mother ships can unload without alongside berths. In addition to cost savings, Waterman's LASH service has also been more successful in attracting inbound shipments than has Waterman's breakbulk service, thereby reducing revenue requirements on the outbound leg. The difference between the River rate and the Conference rate was \$62.01 in late 1979 and this amount is more than justified on a breakbulk/LASH comparison basis [WS-1 at 3]. More LASH barges are not required to serve more distant points on the River or the Gulf provided there is a proper scheduling of mother ship calls [Tr. at 871-874]. It is only necessary to get the barge to and from the inland point in time to catch a Waterman mother ship which calls at New Orleans every 30 days. Waterman's River barges have never missed a sailing [Tr. at 510, 832].

Not every barge has to be fully cleaned [Tr. at 814-816], but even if Waterman had to pay the maximum \$300-500 cleaning cost for every River barge and had no comparable costs on the Gulf, the difference would only be about \$1.00 a long ton, far less than the differences in stevedoring (\$11/LT) and towing (\$10.32/LT).

- (4) Waterman can generally predict the volume of Title II traffic available at River ports when it sets its rates and can therefore construct high volume voyages for such cargo (Ex. WS-1 at 14). Stable and predictable volumes of India bulgur are not and never have been available at any Gulf port (*Id.* at 19). Differences in port conditions and traffic volume can justify the use of volume incentive rates at a particular port. *Agreement No. 9955-1*, 18 F.M.C. 426, 430 (1975); *Great Lakes Japan Trade*, 8 F.M.C. 270, 275 (1964). Waterman sets its rates low enough to get the business ASCS is offering and updates these rates monthly (WS-2 at 4-7). An average of 10,000 LT is required per month. If rates were higher, some or all of this 10,000 ton minimum would have gone to the West Coast or Great Lakes (Ex. WS 3 at 26-40). It is permissible for an ocean carrier to charge preferential rates if it does so for the purpose of meeting competition. *Dant & Russell, Inc. v. American & Hawaiian S.S. Co.*, 1 U.S.M.C. 781, 783 (1938). This competition may come from another port range. *Overland/OCP Investigation*, 19 F.M.C. 184 (1969), *aff'd Port of New York Authority v. Federal Maritime Commission*, 429 F.2d 663 (5th Cir. 1970), *cert. den.* 401 U.S. 909 (1971).

- (5) Waterman's LASH ships do not call at Houston directly despite advertisements in the trade press saying they do. The Commission should take official notice of Marad voyage reports which show no Houston calls during the winter of 1980-1981.
- (6) ICA section 4 is inapplicable to ocean shipping. Moreover, it can be waived by the ICC whenever necessary to meet competition or when justified by other special transportation conditions.

Exception No. 4 - The Presiding Officer erroneously concluded that the Conference was a necessary party to this proceeding.

(A) *Arguments advanced by Cargill and Baton Rouge*

Waterman is the only person engaged in the complained of discrimination and the fact that its Gulf rate is set by the Conference and is in that sense outside of its control does not excuse conduct violative of the Shipping Act. *Surcharge on Cargo to Manila*, 8 F.M.C. 395 (1965); *North Atlantic Mediterranean Freight Conference—Rates on Household Goods*, 11 F.M.C. 202 (1967), reversed on other grounds; *American Export-Isbrandtsen Line v. Federal Maritime Commission*, 409 F.2d 1258, 1260, n. 4 (2d Cir. 1969). In any event, Waterman has not raised a lack of control defense. Cargill merely wants a cease and desist order against Waterman and would leave Waterman free to implement it as it sees fit. One such option would be for Waterman to resign from the Conference. Waterman did resign from the West Coast of India & Pakistan-U.S.A. Conference (FMC No. 8040) on January 1, 1981.

(B) *Arguments advanced by Waterman*

It is necessary for the ocean carrier to control both rates in order to violate section 16 First. *Gulf Intercoastal Rates*, 1 U.S.S.B.B. 516, 518 (1935). *Accord, Surcharge at Seasport*, 9 F.M.C. 129 (1965); *American Export-Isbrandtsen Lines, Inc. v. Federal Maritime Commission*, 409 F.2d 1258 (2d Cir. 1969). Waterman has no control over Conference charges and was unsuccessful in obtaining an open rate for bulgur from the Conference. ASCS has not sought a different Gulf rate and Cargill has not brought an action or even requested lower Conference rates [Tr. 200-201]. The Supreme Court has stated that a carrier must "effectively participate in both rates" before it is guilty of undue preference. *Texas & Pacific Ry. Co. v. United States*, 289 U.S. 627, 650 (1933).

Exception No. 5 - The Presiding Officer failed to find that a substantial amount of bulgur is diverted from Gulf ports and

that these ports have suffered substantial economic harm from Waterman's preferential practices.

(A) *Arguments advanced by Cargill and Baton Rouge*

- (1) Waterman's own expert witness (Mr. Tucker) indicates that 15 million pounds of bulgur would have moved through Gulf ports if the River rates were raised to the level of the Gulf rates. Even more would have moved via the Gulf if the Gulf rates were lowered to the level of the River rates, however. This is illustrated by the increase in Gulf bulgur as a percentage of total ASCS shipments between February and August, 1978, when River rates were high, and the subsequent decline as River rates were lowered. Waterman also began serving two River ports in 1979 (Helena and Lake Providence) which were not served during 1978, thereby increasing the amount of bulgur which could be diverted from the Gulf. The River share of India bulgur increased from 22% in 1978 to 34% in 1979 and the Gulf share decreased from 16% to 7% [Ex. C-10].
- (2) Mr. Tucker failed to consider three ASCS bid cycles (Nos. 74, 75 and 79) which included another 28 million pounds of bulgur which could have gone through the Gulf under Cargill's analysis. [Cycle No. 74—Tr. at 1162-1164; Ex. C-8 at 41; Ex. WS-3, App. C. at 1-74-9. Cycle No. 75—Tr. 1165; Ex. C-8 at 42; WS-3, App. C. at 1-75-21. Cycle No. 79—Tr. at 1095-1102, 1209-1210.] There is no reason why Cargill's analysis of these three cycles should not be accepted.
- (3) Cargo loss directly and indirectly harms a port community. Many Gulf ports regularly seek ASCS business and Baton Rouge testified that it is willing and able to handle India bulgur. The Presiding Officer ignored the clear harm suffered by Gulf ports generally and required evidence of specific harm to particular ports. Section 17 can be violated without a showing of commercial injury, however. *Council of North Atlantic Shipping Associations v. American Mail Line*, 17 S.R.R. 781, 841 (1978); *Household Goods Forwarders Association v. American Export Lines, Inc.*, Order on Reconsideration, 20 F.M.C. 496 (1978). It is unnecessary to show a "monetary loss" (unless reparations are sought), but only a competitive disadvantage or "adverse effect" upon the affected parties. *North Carolina State Ports, supra*, at 526; *City of Mobile v Baltimore Insular Line*, 2 U.S.M.C. 474, 480 (1941). See also *Agreement No. T-1768 - Terminal Lease Agreement*, 9 F.M.C. 202, 207

(1966), *aff'd sub nom. City of Los Angeles v. Federal Maritime Commission*, 385 F.2d 678 (D.C. Cir. 1967).¹⁸

- (4) Baton Rouge was allocated a shipment of 4,523 tons in July, 1978 when River rates were slightly higher than Gulf rates [Ex. C-8 at 140; Ex. WS-3, App. C at 1-64-15]. Therefore, Baton Rouge was entitled to expect similar bulgur shipments for the rest of 1978 and 1979 if Waterman's differential were not imposed.
- (B) *Arguments advanced by Waterman*
- (1) The only evidence of cargo losses at Gulf ports is the fact that Gulf bulgur traffic increased between February and August, 1978 when River rates to the baseports of Bombay and Calcutta were approximately equal to the Conference rates. However, the River rates to Indian outports were lower during this period and it was to these outports that ASCS bulgur moved. The baseport rates were merely "paper rates." [Ex. WS 3 at 52; Ex. WS-6 at 3-5; Ex. C-9 at 1-2, 4; Tr. 1139-1148, 1203-1204]. Thus, the River/Gulf rate relationship is not the cause of ASCS bulgur allocations to the Gulf ports. River traffic moved at approximately the same amount each month throughout 1978 and 1979. [Ex. WS-6 at 4; Ex. C-10 at 7-8]. The true reason for the increase in Gulf traffic between February and August, 1978 is because Gulf rates were lower than the Great Lakes from February through May [Ex. WS-3 at 50-53; WS-6 at 3-5]. The Great Lakes rates then began to decline from May through August.
- (2) The River traffic grew at the expense of the West Coast and Great Lakes, not the Gulf. The Gulf ports increased their share of the India bulgur market from 6.7% (1.953 million pounds per month) to 11.6% (6.737 million pounds per month) in the 30 months before July, 1977 and the 30 months following it. This is a 75% increase during a period when ASCS's total purchases increased only 50% [Ex. WS-3 at 44]. The Gulf ports received 8.2 million pounds in 1976, 36.8 million in 1977 (all in the second half), 105.8 in 1978 and 48.7 in 1979. Even after August, 1978, the Gulf's market share remained at 8%, double the four percent it enjoyed in 1976. The volume of traffic moving was six times greater in 1979 than in 1976. The combined market shares of the West Coast and Great Lakes were 96% and 86% in 1976 and 1977, respectively. These shares declined to 62% and 52% in 1978 and 1979. The lack of injury to Gulf ports is reflected in the fact

¹⁸ The T-1768 decision involved a lease between the City of Oakland and an ocean carrier and did not concern discrimination between ports under section 17, although such an allegation was apparently made by various protestants.

that only one port, Baton Rouge, was interested in intervening in support of Cargill's position.

- (3) The capacity of the River terminals authorized by ASCS to handle bulgur actually declined from 21,000 tons in 1978 to 13,000 tons in late 1979 [Ex. WS-3 App. C at 1-70-1 and 1-86-1].
- (4) The probable loss of the 15 million pounds (6,696 long tons) identified by Mr. Tucker over a two and a half year period represents less than one percent of all India bulgur moving at that time [Ex. WS-3 at 34, 36-39 and WS-11 at 1] and represents about one percent of Baton Rouge's total tonnage for either 1978 or 1979. The loss of this tonnage to the entire Gulf range or even to the single port of Baton Rouge cannot constitute substantial harm of the type required by the Commission's *CONASA* decision. 17 S.R.R. at 838. Moreover, Baton Rouge is not competitive for India bulgur. It handled no Title II commodities. This is because its costs are higher than many other Gulf ports [C-18 at 4-5, 12]. ADM does not appear to have ever bid there and Lauhoff and Cargill bids are excluded by ASCS without computer analysis because they are clearly noncompetitive [Ex. WS-6, 5-6; Tr. 1084-7]. Baton Rouge's own witness did not know of any Baton Rouge bids awarded on a lowest landed cost basis [Tr. 478-483]. The two shipments it did handle were reallocated there when transportation became unavailable at other ranges (e.g., May, 1978, following the freezing of Mississippi River ports the previous winter). Moreover, Baton Rouge was unable to substantiate its claim of direct financial losses in the amount of \$30.00 per ton and indirect losses in the amount of \$90.00 per ton [See Tr. at 467-470].

Exception No. 6 - The Presiding Officer failed to find that Cargill is subjected to a substantial disadvantage in marketing its bulgur.

(A) *Arguments advanced by Cargill and Baton Rouge*

- (1) Cargill enjoys a natural advantage in selling bulgur at Gulf ports because its Dallas mill is located near such ports. Cargill has been injured because it can no longer use these closer Gulf ports, while these ports have been deprived of Cargill's business. Shippers are entitled to all the natural benefits of their location. *North Atlantic Mediterranean Freight Conference, supra*, at 210.

The record requires a finding that the combination of wheat prices and inland transportation costs give Cargill a marketing disadvantage at the River ports and that this disadvantage is a proper basis for section 16 First and section 17 relief. *Johnson Pickett Robe Co. v. Dollar Steam-*

ship Lines, Inc., 1 U.S.S.B. 585 (1936); *Surcharge at Manila*, 8 F.M.C. 395 (1965); *Agreement No. T-1768*, 9 F.M.C. 202 (1966).

- (2) Because of Waterman's discriminatory rate structure, Cargill had to expend an additional \$178,339 to move its product to River ports over what it would have cost to move them to Gulf ports and has not been able to recoup fully these costs from the sales that it made. Lost profits to shippers are relevant to show the extent of harm to shippers. *Intercoastal Cancellations*, 2 U.S.M.C. 397, 400 (1940).
- (3) Cargill cannot obtain flat rate rail transportation to three of the River ports, and especially to St. Louis, on as favorable a basis as Lauhoff [Ex. C-12; Ex. WS-11 at 3; Tr. at 192]. Moreover, the use of flat rates requires Cargill to buy southern wheat which is normally more expensive than northern wheat [Ex. C-1 at 18; Tr. at 609]. Cargill also has to pay more than Lauhoff for rail transportation at transit rates in most instances [Ex. I-1; WS-11 at 1-3].
- (4) There is no evidence to support the Presiding Officer's finding (I.D. at 10) that Cargill buys 80% of its bulgur wheat from Oklahoma where there is a lower rail differential between Gulf and River ports or that Lauhoff generally pays a premium for "truck wheat" as compared to "rail wheat." The Presiding Officer ignored Lauhoff's costs of trucking wheat to its mill prior to its use of flat rail rates and the fact that Oklahoma wheat costs more than Nebraska wheat in concluding that Lauhoff does not have a marketing advantage at River ports. It is invalid to compare Cargill's transit rail rate to Lauhoff's flat rail rate because one cannot separate out the mill-to-port leg of the transit rate. Lauhoff could use transit rates in many instances [Tr. at 215-216] and the fact that it does not do so implies that its total cost is lower via flat rates. Cargill has a lower total wheat/rail cost via transit than via flat rates and is not helped by the fact that flat rates between Dallas and Lake Providence are lower than from Crete to Lake Providence. It is preposterous for the ALJ to claim that the Gulf is not the "natural outlet" for Cargill's bulgur (I.D. at 40-41) because two-thirds of U.S. grain is exported and the price of grain is set in relation to the Gulf. This is a natural movement, not an artificial inducement.
- (5) Cargill has been forced to reduce the amount it bids at *Gulf* ports on all bulgur (including non-India bulgur) in order to compete with Lauhoff and ADM's River bids.

(B) *Arguments advanced by Waterman*

- (1) Cargill never attempted to demonstrate lost sales. When pressed on cross-examination, it admitted that it had sold the maximum quantity of bulgur its Dallas mill could produce during 1978 and 1979 [Tr. at 285] and that sales were up 50% over the 30 month period prior to July, 1977. Cargill did not begin selling regularly at River ports until April, 1979 and sold 51.9 million pounds by December, 1979 [Ex. WS-3 at 35-41 and Table I]. It claims injury because its profits were reduced on these 1979 sales by some \$178,000. Even with higher River rates, Cargill would not have increased its sales prior to April, 1979. Cargill's relative position vis-a-vis ADM and Lauhoff increased from 8.1% in 1976 to 20.1% in 1979. This fact pattern does not amount to "undue" prejudice. See *Port of New York Authority v. Federal Maritime Commission*, 429 F.2d 663, 669 (5th Cir. 1970); *Thatcher Glass Mfg. Co. v. Sea-Land Service, Inc.*, 8 F.M.C. 645, 650 (1965). The *National Association of Recycling Industries* decision is inapplicable here because Cargill's share has grown faster than total market growth and Cargill has not shown that it could have increased its share any more than it actually did. These facts do not support a finding of present or prospective injury.
- (2) It is unlikely that any additional railroad costs paid by Cargill to reach River ports actually caused it to lose profits. ASCS data shows that Cargill always bid and received at least \$0.50/cwt higher on each incremental quantity of bulgur offered at the River than the same incremental quantity offered at the Gulf. This difference more than compensated for the alleged \$0.3436/cwt disadvantage in rail costs.
- (3) Lauhoff, as well as Cargill, pays more to get to the River rather than the Gulf and does not have an overall transportation cost advantage at River ports. Flat rates to Lake Providence favor Cargill by \$0.315/cwt. When both firms purchase wheat in the same location, transit rates can be about the same [Tr. at 221-224]. The relevant comparison, however, is between Lauhoff's truck-in/flat rate-out transportation costs and Cargill's transit rail costs since Lauhoff uses truck-in wheat [Tr. at 602] and Cargill uses transit rates from northern points in 90% of its movements [Ex. C-1 at 14-15; Tr. at 191-192]. This arrangement leaves Cargill with an overall transportation cost advantage to southern River ports [Tr. at 1016-1027], at least when Lauhoff's truck-in costs are included.
- (4) Cargill's claim that it was forced to lower its Gulf bids on all bulgur (including non-India bulgur) to be competitive

with ADM and Lauhoff's bids is speculative and unquantified. The bid reductions were made as a result of broader competitive circumstances, not Waterman's River rates on India bulgur [Tr. at 333-335]. In any event, the alleged Gulf reductions were only a few cents, whereas the Conference all-water rate was \$1.50 higher than the River rate. Thus, the reductions were futile and ill-advised.

- (5) Cargill has no "natural advantage" to the Gulf—only a preferred business pattern. Dallas is closer to the River ports than to the Gulf and is also closer to the River than are Abilene and Crete. Cargill's real disadvantage is in the higher wheat prices it must pay at Texas and Oklahoma points when railcar shortages or other considerations prevent it from purchasing less expensive rail transit wheat in Nebraska and Colorado. This fact is not related to Waterman's River service at all, affects shipments to the Gulf as well, and could not be rectified by a Commission Order. It is caused by the geographic location of Cargill's plant. Section 16 relief is not available in such circumstances. *Sharp Paper & Speciality Co. v. Dollar S.S. Lines, Ltd.*, 2 U.S.M.C. 91, 92 (1939); *Intercoastal Cancellations, supra*, at 2 U.S.M.C. 399. Cargill admits that its real competitive problem is combating the advantages other suppliers enjoy from West Coast and Great Lakes suppliers [Ex. WS-7].

Exception No. 7 - The Presiding Officer erroneously found that the aggregate capacity of the River ports decreased during 1979.

(A) *Arguments advanced by Cargill and Baton Rouge*

St. Louis was the only River port until September, 1978 and was handling about 10,000 tons a month. Memphis, Helena and Lake Providence came on in September, 1978. After St. Louis was decertified, these three ports were handling an average of about 13,000 tons a month.

(B) *Arguments advanced by Waterman*

The capacity of the River ports actually declined in 1979 because St. Louis had a potential capacity of 21,000 tons [Ex. WS-3, App. C, 1-70-1, 1-86-1].

Exception No. 8 - The Presiding Officer erred in accepting Mr. Tucker's evidence that higher River rates did not significantly impair Cargill's sales.

(A) *Arguments advanced by Cargill and Baton Rouge*

Mr. Tucker's methodology is defective because he could not ascertain the quantity of other bagged commodities awarded by ASCS during each bid cycle which might offset vessel and port capacity available for bulgur shifted from River ports to the Great Lakes or West Coast [Tr. at 1070-1071], and did not

analyze the possibility that U.S. Cargo Preference laws might require the use of particular ports.

(B) *Arguments advanced by Waterman*

An ASCS employee verified the approach taken by Mr. Tucker [Tr. 1030, 1198-1199; Ex. C-5 at 108, 111-113, 130-132, 140-143, 177].

Exception No. 9 - Cargill's February 8, 1980 "Motion to Compel Production" should have been granted.

(A) *Arguments advanced by Cargill and Baton Rouge*

Cargill was not allowed to see portions of the notes used by Mr. Boyle, a Waterman Vice-President, during his deposition. At the deposition, Waterman would only show Cargill which was actually used in Mr. Boyle's testimony pertaining to towing costs, although it was admitted that the other material did refer to the "case" generally. The original copy of the notes which were produced was later destroyed. Under these circumstances, the Presiding Officer should have invoked section 502.210(b) of the Rules which allows "adverse inference" sanctions and found that Waterman's LASH costs were higher for the River service.

(B) *Arguments advanced by Waterman*

The scrap of paper in question contained only a few words which did not concern towing costs or any other topic raised at the deposition. This paper was "lost" following the deposition and was not purposely "destroyed." Cargill did not seek discovery of this document, but if it had it would have been privileged as notes of a privileged attorney/client communication. Sanctions can only be imposed for the failure to obey an "Order to Produce" and no such order was issued. Waterman offered to furnish the information on the scrap of paper in response to such an order.

DISCUSSION AND CONCLUSION

Only two Shipping Act sections are seriously at issue in this proceeding: (1) undue preference against Cargill as a "person" under section 16 First; and (2) unjust discrimination against Gulf ports generally and the Port of Baton Rouge in particular under the first paragraph of section 17. Although other portions of these statutes are cited—perhaps inadvertently—by both sides to this controversy, they are either irrelevant or superfluous to the ultimate outcome.¹⁷ Because the elements of port discrimination conceptually resemble those of "undue preference" rather than "unjust discrimination," see *Council of North American Shipping Associations v. American Mail Line*, 17 S.R.R. 781, 841-842 (I.D.),

¹⁷ See I.D. at note 22 for a discussion of the parties' confusion over the various provisions of section 16 First and section 17.

aff'd 21 F.M.C. 91 (FMC, 1978), the entire case is best viewed as a section 16 First matter.¹⁸

The evidence presented is lengthy, incomplete, and confusingly arranged. Much of it consists of statistics which require supplementary information to be used meaningfully in this proceeding. Although considerable detail concerning the purchasing, processing and inland transportation of wheat was introduced, not enough data is available to support precise findings regarding the impact of these factors on the relative success or failure of Cargill, Lauhoff and ADM in selling bulgur to ASCS between 1977 and 1979. Moreover, the available evidence does not support a finding that Waterman's rate structure has caused significant injury to Cargill, Baton Rouge or Gulf ports generally. Cargill's failure to establish this critical fact constitutes the basis of the Presiding Officer's decision and necessarily defeats Cargill's claim for section 16/17 relief. Accordingly, the Initial Decision will be adopted except to the extent it may be inconsistent with the following discussion.

The Initial Decision has generated some confusion concerning Cargill's "standing" in this proceeding. Cargill clearly has standing to prosecute a complaint under section 22 of the Shipping Act even if it were not alleging injuries to itself. See, e.g., *Anglo-Canadian Shipping Co. v. Mitsui S.S. Co.*, 4 F.M.B. 535, 543 (1954), and the Initial Decision does not hold to the contrary. Rather, the question addressed by the Presiding Officer is whether section 16 First creates a cause of action for injury to persons which are not "shippers."

The statute prohibits undue prejudice to "any particular person, locality or description of traffic." Although Cargill is a "person" and therefore included in the literal language of section 16 First, the Presiding Officer recognized that the statute was not intended to subject ocean carriers to liability for all economic consequences factually con-

¹⁸ It is impossible to consider unjust discrimination against *ports* under the standards applicable to unjust discrimination against *shippers* because port discrimination necessarily involves different points of cargo origin or destination. Sections 16 First and 17 were modeled after sections 3 and 2 of the Interstate Commerce Act, respectively, as they read in 1916. Section 2 applied only to unjust discrimination against shippers, however, and Congress offered no explanation as to why port discrimination was included in section 17, particularly since section 3 already protected "localities" against "undue preference." H. Rep. No. 659, 64th Cong., 1st Sess. (1916), SR 51:51. Perhaps this reflected an intention not to include "ports" within the term "localities." When, however, a narrowly divided Supreme Court interpreted the term "localities" in section 3 as not including ports in the sense of cargo "gateways," *Texas & Pacific Ry. Co. v. United States*, 289 U.S. 627 (1933), Congress promptly responded to this decision by amending section 3 to add the words "port, port district, gateway and transit point" after the word "locality," and indicated that the Court had erroneously altered the longstanding interpretation of that statute as protecting ports and port regions. P.L. 74-261, 49 Stat. 607 (August 12, 1935); Sen. Rep. No. 885, 74th Cong., 1st Sess. (1935) at 2; 79 Cong. Rec. 10476, 10616 (views of Senators Moore and Clark during discussion of S. 1633, the bill enacted as P.L. 74-261). The Commission has ruled that *Texas & Pacific Ry. Co.* did not apply to section 16 First because ports are necessarily "origin points" in the context of ocean shipping. *Proportional Rates on Cigarettes*, 6 F.M.B. 48, 54-55 (1960) *City of Mobile v. Baltimore Insular Line, Inc.*, 2 U.S.M.C. 474, 478 (1941).

nected to their ratemaking practices (I.D. at 25). Liability must end at some sensible, reasonably foreseeable point. In cases arising under former section 3 of the Interstate Commerce Act (now 49 U.S.C. 10741), only persons which otherwise deal directly with common carriers in their capacity as such have been entitled to protection. Compare *Southwestern Produce Distributors v. Wabash R.R. Co.*, 20 I.C.C. 458 (1911) with *Merchants Warehouse Co. v. United States*, 283 U.S. 501, 508-509 (1931). See also *American Union Transport, Inc. v. Italian Line*, 2 U.S.M.C. 553 (1941). "Privity of contract" is not required, but it is necessary that the use of regulated transportation be the direct or proximate cause of the prejudice. See *Coastwise Rates Between Gulf Ports and Texas*, 234 I.C.C. 557 (1930) and *Cosby v. Richmond Transfer Co.*, 38 I.C.C. 636 (1916).

The Presiding Officer held that Cargill was not entitled to protection under section 16 First because Cargill is not a shipper. The Commission declines to adopt this conclusion. The unusual, and possibly unique, grain purchasing system employed by ASCS, appears to place the five bulgur suppliers in the same position relative to Waterman's ocean rates in which they would be if they sold grain on a fully delivered basis at Indian ports (e.g., on C.I.F. terms). Waterman also considers the competitive capabilities of the bulgur suppliers in establishing its River rates [E.g., WS-1 at 8-11, 21-22; WS-2 at 3-9]. Under the total circumstances of this case, therefore, the purposes of section 16 First are best served by treating Cargill's alleged injuries as actionable under section 16 First.

Cargill's objections to the Presiding Officer's suggestion that Cargill failed to make a *prima facie* showing of undue preference are of little significance given the fact that the case was not decided upon a motion to dismiss, Waterman presented a full defense, and Cargill lost because of its failure to prove injury, not because it failed to prove that transportation circumstances in the River/India trade were undistinguishable from those in the Gulf/India trade. Nonetheless, the Initial Decision seemingly overemphasizes the burden of proof placed upon section 16 First complainants concerning the similarity of transportation circumstances (I.D. at 16-17).¹⁹ Cargill's second exception will therefore be granted.

The elements of undue preference and the burden of proof thereon were described in a 1979 judicial decision arising under the Interstate Commerce Act, as follows:

- (1) that there is a disparity in rates, (2) that the complaining party is competitively injured, actually or potentially, (3) that

¹⁹ The Presiding Officer more accurately describes the burden of proof in cases of unjust discrimination under section 17, initial paragraph, but even there, the complainant is not required to prove such matters as the cost of providing service which can be accurately known only to the respondent.

the carriers are the common source of both the allegedly prejudicial and preferential treatment, and (4) that the disparity in rates is not justified by transportation conditions. The complaining party has the burden of proving the presence of the first three factors and the carriers have the burden of justifying the disparity, if possible, in connection with the fourth factor. *Harborlite Corporation v. Interstate Commerce Commission*, 613 F.2d 1088, 1091 (D.C. Cir. 1979), quoting *Chicago & Eastern Illinois Railroad v. United States*, 384 F. Supp. 298, 300-301 (N.D. Ill. 1974), *aff'd mem.* 421 U.S. 956 (1975).

As can be seen, the complainant is not obligated to prove that the transportation circumstances surrounding the two movements are identical. This evidence is primarily in the possession of the respondent. It is sufficient that the complainant demonstrate that there are no obvious differences between the trades. At that point, the burden is upon the respondent to demonstrate that there are legitimate transportation differences.

Cargill's third exception was adequately resolved by the Presiding Officer and warrants no further discussion here. There is no substantial evidence to support the proposition that LASH rates to India must be higher from U.S. River ports than from U.S. Gulf ports.

Cargill also takes exception to the Presiding Officer's suggestion that the India, Pakistan, Bangladesh, Ceylon and Burma Outward Freight Conference was a necessary party to this proceeding (I.D. at 34). This exception will be granted, although once again the matter at issue does not affect the ultimate outcome of Cargill's case. A section 16 First action will lie against a carrier which operates within a conference or other ratemaking body whose decisions it cannot unilaterally control. *See American Export-Isbrandtsen Line v. Federal Maritime Commission*, 409 F.2d 1258, 1260, n. 4 (2d Cir. 1969); *Surcharge by the Far East Conference*, 9 F.M.C. 129, 130-132 (1965). Conference membership may ultimately restrict the remedy available for section 16 violations, but it does not restrict the carrier's ability to "effectively participate" in both rates so as to create a defense for the respondent carrier. *See Texas & Pacific R. Co.*, 289 U.S. 627, 650 (1933). In the instant case, the India, Pakistan Conference was a necessary party only to the extent Cargill sought a Commission order directed at the Conference's Gulf Coast rate for bulgur.

Cargill's fifth exception concerns the diversion of bulgur from Gulf Coast ports as a whole. It is true that as much as 43 million (but probably less than 15 million) pounds of bulgur *might have* moved through Gulf ports if River and Gulf rates were equal, more favorable arrangements were unavailable at Pacific Coast or Great Lakes ports, ASCS found all Gulf bids responsive and adequate shoreside and ocean carrier accommodations were available at the Gulf for each proposed

ASCS shipment. This evidence does not, however, constitute a legitimate claim to an ascertainable portion of ASCS bulgur shipments within the meaning of the cargo diversion standards established by the Commission in *Council of North Atlantic Shipping Associations v. American Mail Line*, 17 S.R.R. 781, 841 (1978).²⁰ The ASCS market depends upon several variables other than ocean rates and there is no necessary relationship between a decline in River rates and an increase in Gulf port shipments.²¹ Cargill also offered no evidence relating to the volume and dollar value of the allegedly "lost cargo" to the overall operations of U.S. Gulf ports, ports which are among the nation's largest.²² In short, Cargill's evidence is far too speculative to support a finding of unjust diversion of cargo from Gulf Coast ports as a whole.

Baton Rouge's sole claim of injury to its particular port is based upon the premise that because it received one shipment (4,523 long tons) during July, 1978, it would necessarily have received similar shipments at least once every six months thereafter. This argument fails because lower River rates cannot be said to have "caused" the July, 1978 shipment [see note 22, *supra*], and because Baton Rouge is a relatively high cost Gulf port, not usually bid by Cargill, Lauhoff or ADM [Ex. WS-3 at 53-56, Tr. at 326-328, Ex. WS-6 at 5-6, Ex. C-18].²³ No Baton Rouge bids were in fact submitted in Bid Cycle No. 64 [Ex. WS-3 at 55-56] and although Cargill initially received the award at Baton Rouge, this allocation was probably made because of changed circumstances at some other port [Ex. C-5 at 45-50, 80-84, 125].

Cargill's sixth exception goes to the heart of its undue prejudice case—that Waterman's rate structure subjects Cargill to a substantial disadvantage in marketing bulgur. This assertion is not supported by the record. Cargill sold the maximum quantity of bulgur it could produce during 1978 and 1979 [Tr. at 285], and increased its market share (400%) faster than total market growth (50%), if the 30 months before Waterman began its River service are compared to the 30 months after that date [see note 21, *supra*. Cargill's Gulf bids were also higher than Lauhoff's on some occasions [Ex. WS-3 at 28]. Most impor-

²⁰ Cargill does not claim the Gulf ports lost specific cargoes traditionally handled by them. Rather, it insists that these ports should have enjoyed an increase in India bulgur traffic during 1977-1979 because ASCS's overall purchases increased during this time period. However, the volume of bulgur moving through the Gulf ports during 1977-1979 grew at a greater rate (75%) than did India bulgur market as a whole (50%) [Ex. C-2, Ex. C-10, Ex. WS-3 at 2-3, 42-45, 49-50 and Ex. WS-11 at 1].

²¹ During February and August, 1978, Gulf bulgur shipments increased despite the fact that River rates to the Indian outports actually involved were slightly lower than the Gulf rates. [Ex. WS-3 at 50-53; Ex. WS-6 at 3-5; Ex. C-9 at 1-4; Ex. C-10; Tr. 1139-1148, 1203-1204]. This increase is attributable to higher rates at the Great Lakes [Ex. WS-3, App. C., Cycles 64-70].

²² The only evidence of bulgur's economic value to Gulf ports was Baton Rouge's discredited attempt to establish a \$50.00 per ton direct value for bulgur. The actual value at Baton Rouge was closer to \$3.00 [Ex. C-18 at 10; Tr. at 464-470].

²³ Cargill uses Corpus Christi and Lake Charles as its "base points" for bidding at Gulf ports. ADM and Lauhoff use Pensacola.

tantly, Cargill has successfully marketed bulgur at River ports since it began making such bids in April, 1979 [Ex. WS-3 at 35-41 and Table I].²⁴ These bids have generally been higher (about \$0.50 per cwt) than Cargill's Gulf bids and therefore capable of recouping the additional inland transportation costs (\$178,339 or \$0.34 per cwt) allegedly incurred in reaching the River ports.²⁵ Although Cargill suggests that it faces other, more subtle, handicaps as a result of Waterman's service, it has not proven that such handicaps exist [see Tr. at 328-335].

The record does not show a regular, predictable combination of wheat prices and railroad rates which give Cargill a "natural advantage" over northern bulgur producers at Gulf ports that is unobtainable at River ports. Instead, there is clear evidence that the critical limitation on Cargill's marketing efforts is the advantage enjoyed by West Coast and Great Lakes suppliers, not Waterman's River rates. Moreover, the railroad rate structure applicable to midwestern wheat is highly complex, result oriented (*i.e.*, charges are frequently "equalized"), and subject to Interstate Commerce Act regulation. If Cargill continues to believe it is disadvantaged by rail rates to the River ports, the appropriate remedy would be to lodge a complaint with the ICC.

Exception number seven is a matter of doubtful relevance. The "capacity" of the River ports during 1979 must be judged in terms of ability to handle potential ASCS bulgur shipments and not in terms of bulgur actually handled or vacant warehouse space. Consequently, although the River service grew during 1978 and 1979, it also appears that the Presiding Officer correctly concluded that the withdrawal of St. Louis from the ASCS program in September, 1979 reduced total bulgur handling capacity at the River ports (I.D. at 7, note 5). In any event, Cargill has failed to establish why a different finding regarding River port capacity would materially affect the outcome of this case.

Cargill's eighth exception claims that witness Douglas Tucker's analysis of the effect of Waterman's River rates on ASCS sales was defective because it did not consider potential limitations on the volume of bulgur that could be handled at West Coast or Great Lakes ports. This exception will also be denied. Mr. Tucker's model may not a perfect one, but it is based upon the same data used in ASCS's computers and was corroborated by other evidence [*e.g.*, Ex. C-5, Ex. WS-7]. There is little doubt that the "lowest landed cost" factors employed by ASCS

²⁴ Although Cargill's Gulf shipments decreased from 50,260,000 pounds during February through August, 1978 to 32,600,000 pounds from September, 1978 through December, 1978, this decline was more than offset by the 72,600,000 pounds sold at River ports in 1979 [Ex. C-10].

²⁵ Ex. WS-3, App. C, Bid Nos. 78-81 as set forth in Appendix B to Waterman's Reply to Exceptions. Cargill's ability to compete at River ports is further supported by the fact that Cargill enjoys an inland transportation edge over Lauhoff (\$0.315 per cwt) to Lake Providence [Ex. WS-4 at 5-6], and that St. Louis, the River port furthest from Cargill's mill and closest to the mills of Lauhoff and ADM, lost its ASCS certification in September, 1979.

generally favor West Coast and Great Lakes ports, Waterman's River service is priced to compete with West Coast and Great Lakes services, and Waterman has not diverted significant amounts of bulgur from Gulf Coast ports or unduly prejudiced Cargill's marketing efforts.

Exception number nine is based upon Cargill's claim that it was entitled to view a portion of the notes used by Mr. Boyle during his deposition and that the scrap of paper in question was deliberately destroyed by Waterman's counsel so as to defeat future attempts to compel production. Waterman later offered to reconstruct the 12 words which had been written on the scrap of paper and further claimed that they constituted a privileged attorney/client communication. The Commission cannot presently determine whether the information was or was not discoverable, but concurs fully in the Presiding Officer's evaluation that access to this information could not have hindered Cargill in presenting its case and that no sanctions could reasonably be imposed against Waterman for its counsel's actions.

THEREFORE, IT IS ORDERED, That those portions of the "Reply to Exceptions" jointly filed by Helena Port Terminal, Inc., and Mid-South Terminals Corporation which refer to injury or disadvantage suffered by Cargill, Inc., as a result of Waterman Steamship Company's ratemaking practices are stricken from the record as being beyond the scope of the Presiding Officer's December 28, 1979 "Order Granting Intervention"; and

IT IS FURTHER ORDERED, That the Exceptions of Cargill, Inc., and the Greater Baton Rouge Port Commission, are granted to the extent indicated above, and denied in all other respects; and

IT IS FURTHER ORDERED, That the Initial Decision issued December 23, 1980 in this matter, as modified by the foregoing findings and conclusions, is adopted by the Commission, and expressly made a part of this Report and Order; and

IT IS FURTHER ORDERED, That the complaint of Cargill, Inc., is denied; and

IT IS FURTHER ORDERED, That this proceeding is discontinued.

By the Commission.

(S) FRANCIS C. HURNEY
Secretary

FEDERAL MARITIME COMMISSION

DOCKET NO. 79-72
CARGILL, INCORPORATED

v.

WATERMAN STEAMSHIP CORPORATION

The disparity between respondent's rates on bulgur from Gulf ports to India as compared to bulgur from ports on the Mississippi River to India do not subject complainant to any undue prejudice or unfair disadvantage in violation of section 16 First of the Shipping Act, 1916.

Respondent's rates on bulgur to India found not unjustly discriminatory as between shippers or ports in violation of section 17 of the Shipping Act, 1916.

Edward J. Sheppard and April C. Lucas for complainant.

John P. Meade, Eliot J. Halperin, and J. Michael Cavanaugh for respondent.

Henry W. Gregory, Jr., and Bob C. Worley for intervenors Helena Port Terminal, Inc., and Mid-South Terminals Corp.

T. M. Hogg for intervenor Greater Baton Rouge Port Commission.

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

Partially Adopted November 30, 1981

Complainant, Cargill, Incorporated, charges respondent, Waterman Steamship Corporation, with violations of sections 16 First and 17 of the Shipping Act, 1916 (46 U.S.C. 815, 816), which are said to result from the difference between Waterman's bulgur rates from ports on the Mississippi River to ports in India and its bulgur rates from ports in the Gulf of Mexico to India.² Cargill does not seek reparation. It does seek an order requiring Waterman to cease and desist from the violations which are said to flow from Waterman's rates on bulgur to India.

Helena Port Terminal, Inc., the Mid-South Terminals Corporation, and Lake Providence Port Commission were allowed to intervene for the purpose of presenting evidence on Cargill's charge that Waterman's rates were discriminatory as between ports. The Greater Baton Rouge Port Commission was allowed to intervene for the limited purpose of filing briefs.

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

² Bulgur is a grain product which is manufactured by roasting and then cracking and dehulling whole grains of wheat. Soy-fortified bulgur is made by adding soy grits to regular bulgur to increase the protein content. Unless otherwise specified, "bulgur" includes soy-fortified bulgur.

FINDINGS OF FACT

The Agricultural Stabilization and Conservation Service, a part of the Department of Agriculture, is the agency responsible for the purchase and distribution to relief agencies of the bulgur products which are exported to India under the P.L. 480 program. The amounts to be purchased and the ultimate Indian destination points are established by the relief agencies in conjunction with the Agency for International Development and an inter-agency coordinating committee. The grain used to make the bulgur is purchased on a monthly basis through ASCS's office in Shawnee Mission, Kansas. The procurement policy followed by ASCS requires it to obtain and transport the bulgur to Indian ports at the lowest possible landed cost, i.e., the lowest total cost to ASCS of the commodity landed in India, including the cost of the basic commodity, inland transportation rates, port handling charges, and ocean transportation rates and charges.

The procurement process begins when ASCS issues an invitation for bids to each of the several grain vendors with bulgur producing capacity. The invitations state the approximate quantities of bulgur needed and a request that the seller quote prices on a FAS (free alongside) basis at various port ranges offering regular ocean service to India and the other countries specified by the relief agencies.

In setting its price, the seller is concerned with price of the wheat, the cost of inland transportation both from the point of origin of the grain to the seller's mill and from the mill to the U.S. port of origin, the cost of processing the wheat and overhead, and unloading or handling costs at the port of origin. The seller does not include the cost of ocean transportation in his bid since under FAS the purchaser (ASCS) pays the ocean transportation charges. The seller's bid states how much bulgur it is willing to supply at the prices quoted. ASCS also obtains data from its field office on port capacity for bagged grain products.

After all the data are collected, ASCS feeds them into its computer which is programmed to analyze the data and produce the lowest landed cost to all destinations.

Bulgur is one of the predominate commodities shipped by ASCS under the P.L. 480 program, and India has traditionally been the recipient of the great preponderance of the bulgur exported. For example, in fiscal 1978 the government shipped 613,114,000 pounds of bulgur to India, compared to 762,515,000 pounds shipped to all destinations. In 1979 it was 644,472,000 pounds to India and 817,380,000 pounds to all destinations. Bulgur shipments to India in 1978 and 1979 are nearly double the average of 1973-1977 shipments.

Cargill and its competitors are not told by ASCS the particular foreign country to which the bulgur is destined prior to the submission of each month's bid; however, since the only country of destination

served by River ports is India, the sellers know that all the bulgur ASCS allocates to River ports is destined to that country.

The government's demand for bulgur varies widely from month to month, ranging from as little as 3,200,000 pounds to as much as 112,300,000 pounds. Similarly, India bulgur has ranged from 2,070,000 pounds to 87,600,000 pounds. The quantities offered by each bulgur producer vary widely each month. There are five grain companies competing for this business.

Cargill, with its bulgur plant in Dallas, Texas, competes with four other companies: Fisher Mills, Inc., in Seattle, Washington; California Milling Company located in Los Angeles; Lauhoff Grain Company with its plant in Crete, Nebraska; and Archer-Daniels-Mid-land which has its bulgur plant in Abilene, Kansas.

Because of their location, the two West Coast bulgur producers, Fisher and California Milling, designate West Coast ports exclusively in their bids for bulgur contracts. The Midwest producers, ADM and Lauhoff, have bid successfully for deliveries to the Great Lakes and Gulf ports; and on certain occasions Lauhoff's bids at West Coast ports have also had the lowest landed cost under ASCS's formula. Prior to the institution of Waterman's River service, Cargill bid exclusively at Gulf ports.

Waterman began providing regular River service to India in 1977. Waterman's rates on bulgur have been published in two of its Freight Tariffs, Nos. 55 and 69 (FMC Nos. 83 and 148). Under these tariffs, Waterman published bulgur rates for St. Louis, Missouri; Memphis, Tennessee; Helena, Arkansas; Osceola, Arkansas; and Fort Smith, Arkansas. Waterman began lifting bulgur at River ports in July 1977, and since that time has carried all of the India-bound bulgur allocated by ASCS to those ports. Waterman loads River-port bulgur in shallow draft barges, which are then towed to New Orleans for loading aboard the LASH mothership.³ The mothership takes the barges to India.

Waterman also provides service to India from ports in the Gulf of Mexico as a member of the India, Pakistan, Bangladesh, Ceylon and Burma Outward Freight Conference. Waterman has transported minimal amounts of bulgur from Gulf ports to India both before and after the inauguration of its River service. As in the River barge service, barges from Gulf ports are loaded aboard the mothership at New Orleans. On occasion the mothership will call at Houston.

Helena Port Terminal, Inc., operates warehouse and port facilities on the Mississippi River at Helena, Arkansas. Helena Port Terminal is a partially owned subsidiary of Pine Bluff Warehouse Company, which also owns terminal facilities at several River ports covered by Water-

³ LASH, of course, stands for "lighter aboard ship."

man's Tariff No. 69 (FMC 148), including Fort Smith, the Arkansas River Terminal at Pine Bluff, and the Osceola Port Terminal. Helena handled 21,428 net tons of bulgur shipments to India, on which it earned \$307,058 or 28 percent of its gross revenue. Helena is beginning to handle other P.L. 480 products and is soliciting non-government cargo. The Waterman River service has created between 25 and 30 new jobs at Helena. ASCS has approved the facilities at Pine Bluff and Fort Smith for handling Title II commodities, and these ports plan to compete for the bulgur business. Cargill points out that Helena is located 491.5 nautical miles above Canal Street in New Orleans and 10,031.5 nautical miles from Bombay, India.

The Mid-South Terminal Corporation operates warehouse and terminal facilities on the river at Memphis. Mid-South handled 26,697 net tons of P.L. 480 products, including 20,291 net tons of bulgur shipments to India, all carried by Waterman. This tonnage produced 10 percent of Mid-South's gross revenues. As at Helena, Waterman's service created between 25 and 30 new jobs. Memphis is located 558 nautical miles above Canal Street and 10,098 nautical miles from Bombay.

The Lake Providence Port Commission's facilities are located adjacent to a channel leading to the Mississippi at Lake Providence, Louisiana. A \$250,000 bond issue of the Port Commission, with matching government funds, was used to construct a new general cargo facility at Lake Providence. The Port Commission's income is derived principally from the lease of properties which it owns, including rent received from the Lake Providence Terminal Company, Inc., which operates the "Lake Providence Port." ASCS has regularly shipped India bulgur through the Lake Providence Port, and in 1979 it handled 63,615 net tons and shipped 62,005 tons to India. This bulgur accounted for 94 percent of the total tons received and shipped at the new general cargo facility. Lake Providence is located 341.5 nautical miles above Canal Street and 9,881.5 nautical miles from Bombay.

The Greater Baton Rouge Port Commission is an executive department of the State of Louisiana, and it has the responsibility for the operation of all public port facilities in the parishes of East Baton Rouge, West Baton Rouge, Ascension, and Iberville. Baton Rouge has expended more than \$40 million on the construction of terminal facilities. Baton Rouge is a deep draft port and can handle ocean-going ships as well as LASH barges. Baton Rouge competes for India bulgur. There were no bulgur shipments through Baton Rouge in 1977 or 1979 and only one shipment of 4,523 short tons in 1978. Baton Rouge is located 115 nautical miles above Canal Street and 9,655 nautical miles from Bombay.

After the institution of Waterman's River service, ASCS began to award substantial amounts of India-bound bulgur to ADM and Lauhoff for delivery at River ports. In some instances, the quantities and FAS

prices offered by Cargill were sufficient to have enabled Cargill to obtain at least a portion of the bulgur awarded. It is Cargill's position that all the bulgur was awarded to River ports because Waterman's River rates were lower than its Gulf rates. Mr. Douglas C. Tucker, an expert witness offered by Waterman, is a transportation economist with specialization in the maritime and intermodal fields.⁴ Mr. Tucker, taking the set of data used by ASCS to make procurements from July 1977 (when ASCS made its first purchases at River ports) through December 1979 and altered the transportation environment over that period. He altered the lower rate to equal the Gulf charges as reported in the ASCS data sets and then recalculated the ASCS procurement awards as it would have done under the altered circumstances. Mr. Tucker then compared his revised awards list with the actual awards list of ASCS to determine the impact of Waterman's River service on Cargill. Except for altering the River rates, Mr. Tucker left all the other procurement factors constant.

As can be expected, Mr. Tucker's view of the impact of Waterman's River service is quite different than that of Cargill. To put it simply, Mr. Tucker finds very little harm to Cargill from Waterman's rates, while Cargill attributes virtually all its bulgur woes to those rates. Almost two days of cross-examination of Mr. Tucker by Cargill failed to discredit or even alter Mr. Tucker's findings in any significant way. Cargill offered no "expert" witness, but through corporate officials or employees attempted to show the "harm" suffered by Cargill at the hands of Waterman. Of the two, Mr. Tucker's evidence, while by virtue of its being an economic model is somewhat inexact, is the more competent.

Mr. Tucker, in response to Cargill's assertion that all of the bulgur awarded to River ports was due to Waterman's lower rates, demonstrated that there was no instance in which any of Cargill's unsold bulgur would have yielded a lower landed cost than bulgur ADM, Lauhoff or the West Coast Mills would have had available. Between February 3, 1978, and August 15, 1978, total charges under the Conference's tariff for transportation of bulgur from Gulf ports to the major India ports of Bombay and Calcutta were \$117.92. Waterman's River rates to Bombay and Calcutta were \$118 to \$121 during this period.

⁴ Mr. Tucker has over the past 16 years conducted many studies in maritime and intermodal transportation fields. These include a study for the New York Port Authority on the potential of expanding containerization in international trade; the potential of the Great Lakes/St. Lawrence Seaway System under a series of proposed physical improvement alternatives; and a follow-up study for the Secretary of Transportation which examined competitive relationships of transportation services available to shippers in the Great Lakes/Seaway hinterland. Most recently Mr. Tucker directed research programs producing short-term forecasts of maritime trade between the United States and Japan, Korea, and the Far East; domestic intercoastal and intracoastal general cargo traffic; the U.S. export coal trade with both Japan and Europe; and the market for U.S. and Canadian grain exports.

However, Waterman's River rates to Indian outposts such as Madras remained lower than the Conference rates. During this same period, rates from Great Lakes ports to India increased. During this six-month period, ASCS purchased approximately 69,860,000 pounds of India-destined bulgur for delivery at Gulf ports. Cargill supplied about 50,260,000 pounds of this bulgur. During the entire 17-month period between August 1978 and the end of 1979, when Gulf rates increased, the government purchased only 70,000,000 pounds, of which Cargill supplied some 32,600,000 at Gulf ports.⁵ The record does not establish that this bulgur would have gone through River ports had it not been for Waterman's River rates. The reason for this increase in Gulf tonnage was the momentary increase in Gulf Lakes' rates.

Beginning August 16, 1978, Waterman's charges under the Conference tariff increased because of increases in port surcharges for Bombay and other major Indian ports and bunker fuel surcharges. The bunker fuel surcharge alone went from \$25.50 to \$50.50 between August 1978 and late 1979. Conference rates have increased by some 58 percent since August 1978. Waterman's River rate went from \$121 to as low as \$112.25 in August 1979. Waterman's River rate was \$97.50 L/T in 1977 and is now \$116.25 L/T. Fluctuations can be attributed to changes in competitor's rates.

Cargill insists that "at least" 43.4 million pounds of bulgur would have been awarded to ADM, Lauhoff or Cargill had it not been for Waterman's River service. However, Waterman has shown that only some 15 million pounds or 6,696 long tons could have moved through the Gulf in the 30 months following July 1977, when the River service was instituted. Cargill's assertions of lost tonnage are based upon its assumption that Mr. Tucker in making his findings did not take into account the number of vessels available for Great Lakes service or their capacity for any particular bid cycle, or the amount of other bagged commodities which might have limited their ability to load bulgur. The record shows, however, that the Indian carriers serving the Great Lakes allocate calls on the basis of cargo bookings and that in only one case would the added bulgur tonnage which, hypothetically, would have been shifted to the Lakes under Mr. Tucker's model, have exceeded the capacity of the available vessels.⁶ The same can be said of Cargill's assertion that no account was taken of the U.S. flag-preference laws, citing the fact that for all practical purposes, no U.S. flag carriers

⁵ Cargill also points to the "dramatic" expansion of capacity at River ports. However, River port capacity actually decreased with the withdrawal of St. Louis.

⁶ Great Lakes capacity was insufficient to carry added bulgur only once, in late 1979, when by government edict the Great Lakes calls were canceled so that the ships could pick up cargoes of paper necessary to print fresh Indian currency.

operate in the Great Lakes-India trade and foreign flag lines handle most of the bulgur out of the West Coast.⁷

With the advent of Waterman's River service, Cargill began bidding for deliveries at River ports. Cargill's total costs for deliveries at River ports are higher than its total costs for deliveries at some Gulf ports. In seven months of bidding at River ports, Cargill estimates it incurred \$178,300 in additional costs.

Cargill ships its bulgur products under two types of rail rates, generally described as "flat" rates and "transit" rates. A flat rate is applicable to movements between the plant in Dallas and the port of delivery. Under a transit rate, the rail carrier assesses a single through rate from the point of origin of the wheat to Cargill's plant to the specified point of delivery after the wheat has been converted to bulgur at the plant. The advantage of the transit rate is that it enables Cargill to ship its bulgur to the port of delivery at the same rate as it shipped the wheat from its point of origin to the plant despite any increase in rail rates during the period between the purchase and shipment of the wheat and the shipment of bulgur to the point of delivery. Generally, export transit rail rates available at the Gulf Coast ports tend to be equalized among all Gulf ports, particularly for traffic which originates a substantial distance away from the Gulf. If bulgur producers purchase their wheat from the same point of origin, they are able to take advantage of the same export transit rates for delivery to Gulf ports, regardless of the location of their mills. ADM and Lauhoff are able to take advantage of the same transit rates as Cargill on wheat purchased in markets in southern Nebraska, Kansas, and Missouri for delivery at Gulf ports. However, because of the rail rate structures, Cargill cannot "reach" Pensacola where terminal charges are substantially lower, and this allows ADM and Lauhoff to offer lower Gulf bids than Cargill.

Although 90 percent of Cargill's bulgur moved under transit rates in past years, the percentage dropped to 70-75 percent from time to time during the last year or two because of rail car shortages in Kansas, Missouri, Nebraska, and Oklahoma, the markets from which transit rates are available to Cargill. Lauhoff was unable to get transit rates established to the River ports and uses non-transit or flat rates almost exclusively to the active River ports of Helena, Lake Providence and Memphis. Lauhoff purchases approximately 99 percent of the wheat it uses to manufacture bulgur in Nebraska markets. The balance comes from markets in Colorado and Kansas. Since many wheat origin points for Lauhoff are located close to its bulgur plant in Crete, Nebraska, in

⁷ Cargill seems to have created a dilemma for itself. From the above, it seems to say that U.S. flag carriage is valid consideration, yet on brief it says: "No citation is required to establish the proposition that national flag preference has no role in sections 16 and 17 of the Act, the sections under which this case has proceeded." More on this will be said later.

many instances the flat rates on Lauhoff's shipments to Gulf ports are the same as the transit rates on those shipments. During most of the period since Waterman instituted its River service, Lauhoff's flat rates to Gulf ports have been identical to the flat rate to Lake Providence, Memphis, and Helena; and the rates from Crete to those River ports have been the same as the export transit rates from Crete to Gulf ports. Currently, Lauhoff's rail rates to Ft. Smith are 12½ cents lower than its rates to Helena, Memphis, and Lake Providence; and the port handling charges are the same as at Helena.⁸

In flat rates, Lauhoff has the advantage at Helena and Memphis, while Cargill has the advantage at Lake Providence.⁹ Cargill would utilize flat rates only when it is necessary to truck wheat in from local Texas markets where the cost of wheat is normally higher than in Nebraska, where Lauhoff buys its wheat. Cargill points out that it is similarly disadvantaged compared to ADM when rail car shortages force Cargill to truck wheat to its Dallas plant from higher cost markets close to the Gulf ports and ship its bulgur out of the plant at flat rates, since ADM can continue to purchase wheat in the lower cost markets in Nebraska, Kansas, and Missouri. If Cargill purchases wheat in northern markets, its overall rail costs to river ports under rail rates would be higher than Lauhoff's flat rates. However, this overlooks those times when Lauhoff has to truck the wheat to its plants.

Eighty percent of the inbound shipments of wheat to Cargill's Dallas plant for shipment to River ports under transit rates originated at points in Oklahoma; the other 20 percent came from Nebraska and Colorado. From the Oklahoma markets the rail transit rates on bulgur from Dallas to the River ports ranged from 21½ to 41½ cents per 100 pounds. The flat or nontransit rates from Lauhoff's mill in Crete, Nebraska, to the same River ports under transit (wheat in, bulgur out) to the same River ports on the same dates ranged from \$1.37 to \$1.60½ per 100 pounds. The total transit cost to Cargill of getting the bulgur to River ports under transit (wheat in, bulgur out) is from 3 cents less to only 18½ cents per 100 pounds, more than just the flat rate on bulgur from Crete to the same River ports. The rail rates on wheat from Oklahoma origins to Dallas ranged from \$1.14½ to \$1.23 per hundred pounds. The truck rates on wheat to Crete are not of record, but Crete pays a premium for truck wheat except when there is a rail car shortage.

To the extent, if any, Cargill is unable to recover its higher inland transportation costs when it bids at River ports, it is only to the extent of some "negative impact upon Cargill's profit margins," i.e., its com-

⁸ These rail rates are "paper" rates in the sense that the record contains no evidence of bulgur moving through Ft. Smith. As noted, Ft. Smith "intends" to compete for bulgur.

⁹ As already noted, St. Louis no longer handles bulgur.

petitors "ADM and Lauhoff are unable to realize greater profits on similar transactions."

All of the India-bound bulgur loaded on barges at river ports is placed aboard the same LASH mothership which carries bulgur in barges loaded at Gulf ports. Waterman's River barge service and its Gulf barge service are integral parts of the same LASH system. Although Waterman now serves the Gulf with conventional breakbulk vessels, its plans are to replace those ships with LASH vessels.

Each of the River ports served by Waterman is farther from India ports of destination than any of the Gulf ports served by Waterman. Cargill asserts as a "general matter of transport economics, greater distance entails additional expense in actually moving traffic and the additional length of time for which valuable equipment is tied-up." However, in a LASH operation, distance from the port of destination to the port of origin may or may not increase cost. For example, as a general proposition River towing is cheaper than Gulf towing because a greater number of barges may be incorporated in a River tow than in a Gulf tow. Contrary to Cargill's assertion, River towing costs do not increase in direct proportion to the distance from New Orleans, e.g., the cost of towing to and from Helena is more than to and from Memphis even though Memphis is closer to New Orleans. Provided a barge can be towed to the loading port and back to New Orleans in time for the next sailing of the mothership, the "time cost" of its barges does not increase with distance. Since the advent of the River service, Waterman has acquired additional barges to its fleet.

Waterman's turn-around time for barges at Memphis, the most distant River port, is 21 days. Waterman on occasions has held barges at River ports until it has enough to tow. While this involves additional fleeting charges, the record does not establish that this significantly increases Waterman's overall River costs viz-a-viz Gulf costs. Per diem fleeting costs are substantially higher at Gulf ports, up to four times higher at Lake Charles which is Cargill's base port on the Gulf. Therefore, a barge waiting at Gulf ports several days would incur higher fleeting costs than a River barge waiting ten days.

At Memphis, Waterman pays \$250 per barge for cleaning and \$37.50 for customs clearance. At Helena it is \$93.23 for cleaning and \$88.27 for customs clearance. However, the cleaning costs are not incurred by every one, depending upon its condition. The record contains no figures which can be used for a meaningful comparison of Waterman's costs at Gulf ports.

Since 1977 the Conference has found it necessary to increase its total charges because of increases in fuel costs and problems with congestion at some Indian ports. LASH uses only about half the fuel per cargo ton as breakbulk ships and does not face the congestion problems breakbulks do. Waterman's River rates were \$97.50 a long ton in 1977 and

have increased to the present levels of \$114.75 and \$116.25 per long ton, and have been as high as \$126 during this period.

DISCUSSION AND CONCLUSION

From its inception, this case has provoked argument on a number of issues ranging from the purely procedural to the jurisdictional. Strictly speaking, none of them goes to the "merits" of the case, although each could dictate or significantly affect its outcome. The resolution of these issues is a sort of condition precedent to any meaningful discussion of the main question presented, i.e., do Waterman's rates on bulgur to India violate sections 16 First and 17 of the Shipping Act?

THE BURDEN OF PROOF

Cargill has devoted a good deal of time and effort to the question of whether it or Waterman has all or a part of the "burden of proof" in this case. While it is unnecessary to deal with the burden of proof question since the evidence of record is sufficient to decide the case on its merits, leaving Cargill's argument untreated could lead to the idea of argument by silence, and a part of Cargill's theory could work a basic change in the way future cases are presented.

Cargill's complaint is that the disparity between Waterman's Gulf rates and River rates on bulgur to India violates sections 16 First and 17 of the Shipping Act, 1916.¹⁰ It is Cargill's position that it has sustained its burden of proving the violations once it has shown that (1) there is a significantly higher rate in another trade (Gulf ports to India), and (2) that the movement of goods under the higher rate has been impaired. According to Cargill, once it has done this the "burden of proof" shifts to Waterman, which then must prove that the rate disparity (high Gulf rates - low River rates) is justified by "costs or other transportation circumstances," because "the financial data relating to operations and the reasons which underlie the disputed rates are in the [Waterman's] sole possession." Moreover, failing this justification by Waterman, it is Cargill's contention that "the higher rate must be *presumed* to be unjust." (Emphasis added.) Cargill cites only two cases, *Outbound Rates Affecting Export High Pressure Boilers*, 9 FMC 441 (1966); and *Iron and Steel Rates, Export-Import*, 9 FMC 180 (1965).

On the other hand, Waterman places the burden of proof on all issues including whether or not the rate differential is justified by differing transportation factors on Cargill. In doing so, Waterman draws a dis-

¹⁰ Section 16 First makes it unlawful for a common carrier by water "to make or give any undue or unreasonable preference or advantage to any person, locality or description of traffic in any manner 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 makes it unlawful for any common carrier by water in foreign commerce "to demand, charge or collect any rate, fare or charge which is unjustly discriminatory between shippers or ports. . . ."

inction between proceedings instituted by the Commission and complaints filed under section 22 of the Act. See, e.g., *Dept. of Defense v. Matson Navigation Co.*, 20 FMC 24 (1977).

Cargill, as the proponent of an order declaring Waterman's rates to be in violation of sections 16 First and 17 of the Act, has the burden of proof in this case.¹¹ The burden of proof remains on complainant throughout and does not shift to respondent at any point in the proceeding. *U.S. v. American Export Lines, et al.*, 8 FMC 280, 290 (1964). Cargill's real argument deals with the "burden of going forward" with the evidence and a "presumption" which it says can arise in cases like this under certain circumstances.

Cargill summarizes the factual issues raised by an allegation of violations of sections 16 and 17 as similarity of traffic, disparity in rates on that traffic, and an adverse affect due to the disparity in rates.¹² Once it has established these facts, Cargill considers its task completed because a presumption is thereby created that the two trades involved are substantially similar.

Citing the *High Pressure Boilers* and *Iron and Steel Cases*, *supra*, Cargill says that:

. . . the Commission has indicated that it will *presume* that two trades possess similar conditions in cases like the instant proceeding where carriers publish noticeably different rates on the same item and no obvious differences in transportation conditions appear. (Emphasis mine.)

Leaving aside the problems in meaning resulting from the use of terms like "noticeably different rates" and "obvious differences," what Cargill is insisting on is the existence of "a presumption" in cases of prejudice or discrimination under sections 16 First and 17 of the Act.

Iron and Steel Rates, Export-Import, 9 FMC 180 (1965), a case that arose under section 18(b)(5) of the Act,¹³ presented the issue of "whether the outward and inward rates on iron and steel items published by Respondent Conferences . . ." violated that section. Hearing Counsel argued that "the existence of a rate disparity along with a showing that tonnage will not move because [the outbound] rate is so high, where the rate in a reciprocal [inbound] trade is lower, should constitute the former rate as *prima facie* unreasonably high." The respondents argued the disparities (inbound-outbound) were neither *per se*

¹¹ 5 U.S.C. 556(d). See also Rule 155 of the Commission Rules of Practice and Procedure (46 C.F.R. 502.155).

¹² In the case of a violation of section 16 First, Cargill recognizes the additional requirement that there be a competitive relation between the allegedly preferred shipper and the shipper allegedly prejudiced.

¹³ Section 18(b)(5) directs the Commission to disapprove rates or charges filed by a common carrier by water in foreign commerce which the Commission finds to be "so unreasonably high or low as to be detrimental to the commerce of the United States."

nor *prima facie* unlawful primarily because Congress failed to explicitly create the kind of presumption Hearing Counsel was asking the Commission to create.

Although stating that questions of what "presumptions" might exist were of more academic than practical importance, the Commission went on to say:

When a rate disparity in reciprocal trades, on similar commodities appears, and when movement of the goods under the higher rate has been impaired, the carrier quoting the rate must demonstrate that the disparate rates are reasonable.

Thus, whether by design or inadvertence, and while never referring to it by name, the Commission created a presumption, i.e., once it has been established that a disparity in rates exists in reciprocal trades and that the movement of the goods under the higher rate has impaired, the presumption arises that the higher rate is unreasonable. The presumption thus created shifts the burden of going forward with the evidence to the carrier quoting the rate, and it must then demonstrate that the higher rate was in fact reasonable. The presumption created in *Iron and Steel* was that of the *unreasonableness* of a rate under section 18(b)(5).

In *Outbound Rates Affecting Export High Pressure Boilers*, 9 FMC 441 (1966), the Commission had before it that provision of section 17 which makes it unlawful for a common carrier by water in foreign commerce to charge a rate which is "unjustly prejudicial to exporters of the United States as compared to their foreign competitors." Cargill argues that the Commission in that case followed *Iron and Steel* and used the presumption established in that case to presume that shipments in the two trades under comparison moved under similar transportation circumstances. What the Commission actually said was:

Assuming that the rate offered to the American exporter is significantly higher than rates offered to a foreign competitor and the American exporter is shown to be harmed in some way, the rate still must be found to be unjust. If the rate is significantly higher than a rate on a similar product in another trade *under comparable transportation circumstances*, and some harm is shown to the American exporter, we believe the rate may be presumed to be unjust subject to refutation of one of these elements or to proof by the carrier that the rate is justified on the basis of cost or other transportation factors. (9 FMC 457.) (Emphasis mine.)

A careful reading of the above language shows that it is not the similarity of the transportation conditions which is the subject of the presumption. What is presumed is the unjustness of the rate after the other elements of the violation have been shown, i.e., a higher rate to an American exporter than his foreign counterpart, harm to the American exporter, and comparable transportation circumstances. As in *Iron*

and *Steel*, the presumption shifted the burden of going forward to the carrier quoting the rate. The carrier did not have to establish dissimilarity in the trades under comparison because it had already been done, at least after a fashion, by the Commission. So when Cargill cites *High Pressure Boilers* for the proposition that the Commission "has indicated that it will presume that two trades possess similar conditions" when "no obvious differences between the transportation circumstances appear," Cargill has just misread the case. Earlier in its opinion the Commission stated:

The record discloses that in some instances rates on utility boilers exported from this country are higher than rates in the foreign-to-foreign trades. *And it appears that the United States-to-foreign trades and foreign-to-foreign trades under study here are comparable in material respects.** (Emphasis added.)

The Commission has not created a presumption that where "no obvious differences" appear between two trades they will, absent rebuttal evidence, be treated as if they were comparable in transportation conditions or circumstances, and Cargill has offered nothing which would support the creation of such a presumption in this case. Since Cargill is the proponent of an order declaring Waterman's rates unlawful under sections 16 First and 17 of the Act, and since a similarity in transportation conditions is an element in any finding of a violation of those sections, the burden of establishing the necessary similarity is on Cargill. In *Phila. Ocean Traffic Bureau v. Export S.S. Corp.*, 1 U.S.S.B. 538, 541 (1936), a predecessor of the Commission said: "It is well settled that the existence of unjust discrimination and undue preference and prejudice as a question of fact must be clearly demonstrated by [a preponderance of the evidence]" and that "[t]o justify an order compelling the exact equality of rates a complainant must show a substantial similarity in the conditions surrounding the transportation under the rates sought to be equalized." See also *North Atlantic Mediterranean Freight Conference - Rates on Household Goods*, 11 FMC 202 (1967).

THE PERSONS PROTECTED BY SECTIONS 16 FIRST AND 17

Another threshold issue is raised by Waterman which argues that the injury or harm alleged by Cargill cannot be redressed under either sections 16 First or 17 of the Act. Characterizing Cargill's requested relief as a demand that "the Commission interfere in U.S. Government bulgur market by manipulating the ocean rates of common carriers in foreign commerce," Waterman then asks:

* Section 17 requires that such differentials as have been shown to exist between United States rates and foreign-to-foreign rates be shown to exist in trades which are fairly comparable in material respects.

. . . whether a supplier who sells to a shipper can press a "rate discrimination" case based on its complaint that the "discrimination" is harming its competitive position in bidding for the shipper's business for delivery at U.S. ports, raising no issue of the effect of the rates on any movement in foreign commerce[?]

It is Waterman's reading of sections 16 First and 17 that they are limited to discrimination involving the movement of cargo in the foreign trade and may not be used to alter the competitive situation in the domestic market for bulgur merely because the domestic buyer ships the bulgur overseas by ocean carrier after it purchased from the seller. Thus, Waterman concludes where, as here, the shipper (the U.S. government) benefits from the rate under attack, no allegation of harm to the supplier (Cargill) in his battle with other U.S. bulgur suppliers for the "captive" U.S. government bulgur market can support a complaint under a statutory provision which is limited to redressing discrimination in the foreign commerce.

Cargill is content to argue that I have already disposed of this contention in an early ruling in the case, Denial of Motion to Dismiss. Docket No. 79-72, served November 6, 1979. Waterman itself admits that its argument on brief might "seem on the surface to overlap" the one made in its earlier motion to dismiss, but contends that it really does not. Whatever its relation to the earlier contentions, Waterman's present argument raises serious questions about the reach of sections 16 First and 17.

The protection against unjust discrimination afforded by section 17 is by its express language restricted to "ports" or "shippers." Whether Cargill is protected by section 17 against unjustly discriminatory rates depends upon Cargill's relationship as a "shipper" of goods with a "common carrier by water in the foreign commerce of the United States." By its own admission, Cargill is not such a shipper, and cannot invoke the provisions of section 17 against the rates in issue here. See, e.g., *HGFAA v. American Export Lines*, 19 FMC 787 (1977), in which the Commission distinguished between the shipper and its agents in determining the "real party in interest."

Waterman would also deny Cargill the protection of section 16 First, arguing that in order to sustain an allegation of a violation of that section, a complainant must show harm in the form of an "impact on the movement of cargo *in the foreign commerce*." Waterman says that where, as here, "the shipper obviously benefits from the rate under attack [the River rate], and the movement of the commodity in foreign commerce is actually furthered by the rate," no amount of harm to Cargill's competitive position in the domestic or "captive government market" can sustain its complaint. In *Tri-State Wheat Transportation Council v. Alameda Transportation Co.*, 1 USMC 784 (1935), the single

authority cited by Waterman, some flour interests contended that rates on wheat and flour should be on an exact parity because a lower wheat rate would enable southeastern mills to secure northwestern wheat and market their flour at an advantage over flour from the northwest. In disposing of this argument, the Commission laid down the principle relied upon by Waterman that it had no authority to adjust rates primarily to protect an industry from domestic competition. Waterman says that *Tri-State* is analogous to this case and that the parallel is clear.

Aside from involving wheat, the parallel between this case and *Tri-State* is not that clear. Any attempt to understand *Tri-State* necessarily involves consideration of the earlier decision in *Gulf Westbound Intercoastal Soya Bean Oil Rates*, 1 U.S.S.B. 554 (1936), a case arising under the Intercoastal Act of 1933. In arguing against a proposed increase in the rate on soya bean oil meal, the protestants claimed that it would prevent them from meeting West Coast competition. The Commission said:

The competition met by protestants in the sale of soya bean oil meal on the Pacific Coast may be considered only so far as it is a factor affecting the value of the service to the shipper. The [Commission] has no authority to reduce a rate primarily to protect an industry from foreign or domestic competition.

The full quote in *Tri-State* case from which Waterman's principle was drawn was: "But as stated in *Gulf-Westbound Intercoastal Rates Soya Bean Oil Meal* . . . we have no authority to adjust rates primarily to protect an industry from domestic competition." At first blush, it would seem that the quoted rule would apply only to cases where the *reasonableness* of a rate was at issue. However, in *Tri-State*, there were three sections of the Shipping Act involved, sections 16, 17 and what is now 18(a). The Report does not make it clear that the rule in question was applied solely to the issue of reasonableness under section 18(a). It can also be read as applying to section 16, depending on how one interprets the context in which the quoted statement appears. However, this is a fragile premise upon which to construct a theory as far-reaching as that proffered by Waterman, and no other precedent has been cited to me by any of the parties.

The real question presented by Waterman's argument is where does that "foreign commerce" subject to regulation under the Shipping Act begin. It seems to me the answer depends upon the nature of the activity involved and the particular entity being regulated. For example, if the issue is preference or prejudice between shippers by a terminal in the application of its storage charges, the physical location of the activity to be regulated would be quite different than if the issue was preference or prejudice as between shippers by a carrier's application of its rates. The former would or could be some miles inland,

while the latter would begin at "the water's edge," so to speak. Yet another point could be involved if the shipments were intermodal.

I have neither been cited to nor have I found any Commission or court precedents delineating or fixing the boundaries of "foreign commerce" as used in the Shipping Act. The term itself is only defined by indirection in the Act. For example, the protection afforded by section 16 First is from prejudice or disadvantage by "common carriers by water," a term which is defined in section 1 of the Act. The term "common carrier by water" means or includes the term "a common carrier by water in foreign commerce"; and a "common carrier by water in foreign commerce" is:

. . . a common carrier engaged in the transportation by water of passengers or property between the United States or any of its Districts, Territories, or possessions and a foreign country whether in the import or export trade: *Provided*, That a cargo boat commonly called an ocean tramp shall not be deemed such "common carrier by water in foreign commerce."

As can be readily seen, the definitions do not help; but they do point the way. The Shipping Act regulated the rates, charges and practices of the carriers subject to its provisions and further declared unlawful certain activities of those carriers. At the risk of stating the obvious, the Act concerns itself only with those activities of the common carrier which it engages in by virtue of its being a common carrier; and, it would seem to follow, that the Act's protection from the practices proscribed therein extends only to those persons who deal with the common carrier in its capacity as a common carrier. If this proposition is correct, then the more fruitful approach is to examine the relationship between the person claiming harm under the Act and the common carrier alleged to have caused that harm, i.e., is a specific or special relationship necessary before a person can claim the protection of the Shipping Act against the rate practices of a common carrier by water in foreign commerce?

As already noted, this relationship became an issue when Waterman earlier moved to dismiss this case primarily on the grounds that Cargill could not bring the action and could not state a cause of action upon which relief could be granted because it was not a "shipper."¹⁴ I denied the motion first because under section 22 of the Act "any person" may file a complaint whether or not it has suffered the harm alleged;¹⁵ and, second, because none of the cases then cited to me by

¹⁴ Although it is not defined in the Shipping Act, the term shipper is commonly understood to mean "the owner or person for whose account the carriage of the goods is undertaken." *Norman G. Jensen v. FMC*, 497 F.2d 1058 (8th Cir. 1974), citing *Compagnie Transatlantique v. American Tobacco Co.*, 31 F.2d 663 (2d Cir.), cert. denied, 280 U.S. 555 (1929).

¹⁵ See *Anglo Canadian Shipping Co., Ltd. v. Mitsui Steamship Co., Ltd.*, 4 FMB 535, 539 (1955); *Isthmian S.S. Co. v. United States*, 53 F.2d 251 (SDNY 1931).

Waterman stood for the proposition that only shippers were protected by section 16 First. Both the constraints of the motion and lack of time for independent research prompted my conclusion that at least impliedly persons other than shippers were protected by section 16 First. Additional research and reconsideration has led me to alter that conclusion.

In *American Union Transport, Inc. v. Italian Line*, 2 U.S.M.C. 553 (1941), the complainant was a steamship broker and a freight forwarder. The complaint alleged violations of sections 14 and 16 First because of respondent's refusal to accept and book five shipments which complainant as a broker had offered to the respondent carrier. The Commission found that the complainant's interest was in its lost earnings and the damage to its reputation and stature as a broker, and went on to say:

We are not convinced that the duties imposed upon defendant by sections 14, 16 and 17 of the Shipping Act, 1916, were owed to complainant broker whose only interest in the transportation involved was the compensation it expected to receive from defendant in return for supplying cargo for defendant's vessels. Complainant's cause of action, if any, is not cognizable under the provisions of the Shipping Act, 1916, alleged to have been violated. Similar interpretations by the Interstate Commerce Commission involving the principle concerned are *Southwestern Produce Distributors v. Wabash R.R. Co.*, 20 ICC 458 (1911); *Cosby v. Richmond Transfer Co., et al.*, 23 ICC 72 (1912); and *C.S. Emory and Company v. B&M R.R.*, 38 ICC (1916).

In the *Southwestern* case, cited by the Commission, the respondent railroad allowed a fruit auctioneer to use its station premises free of charge to hold auctions of produce. Complainant demanded that the railroad extend to it the same privilege. The ICC found no violation of the Interstate Commerce Act saying:

While a common carrier must serve the traveling or shipping public on equal terms and without discriminations or preferences, we have not understood that in undertaking to perform certain duties for those who travel or ship their merchandise over its lines, it assumes any obligations to those who do neither one nor the other. Our authority under the Act in a broad or general sense extends only to the relations between carriers and those who travel or ship merchandise over their lines.

In *Cosby v. Richmond Transfer Co.*, the second case relied on by the Commission, complainant had a baggage transfer business in Richmond. A rival named Garber, together with a group of the defendant railroad's officials, formed a competing baggage transfer business, the Richmond Transfer Company, and the railroad then granted Richmond the exclusive right to the baggage transfer business on the trains. *Cosby*

argued that this violated section 3(1) of the Interstate Commerce Act.¹⁶ The ICC found no violation of section 3(1) saying:

It is so much beyond our power to order a railroad to give Cosby Transfer an opportunity to bid against the Richmond Transfer Company for the privilege of soliciting on trains as it is beyond our power to compel a railroad to place its fruit vender's business at auction, for neither is *transportation* under the act and over neither one have we jurisdiction. (Emphasis the ICC's.)

In contrast, the *Emory* case, also cited by the Commission, involved a customhouse brokerage business which sought to have the railroad grant it certain privileges which had been granted to the railroad's agent who was also a customhouse broker. There the ICC found a violation because the brokers were also consignees of the shipments involved and forwarded the shipments on to their ultimate destinations. They, therefore, occupied the status of consignees/shippers and were protected by section 3(1). Still other and later cases involving the Interstate Commerce Act clarify and extend the principle that in order to be protected by the provisions against discrimination, prejudice, or disadvantage, the relationship with the carrier must be that of "shipper," including among others a consignor or consignee.

In *Okla-Ark. Teleph. Co. v. Southwestern Bell Teleph. Co.*, 183 I.C.C. 771 (1932), the complainant telephone company argued that respondent, also a telephone company, was discriminating as between common carriers by rail within the meaning of section 3(1). In dismissing the complaint, the ICC concluded that section 3(1) was restricted to cases of preference or prejudice between shippers and could not in view of the specific provisions of section 3(3)¹⁷ be used to prevent instances of prejudice or preference between carriers. The ICC followed this interpretation in *Coastwise Rates Between Gulf Ports and Texas*, 234 I.C.C. 557 (1939), where some railroads wanted to cancel certain of their rates from inland points in Texas, Louisiana and Arkansas to Gulf ports in Texas and Louisiana. The cancellation was protested by common carriers by water in the coastwise trade on the ground that the cancellation

¹⁶ Section 16 First was drawn directly from the original section 3(1) of the Interstate Commerce Act and the Commission has relied upon the ICC's interpretation of section 3(1) to determine the intended meaning of section 16 First. See *North Atlantic Mediterranean Freight Conference - Rates on Household Goods*, 11 FMC 202 (1967) and cases cited therein. At the time section 16 First was drafted, section 3(1) read:

That it shall be unlawful for any common carrier subject to the provisions of this Act to make or give any undue or unreasonable preference or advantage to any particular person, company, firm, corporation or locality or any particular description of traffic whatsoever or to subject any particular person, company, firm, corporation, or locality or any particular description of traffic to any undue or unreasonable prejudice or disadvantage in any respect whatsoever.

¹⁷ Section 3(3) specifically prohibited discrimination as between carriers.

would prejudice their coastwise carriage while preferring the carriage of their competitors from areas where the lower rates would remain in effect. The ICC said:

Under section 3(1) of the Act it is unlawful for a common carrier subject thereto to make or give any undue or unreasonable prejudice or disadvantage to any particular description of traffic whatsoever. Although this section is couched in broad general terms, the wrong which it prohibits has been found to be prejudice and preference between shippers. *Okla-Ark. Teleph. Co. v. Southwestern Bell Teleph. Co.*, 183 I.C.C. 771; *Delaware, L&W R.R. Co. v. Kulter*, 147 Fed. 51, cert. denied, 203 U.S. 558.

Finally, in *Movement of Highway Trailers by Rail*, 293 I.C.C. 93 (1954), the ICC answered twelve questions "concerning the legal relations, limitations, and obligations incident to the transportation of highway trailers on railroad flatcars." The questions were posed in a petition for declaratory order, and one of the questions was:

May a railroad engaged in performing trailer-on-flatcar service under joint-rate arrangements with motor common carriers refuse to publish and file appropriate tariffs and to transport the freight laden trailers of (a) contract carriers by motor vehicle; (b) private carriers by motor vehicle; (c) freight forwarders?

The "shipper interests" (the private motor carriers and freight forwarders) contended that the provisions of sections 2 and 3(1) prohibiting unjust discrimination and undue or unreasonable preference or prejudice precluded the railroads from confining this service to common carriers. The common carriers by motor vehicle with their joint-rate arrangements with the rail carriers were not shippers on those rail carriers. In rejecting this argument, the ICC said: "In our view, however, these provisions are applicable only to those who stand as to the railroad in the relation of shippers." In short, there were not two shippers receiving dissimilar treatment and sections 2 and 3(1) were not applicable. Thus, it would appear that the ICC has consistently restricted the application of section 3(1) to cases of preference or prejudice between shippers.

Other than the *American Union Transport* case, discussed above, I can find no other Commission case in which the specific question arose. All of the other cases which time has permitted me to examine involved shippers or consignees or at least persons having that status by assignment or otherwise. The clear result dictated by the *American Union Transport* case is that Cargill, since it is not the shipper of the bulgur, cannot claim injury under section 16 First. Although it is not discussed, the rationale behind limiting the section to shippers would appear obvious.

If the protections of section 16 First and other sections of the Shipping Act, 1916, are extended beyond those who deal as shippers with the carrier for transportation of the cargo, the problem becomes one of where to draw the line. For instance, if "any particular person" is broadened to include the seller of the finished product (bulgur), no reason in logic would prevent its extension to the seller of the raw material (the wheat) which is converted into the finished product. If this is done, such nice questions as the identity of the commodity arise; i.e., is the wheat sold to Cargill the same commodity for transportation purposes as the bulgur Cargill sells to ASCS? Or, what part of the wheat vendor's inability to sell to the bulgur producer does the ocean rate play? Can a bulgur shipper's inability to reach a foreign market because of allegedly prejudicial ocean rates support the wheat vendor's claim that he cannot sell wheat? Suppose we insert a middleman; does it then become necessary to consider the reasonableness of his commissions? Limiting the carrier's liability to shippers might seem to work a hardship on some persons but the burden placed upon the carrier by an extension of that liability is entitled to at least equal weight. If they must look beyond the shipper, carriers would never be able to set their rates with any reasonable assurance that they had properly considered all the factors necessary to protect themselves from litigation by persons far removed from the actual act of transportation performed by the carrier.

Finally, the satisfaction of the complaint by someone other than the shipper might well do that shipper an injury equal to or greater than the alleged injury to the complainant. An example is the situation presented here. One of the possible forms of relief in this case, given the right set of circumstances, would be to raise Waterman's River rates. While this might possibly help Cargill to some degree, it would most certainly deprive ASCS of the low rate it now enjoys and would cause a potentially unsupportable loss of traffic to the River ports. It seems clear that the principle of the *American Union Transport* case is proper and grounded upon a realistic view of the practical limitations of regulation. Cargill, under that principle, cannot claim the protection of section 16 First.

PREJUDICE OR DISADVANTAGE TO CARGILL

UNDER SECTION 16 FIRST

Generally, the prohibition in section 16 First against undue or unreasonable preference or prejudice is intended to deal with two or more shippers receiving different treatment which is not warranted by differences in competitive or transportation conditions. *North Atlantic Mediterranean Freight Conference - Rates on Household Goods*, 11 F.M.C. 202 (1967). The shippers involved must be shipping their cargoes from different points or ports of origin to a common destination or market,

and they must be in competition with each other in that common market.¹⁸ Prejudice to one shipper to be unjust must ordinarily be such that it constitutes a source of positive advantage to another. *Philadelphia Ocean Traffic Bureau v. The Export S.S. Co.*, 1 USSB 538 (1936). The competitive relationship required between the shippers is necessary to show the extent to which the complaining shipper was harmed by the alleged preference, prejudice or disadvantage. *Boston Wool Trade Association v. M. & M.T. Co.*, 1 USSB 24 (1921).

Cargill's basic case is based upon its "demonstration" that Waterman assesses substantially lower charges for India-bound bulgur at River ports than it does at Gulf ports and that these charges have resulted in diversion of significant amounts of traffic from Gulf ports, which in turn has jeopardized Cargill's ability to compete with ADM and Lauhoff for sales of bulgur to ASCS. As already mentioned, Cargill relies upon the presumption, rejected above, that the River-to-India trade and the Gulf-to-India trade are substantially similar; and it is Cargill's position that each of the differences in transportation conditions which do exist between the two services favors lower rates from the Gulf ports.¹⁹ However, a close reading of Cargill's argument shows that these differences are all contained in the statement that, "Waterman's River service is in effect an 1100 mile extension of its basic Gulf-to-India service." Cargill points to the fact that Waterman must carry River bulgur shipments first to Gulf ports²⁰ and then to India on the same mothership and argues that this "circumstance is sufficient of itself to establish violations of section 16 First and 17." At this point, it is necessary to say a word or two on Cargill's penchant for confusing the criteria of discrimination with those of preference or prejudice. Thus, in support of the statement just quoted, Cargill cites *Rates, Charges and Practices of General Atlantic Steamship Corp.*, 2 U.S.M.C. 681 (1943) at page 686, and the *Household Goods* case, *supra*, at page 218. In the *General Atlantic* case, the specific finding on the page cited was that "in numerous instances respondent charged different rates for transportation of the same descriptions of commodities on the same vessel and voyage"; and in the *Household Goods* case, the specific finding, again on the page cited, was that the respondents "by charging different rates to the Department of State and the military departments for transporting household goods of each over their lines between the same ports under substantially identical circumstances and conditions have unjustly dis-

¹⁸ The requirement of competition in the common market highlights another anomaly present when the coverage of section 16 First is extended beyond shippers. Cargill's "market" is the ASCS, not India, the destination of the common carriage by water. Cargill's position is at least as much due to ASCS's purchasing practices as it is to Waterman's allegedly unlawful rates.

¹⁹ As discussed later, Cargill is decidedly ambivalent about the relief it thinks it needs.

²⁰ The River barges are not carried to Gulf "ports"; they are taken to New Orleans, which is a "fleeting area" for the mothership.

criminated as between them in violation of section 17." In both cases, the conduct of the carrier resulted in discrimination prohibited by section 17, which as already noted is restricted in its application to shippers.²¹ Cargill cannot have it both ways. It cannot use the criteria of discrimination to establish preference or prejudice.

The decision in *Household Goods* distinguished between discrimination under section 17 and preference and prejudice under section 16 First. Discrimination occurs when a carrier charges two shippers different rates for transporting the same or a similar commodity over its line from the *same point of origin* to the same point of destination. Prejudice is the result of a carrier charging two shippers different rates for carrying the same or similar cargo from *different points of origin* to the same point of destination. If the charge against Waterman is discrimination, then the point of origin for the shipments must be New Orleans where the bulgur is loaded aboard the LASH mothership. However, since Cargill is not a shipper, it cannot plead the protection of section 17 against discrimination. Thus, Cargill's reliance on the specifically cited portions of the *General Atlantic* and *Household Goods* cases is misplaced. Cargill's cause of action, if it has one, lies under section 16 First; and in order to meet the criteria of section 16 First, Cargill must take as the points of origin of the bulgur shipments the ports where the bulgur is loaded in the barges. It is here that the operational differences between LASH and breakbulk or container services are ignored by Cargill.

In a breakbulk operation, the ship itself must call at every port it loads cargo unless there is some form of substituted service employed by the carrier. The same is true for the containership although the use of substituted service is likely to be more frequent and there is the ever-increasing use of intermodal service. In contrast, the LASH service is composed of the mothership, which normally calls at a single port in the range, and the barges, which are then dispatched to the other ports within the range as the cargo demands. This basic operational difference casts the issue of distance and its role in adjudging rates unduly prejudicial in quite a different light.

So far as I have been able to determine, this is a case of first impression. The LASH concept is a relatively recent innovation and this case seems a particularly appropriate one in which to apply the considerations announced by the Commission in *Disposition of Container Marine Lines*, 11 F.M.C. 476 (1968), at page 489:

. . . the Commission does not intend to create or permit impediments to the improvement of shipping services. Enlight-

²¹ In the *General Atlantic* case, the Commission actually found that the respondent had violated section 16 First as well as section 17. However, the *Household Goods* decision rendered the finding of a section 16 First violation improper.

ened regulation is the key to effective regulation; no regulatory agency can permit regulation to be outstripped by new techniques in the industry. Progressive regulation is required in the interest of encouraging the modernization of shipping services. Outmoded principles and rules will surely stifle advances in all fields and especially transportation where developments have followed so quickly upon each other.

The Commission concluded that it must "assume a flexible posture and must view broadly, when necessary, its regulatory purpose and governing laws and rules." (11 F.M.C. at 489.)

Cargill's ultimate standard of distance is the number of nautical miles from the port at which the barge is loaded to the "major ports of destination in India."²² While it is true that the straight-line, over-the-water distance from several of the River ports to India is shorter from any port in the Gulf, that distance is not the same as the actual distance traveled by the bulgur. As already noted, Waterman tows all bulgur barges to New Orleans for loading aboard the mothership; and several Gulf ports are farther from New Orleans than are the River bulgur ports. Thus, bulgur loaded at Cargill's Western baseport of Corpus Christi, which is 548 miles from New Orleans, travels 165 miles farther than bulgur loaded at Lake Providence, which is only 383 miles from New Orleans.

In its attempt to use the distance factor as the basis for a conclusion that Waterman's River rates are prejudicial to it, Cargill would test Waterman's unique LASH operation by principles peculiarly adapted to the traditional break-bulk operator. Whether LASH is the innovation for the future is not a question to be answered here. However, one question clearly presented here is whether LASH is to be stillborn, denied an opportunity to test its potential by an inflexible and narrow construction of the Shipping Act and the case law developed under it. The only answer is as clear as the question itself. Enlightened regulation must encourage modernization and innovation. A carrier's efforts to provide innovative and improved service must not be hampered by the arbitrary application of regulatory principles developed in another age for an operation different in kind. Unless Waterman's LASH operation is itself somehow improper, then the old criteria must be adjusted to reflect the difference between it and the old or traditional operations of breakbulk carriers. Thus, the proper distance criteria here is that

²² Whether intentionally or not, Cargill has presented its arguments in a manner which renders them confusing, obscure and in some instances misleading. It continually fails to separate the allegations under 16 First from those under section 17; it makes several arguments by analogy but fails to state that it is doing so, and often confuses its own position with that of the ports which it alleges have lost cargo because of Waterman's rates. All of this makes it difficult, without extending this opinion to unwarranted lengths, to restate Cargill's arguments, which in turn accounts for the perhaps excessive resort to quotations.

actually traveled by the bulgur as a result of Waterman's LASH itinerary. It is the distance traveled by (1) the barge to the mothership and (2) the distance the mothership travels to the port of destination.

Cargill attempts to draw an analogy from section 4 of the Interstate Commerce Act (46 USC 10726), which prohibits a rail carrier "from charging lower rates for a longer haul where, as is the case here, the shorter route is subsumed by the longer." Absent special approval by the ICC, such charges are deemed per se violative of sections 2 and 3 of the Commerce Act which are, as noted, counterparts to sections 16 and 17 of the Shipping Act. Waterman does not challenge this dubious analogy on the obvious differences between its LASH operation and the normal long-haul, short-haul rail service, but rather points to the fact that under section 4, the ICC can permit such charges in special cases and that the "principal" special case is where the rail carrier adopts the proscribed rate to meet competition. *Sewage, Sludge and Tankage from Wisconsin*, 218 I.C.C. 184 (1938); *Anthracite Coal to New England*, 277 I.C.C. 569 (1950). But Cargill counters that Waterman's reliance on competition from carriers operating out of the Great Lakes and West Coast is misplaced because Waterman's need to compete with these carriers "is identical to Waterman at both River and Gulf ports," i.e., Waterman is said by Cargill to be facing "exactly the same competitive factors . . . whether it is pricing River bulgur or Gulf bulgur." The question of Waterman's ability to "price Gulf bulgur" aside, the record establishes that the competitive factors are not the same. For the two and one-half years prior to Waterman's River service, 825.3 million pounds of India-bound bulgur moved over ports on the Great Lakes and the West Coast. Neither Cargill nor Waterman had an opportunity to participate in this business; it went to their competitors. Cargill and Waterman did have an opportunity to participate in the 58.6 million pounds that moved over Gulf ports during this period, but this represented only 7 percent of the total purchases for India. Thus, before Waterman's River service, Cargill's competitive position was such that it did not even place bids on 93 percent of the government purchases of bulgur for India. During the 30 months prior to Waterman's River service, Cargill received only 3 percent of the total purchases for India; and during the 18-month period preceding the River service, Cargill's share was only 1.5 percent.

The institution of Waterman's River service actually gave Cargill an opportunity to compete for bulgur which had historically gone to its competitors. During the two and one-half years following the commencement of the River service, the quantity of bulgur for which Cargill could compete went from 7 percent (Gulf bulgur) to 36 Percent (Gulf and River bulgur). For reasons not apparent from the record, Cargill did not begin to bid for delivery at River ports until almost two years after the service commenced; but when it did, its share of the

purchases increased to 12.3 percent—all of which demonstrates that it was only through the River service that Waterman and Cargill have been able to actually compete for bulgur traditionally going to the Great Lakes and the West Coast. However, Cargill says that had Waterman's rates in the Gulf been competitive, it could have competed at least as successfully through the Gulf and in doing so would have saved some \$178,000 in "excess" rail charges. This leads directly to the question of Waterman's "control" over the Conference's rates on bulgur at Gulf ports. Cargill's rather ambivalent approach to just what is proper in Waterman's rate practice is demonstrated by the following statement made by Cargill in its closing brief.

We believe it is important at the conclusion of briefing this case that the record be clear as to what remedy Cargill is seeking from the Commission. Perhaps it is best to discuss as well what Cargill is not seeking. Cargill is not seeking the Commission to order (1) Waterman to increase its River rate, or (2) the Conference to decrease its Gulf rate.

What Cargill has asked of the Commission is that it order Waterman to adjust its rates so that Cargill is not disadvantaged and prevented from selling its bulgur for delivery at Gulf ports. We believe that Waterman is in the best position to determine how such an adjustment can best be made and that Waterman should be given the freedom to select how the adjustment should be made from among the infinite number of possibilities available.

Should the "remedy" sought be ordered and Waterman be given the "freedom" to select from the "infinite number of possibilities available," one could readily wish that Waterman's freedom be accompanied by a healthy dose of Solomon's wisdom, for all the alternatives are fraught with potential "disadvantage" to interests other than Cargill's. Stripped of its concern for Waterman's chance to exercise its prudent discretion, Cargill's remedy reduces itself to three basic possibilities which it recognizes. The River rate can be raised to the Gulf level, or the Gulf rate can be reduced to the River level, or finally both rates can be adjusted somehow. It is Cargill's position that all or any of the possibilities "can be granted without the participation of the Conference," because "Waterman is the party responsible for transporting bulgur at unreasonably prejudicial rates and discriminatory rates and Waterman has the ability to change those rates without any conference action—by withdrawing from the conference if necessary." Cargill also notes that Waterman could also use its "good offices" and petition the Conference to open its rates on bulgur and could "enlist the assistance of the Commission in this regard." As for the latter, it would seem clear that if the Commission's assistance is required to make the Conference act in some way, that the complainant Cargill should have sought that assistance in this proceeding. Indeed, Cargill's whole approach to the question of the

appropriate remedy appears to be the result of an inability to decide which of the two rates is improper and its failure to join the Conference as a party to this proceeding.

That the carrier accused of undue preference or prejudice must control both the rates in question is well established. *American Peanut Corp. v. M&MT Co.*, 1 USSB 78 (1925); *Gulf Intercoastal Rates*, 1 USSB 516 (1935). However, does the carrier's "voluntary" membership in a conference, which by its agreement fixes the rates, in any way alter the requirement of common control over the allegedly prejudicial and preferential rates. Cargill, of course, says it does and relies on two Commission decisions, *Surcharge on Cargo to Manila*, 8 F.M.C. 395 (1965), and *Imposition of Surcharge by the Far East Conference*, 9 F.M.C. 129 (1965).

In the *Manila* case, the Far East Conference imposed a surcharge on cargo moving from U.S. North Atlantic ports to Manila. Maersk Line, a member of the Far East Conference, served Canadian ports as an independent and did not impose a surcharge on newsprint moving to Manila from Canadian ports. While the Commission found the Conference surcharge lawful, it also found that Maersk Line had violated section 17 by assessing the surcharge at Searsport, Maine, but not at nearby Canadian ports. The Commission ordered Maersk to stop imposing the surcharge on newsprint moving from Searsport to Manila. In *F.M.C. v. Maersk Line*, 4 S.R.R. 20,833, the Commission sought to enjoin Maersk Line from imposing the surcharge at Searsport. The court refused to issue the injunction noting that if the Commission now believed the Conference surcharge to be unreasonable, it could reopen its proceeding and direct the Conference to remove the surcharge. Until that was done, however, and a new order issued, the Court concluded that Maersk was bound by section 18(b)(3) to charge the rates in the Conference tariff and that:

It would hardly seem equitable to enter an injunction requiring Maersk to obey an order of the Commission where by doing so it would be violating another section of the Act. (4 S.R.R. 20,835.)

Upon the Court's refusal to issue the injunction, the Commission instituted a second proceeding, *Imposition of Surcharge by the Far East Conference*, 9 F.M.C. 129 (1965), in which it required the Conference to show cause why its agreement should not be amended to remove the Port of Searsport from the trading range of the Conference. The Commission found that by assessing the surcharge at Searsport, Maine, the Conference had operated in a manner which was unjustly discriminatory and unfair as between ports and between exporters from the United States and their foreign competitors, detrimental to the commerce of the United States and contrary to the public interest, all in

violation of section 15. The Conference was then ordered to open the rate on newsprint at Searsport.

Cargill cites the *Manila* case for the proposition that "Waterman's claim of conference control over one of the questioned rates is totally irrelevant" to the question of whether Waterman has violated sections 16 First and 17. On the other hand, Cargill cites the *Far East Conference* case for the seemingly contradictory proposition that Waterman can petition the Conference to open its bulgur rates and, should the Conference fail to do so, Waterman could seek the Commission's aid, presumably by petitioning for the institution of a proceeding against the Conference. From Cargill's own argument, it is clear that the Conference's control over the Gulf rate is far from irrelevant. Close examination reveals that Cargill recognizes the obvious limitations on Waterman's ability to act unilaterally. The only rate action which Waterman in its present posture is free to take is to raise its River rate. The only other options open to Waterman are to (1) resign from the Conference, (2) petition the Conference to open the rate, and (3) if the Conference refuses to open the rate, petition the Commission to force the Conference to open the rate on bulgur. The latter two options would place Waterman in somewhat the same position as that in which the Court found Maersk.

Cargill has throughout the proceeding refused to take a stand on which of the two rates is the improper one. This refusal highlights the dilemma Waterman would be facing if Cargill were given its "remedy." There has been no demonstration by Cargill that the Gulf rate is itself too high or otherwise unlawful. Why then should Waterman give up the advantages of Conference membership by withdrawing from the Conference? Cargill's argument that each difference in transportation conditions "militates in favor of lower Gulf rates" is really founded on the single idea of distance. However, as already concluded, Cargill's concept of distance is not applicable to Waterman's LASH operation. Cargill has simply not made a case for requiring Waterman to withdraw from the Conference and operate as an independent out of the Gulf. Moreover, Waterman did request the Conference for relief in the Gulf bulgur rate and was turned down. Cargill, on the other hand, has never approached the Conference about a reduction in the Gulf rate. Finally, if it is indeed Cargill's position that some action should be taken on the Gulf rate, it could quite easily have made the Conference and its members respondents to its complaint in the case. Cargill has not shown that the Gulf rate should be lowered.

To return to the question of competition, Cargill's position would seem to be that Waterman is obliged to compete out of the Gulf with the Great Lakes and West Coast under the identical terms and conditions that it competes out of the River ports. This ignores any differences existing between the River range and the Gulf range.

The U.S. Gulf-India Conference assesses rates uniformly for the carriage of bulgur to India from each of many hundreds of ports over some 4,000 miles of coastline from Maine to Texas. This charge takes into consideration a multitude of varying conditions and costs confronting the Conference members at each port. On the other hand, Waterman publishes rates for a half dozen River ports, only three of which handle bulgur, at which significant carrier cost items are nearly uniform. Thus, the Conference's charges necessarily include leeway for a wide variation in costs and conditions, depending upon the ports served on any given voyage, whereas Waterman's River rates can be tailored to fit the predictable regular costs at Helena, Memphis, and Lake Providence. The Conference charges include no volume minimum; therefore its charges must allow for the handling of the occasional small volume shipper with its correspondingly higher unit cost, for example, if Waterman normally issues breakbulk ships for small offerings at Gulf ports. In the River, however, Waterman has imposed a 1,000 ton minimum per port call, avoiding the problems attendant to low-volume shipments.

In its LASH service, Waterman faces higher costs in serving Gulf ports than in its River service. The stevedoring charges at Corpus Christi, Lake Charles, and Pensacola, the predominate gateways for India-bound bulgur, are considerably higher than charges at Memphis, Helena, and Lake Providence. Lake Providence is currently the principal bulgur port on the River with over 50 percent of the capacity; and the difference between stevedoring costs there and Corpus Christi and Lake Charles, which are Cargill's Gulf baseports, are up to \$11 per ton.

Waterman's LASH vessels call only at New Orleans on Gulf/India voyages. The LASH was designed to minimize costs by having the mothership call the fewest possible ports in each range, and Waterman has found that its most economical method of operation in the Gulf is to have the mothership call at New Orleans with the barges towed to and from the other ports. Based on current expenses, the per-barge towing cost for moving a LASH barge to and from the predominant ports of Corpus Christi, Lake Charles, and Pensacola are substantially higher than the costs to and from Memphis, Helena, and Lake Providence. This difference is as great as \$10.32/LT as between Cargill's baseport of Corpus Christi and the predominate River bulgur port of Lake Providence. Per-diem fleeting costs at Gulf ports range up to \$75 per barge higher than at River ports. This difference amounts to about 21 cents a long ton per day and would total \$2.10 per ton on a movement where a LASH barge is at River port for ten days.

Cargill concentrates its efforts at demonstrating that operating costs at River ports are higher on the topics of the capital costs of barges needed to operate the River service, the time Waterman's barges spend in transit to and from River ports, the cost of cleaning barges to handle

P.L. 480 cargoes, and that Waterman also uses costlier breakbulk vessels in the Gulf. The evidence of record, however, falls considerably short of establishing the alleged higher River service costs.

As for the capital costs of the barges needed for the River service and other costs, Cargill argues that "Waterman has distributed the expenses attendant to the operation of its LASH motherships inequitably between bulgur shipments in its River and Gulf services in contravention of the principles established in the *Volkswagenwerk* line of decisions." This "line of decisions"²³ is said by Cargill to establish the proposition that there must be a "reasonable relationship between benefits and charges." Moreover, argues Cargill, "where rates are too low to recover costs section 17 has been breached and where the burden of defraying that cost has been shifted to non-users of the service section 16 First has been violated." The cases relied upon are precisely those which do not deal with ocean transportation rates and where the charges in question are not dependent upon transportation conditions and circumstances. But aside from the dubiousness of the analogy, Cargill has failed to show that Waterman has inequitably distributed its operational expenses as between the Gulf and the River. Cargill's whole case is based upon the assumption that since bulgur constitutes virtually all of Waterman's River traffic in contrast to the commercial traffic carried by Waterman from the Gulf, Waterman must depend upon bulgur alone to defray all the expenses of the River service. From this, Cargill presumes that Waterman depends upon higher rated Gulf cargoes to contribute towards expenses of the River service. No figures, cost or otherwise, are offered by Cargill in support of its presumption.

Beginning in 1974, Waterman provided some service to the River, and when it obtained its full complement of 1,000 barges, it expanded this to regular River service. However, the record does not show how many of these barges were needed because of the regular River service or how many could be eliminated if the River service was abandoned. Consequently, there is no way to tell what costs are involved. As for the cleaning costs, not every barge needs to be cleaned; and the charge would apply when needed whether the barge was at a Gulf port or a River port. A Waterman mothership calls at New Orleans every thirty days, thus the prime concern for service at the River ports is that the barge call at the River port, load and return in time to be lifted aboard the mothership. Waterman's barges move up river to the current ports of Helena, Memphis, and Lake Providence, load bulgur and return to New Orleans on an average of 21 days. There is no indication in the record that transit time to River ports creates unusual expenses which

²³ *Volkswagenwerk Aktiengesellschaft v. F.M.C.*, 390 U.S. 261 (1968); *Investigation of Free Time Practices - Port of San Diego*, 9 F.M.C. 525 (1966); *WINAC v. New York Shipping Assoc. Inc.*, 12 S.R.R. 1096 (I.D. 1972).

are then defrayed by Gulf revenues. In short, Cargill has failed to show that the bulgur shipments in question move under substantially similar circumstances and conditions, while Waterman has shown that differing transportation conditions justify the difference in its rates on bulgur.

One final argument needs to be dealt with before taking up the question of the alleged discrimination between ports. Cargill takes the position that since it is not asking for reparation, it does not have to show "injury" in the "sense of monetary loss." Indeed, calling Waterman's arguments on the question of harm "no more than quibbles," Cargill says "it is not useful to argue over the amount of damage involved." Waterman, on the other hand, quite emphatically argues "no harm, no violation."

In order for a rate differential to violate section 16 First, there must generally be a preliminary showing that a particular person, locality or description of traffic must have been subjected to a competitive disadvantage that results in actual injury, *Matson Navigation Co. - Rate Increases*, Docket No. 75-57, 18 S.R.R. 1446 (FMC served December 12, 1978). The injury suffered must be substantial, *CONASA v. American Mail Line, et al.*, Docket No. 73-38, 17 S.R.R. 781 (Initial Decision served July 1, 1977), *aff'd* 21 F.M.C. 91 (FMC served August 8, 1978); *Beaumont Port Commission v. Seatrains Lines, Inc.*, 2 U.S.M.C. 699, 703 (1943).

Although in its complaint Cargill alleged a loss of sales due to Waterman's rates, it failed to actually show any such loss and indeed admitted at the hearing that its Dallas plant had operated at virtually full capacity during 1978-79.²⁴ Now its allegation of harm is that it must pay higher inland transportation costs to deliver bulgur at River ports than it pays to Gulf ports. According to Cargill, it has been forced to pay "some \$178,000 in excess rail charges, after taking into account savings in port charges." This results in a reduced profit to Cargill, although it nowhere says how much its profit was reduced. Simple loss of an unspecified part of profits is not ground to alter a rate, *Intercoastal Cancellations*, 2 U.S.M.C. 397, 400 (1940). Moreover, the alleged inland rate advantage allegedly enjoyed by Lauhoff and ADM, Cargill's Midwest competitors, is far from established by the record.

The record clearly shows that, except from time to time during rail car shortages, Cargill uses transit rates to the River ports 90 percent of the time, whereas Lauhoff mostly uses non-transit. There are substantial economic advantages to the user of transit privileges and a supplier's total transportation cost under transit rates is lower than the combina-

²⁴ There is on brief a simple assertion of "disruption in Cargill sales" because of the asserted deprivation of Cargill's right to use Gulf ports. Just what this "disruption" is and what it has done to Cargill is not explained.

tion of flat rates on the wheat to the mill and for the outbound movement of bulgur. This is confirmed by a comparison of the rail rates of record on representative transit shipments by Cargill to River ports with the flat or non-transit rates of record applicable from Lauhoff's mill at Crete.

The rail rates on bulgur from Dallas to the River ports under the predominantly Oklahoma wheat origin transit rates reflect transportation costs to Cargill of from \$1.15½ to \$1.19 per 100 pounds less than from Lauhoff's mill at Crete. Even the total transportation cost to Cargill of wheat in and bulgur out is from 3 cents per 100 pounds less to only 18½ cents more than just the flat rate on bulgur from Crete. As the truck rates on wheat to Crete are not of record, an exact comparison cannot be made of Cargill's total in-and-out transit costs with Lauhoff's in-and-out non-transit costs. However, the record does show the rail rates from the Oklahoma origins to Dallas ranged from \$1.14½ to \$1.23 per 100 pounds and that Lauhoff pays a premium for truck wheat except when there is a rail car shortage. With respect to the other two transit wheat origins in Colorado and Nebraska used by Cargill, as the transit rates from the northern origins to the River ports are the same for Cargill, ADM and Lauhoff, Cargill cannot support a claim of higher cost from any of the transit origins.

Even during the 10 percent of the time that Cargill uses flat or non-transit rates, its transportation costs to Lake Providence, the port with the largest capacity for handling bulgur, is 31½ cents per 100 pounds less than the flat rate that Lauhoff must always use. To the other two active ports of Helena and Memphis, the flat rates favor Lauhoff in the amount of 3½ cents per 100 pounds, but only because Cargill rejected the offer of the railroad to reduce its flat rate by the same amount that it actually reduced the rate from Crete.

Thus, the weight of the evidence indicates that Cargill's transportation costs to the River ports are certainly no higher than those of Lauhoff; indeed, there is every indication that Cargill's transportation costs are lower. Even if the record showed that the rail rates of Cargill to the River ports were on a relatively higher basis than the rates of ADM and Lauhoff, or just higher per se, the lawfulness of railroad rates is not at issue here, nor should a change in ocean rates be ordered as necessary to adjust those differences, lawful or otherwise, between the bulgur producers and any port.

Cargill says that the rail transportation and port costs on its shipments to River ports during 1979 exceeded what the costs would have been had the shipments been made to Gulf ports in the amount of \$178,339, and that it cannot recover the additional costs. Even if Cargill's calculations are correct, the figures fall far short of proving harm for several reasons. The charges to the River ports are partly based on the flat rates from Dallas, and Cargill refused a reduction in the rates to

the River. Cargill cannot refuse lower transportation charges on the one hand and then successfully claim harm because of higher charges. Moreover, the Gulf port handling charges reflect those applicable at Lakes Charles, Louisiana, whereas the flat rates used in calculating the charges to the Gulf ports apply only to Texas ports. Thus, the higher transportation charges claimed by Cargill are not valid and are overstated.

Additionally, even using the figure of \$178,339, it relates to only 34.46 cents per 100 pounds additional cost to River ports on the 51,900,000 pounds of bulgur that Cargill shipped during this 1979 period. On the other hand, the bids of Cargill to the River ports were at least 50 cents per 100 pounds higher than its lowest bids to the Gulf. Thus, as the price that Cargill received for bulgur at the River vis-a-vis the Gulf ports exceeded the amount of the claimed additional transportation costs, its alleged harm is really a reduction in profits.

Finally, Cargill argues that the Gulf ports in Louisiana and Texas are the natural outlets for its bulgur products and that Waterman's River rates have "deprived it of the natural advantages of its proximity to Gulf ports." However, the record is clear that Cargill does not have a "natural" advantage in reaching the Gulf ports and that its so-called natural flow stems largely from the fact that the Gulf ports historically have been Cargill's only outlet for bulgur. First, as a whole, the distances from Dallas to the active and developing River ports are no greater than from Dallas to the Gulf ports. Too, the distances from Dallas to the River ports are less than from Abilene, Kansas, and Crete, Nebraska, to the River ports. Secondly, the domestic rates applicable on wheat to Dallas are higher than the export rates to the more distant Gulf ports. Lastly, there is an artificial tariff rebate provision uniquely applicable among the bulgur producers only to the mill at Dallas that gives Cargill a rebate or refund from the higher domestic rates on wheat to Dallas down to the lower (export) rates applicable to the Gulf ports. Thus, any equality that Cargill holds with the other producers to the Gulf ports flows from a man-made rebate rule, without which its "natural" geographical location would result in it being at a decided disadvantage with the other producers.

For the reasons set forth above, Cargill has failed to establish that Waterman's rates on bulgur violate section 16 First. The rates are not for the transportation of bulgur under similar circumstances and conditions, and the differences in those circumstances and conditions justify the disparity in the rates.

DISCRIMINATION AS BETWEEN PORTS IN VIOLATION OF SECTION 17

It is alleged that the disparity in Waterman's rates on bulgur discriminates against Gulf ports. Although Cargill casts its charge in broad

terms, only intervenor Baton Rouge is dealt with in any detail at all. Cargill argues that Waterman's River rates "have diverted large quantities of bulgur away from Gulf ports." The record demonstrates, however, that historically Gulf ports have not been competitive on India-bound shipments of bulgur largely because the ocean rates of the Conference are substantially higher than the rates of foreign flag carriers serving ports on the West Coast and the Great Lakes. For example, for the two and one-half years prior to the inauguration of Waterman's River service, the Gulf Coast ports handled only 7 percent of the bulgur that the government shipped to India. The other 93 percent was transported from ports on the Great Lakes and West Coast. However, during the 30 months following the initial lifting of bulgur in Waterman's River service, the India-bound bulgur from the Great Lakes and West Coast dropped from 93 to 64 percent of the government purchases. Of this 36 percent, the River ports got 24 percent and the Gulf ports got 12 percent. In addition, the analysis performed by Waterman's expert witness, Mr. Tucker, shows that had the River rates been raised to the level of the Gulf rates, an additional 15 million pounds of bulgur would have moved through the entire Gulf range.

Cargill has failed to show the specific injury to any particular which is necessary to sustain a violation of section 17. *Council of No. Atl. Shipping Associations v. AML*, 21 F.M.C. 91 (1978) (CONASA).

Although Baton Rouge argues that it has suffered substantial harm through diverted bulgur caused by Waterman's River rates, the record fails to disclose a single pound of bulgur handled by Baton Rouge prior to 1978. The only loss specifically alleged by Baton Rouge is of 4,523 and 9,000 net tons of bulgur in 1978 and 1979, respectively.

As for the 4,523 tons allegedly lost in 1978, this claim is predicated on the fact that Baton Rouge handled that much bulgur in the *first half* of that year. From this, Baton Rouge concludes it should have handled at least that much in the second half of 1978. However, the 4,523 tons of bulgur handled by Baton Rouge in the first half of 1978 were not awarded as the result of competitive bidding. This tonnage was first shipped to St. Louis and later diverted to Baton Rouge because the Mississippi was frozen. Additionally, both the 4,523 tons and 9,000 tons actually were handled by Baton Rouge after the institution of Waterman's River service, and during a period when Gulf rates were lower than rates of the Great Lakes and the River ports had handled their maximum capacity. Finally, the transportation circumstances referred to above in the discussion of the alleged section 16 violation are equally applicable here in dealing with the alleged discrimination against Baton Rouge and the other Gulf ports. *CONASA, supra*. Baton Rouge has failed to establish that Waterman's River service unjustly discriminates against the Port of Baton Rouge in violation of section 17 of the Shipping Act, 1916.

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Complainant Cargill, Incorporated, has failed to show that respondent Waterman Steamship Corporation has violated sections 16 First or 17 of the Shipping Act, 1916, and the complaint is dismissed.

(S) JOHN E. COGRAVE
Administrative Law Judge

FEDERAL MARITIME COMMISSION

DOCKET NO. 81-47

LEASE AGREEMENT NO. T-3753 BETWEEN MARYLAND
PORT ADMINISTRATION AND ATLANTIC & GULF
STEVEDORES, INC.

ORDER

December 2, 1981

The Maryland Port Administration (MPA) has filed a Petition for Declaratory Order regarding a dispute over the interpretation of the term "cargo" in Lease Agreement No. T-3753 between MPA and Atlantic & Gulf Stevedores, Inc. (A&G).¹ Under the terms of the lease, A&G pays MPA a flat annual rental fee, plus an additional charge "for each ton of cargo in excess of 500,000 tons loaded or unloaded" at the premises during the year.

MPA claims that the term "cargo" includes the weight of containers, and A&G contends that the term excludes the weight of containers.² A&G also contests the Commission's jurisdiction to decide MPA's claim. A&G argues that what is in issue is a lease, not a tariff, and notes that MPA has alleged no violations of the Shipping Act. Finally, A&G submits that even if the Commission determines that it has jurisdiction over the instant dispute, it should exercise its discretion to defer jurisdiction to the Circuit Court of Baltimore City, a state equity court, where a Bill of Complaint for Declaratory Judgment and Injunctive Relief is now pending.

The Commission clearly has jurisdiction to decide a dispute over the interpretation of a Commission-approved lease agreement, and thus could decide to exercise that jurisdiction and entertain the instant Petition. There is no indication, however, that the instant case requires the unique technical expertise of this agency any more than the judgment of the court in which the matter is currently pending litigation. It is not alleged that the interpretation of the lease raises any direct questions regarding the statutes this agency is mandated to enforce. In fact, in view of MPA's failure to rely upon any specific section of the Shipping Act as a cause of action, this dispute does not appear to be a matter

¹ The five-year lease to A&G of the Locust Point-South Marine Terminal was approved by the Commission under section 15 of the Shipping Act, 1916 (46 U.S.C. 814) on February 9, 1979.

² Sea-Land Service, Inc. has petitioned to intervene in the proceeding, stating that its purpose is to ensure that the Commission decide only the precise controversy between MPA and A&G, and that it not go beyond a limited ruling "through inadvertently broad language."

most properly resolved within the context of a Declaratory Order under Rule 68 of the Commission's Rules of Practice and Procedure (46 C.F.R. 502.68).

Furthermore, review of this matter by the Commission does not appear to be the shortest route to a solution which will bring satisfaction to the parties in question. Although the Commission can exercise jurisdiction with respect to the disputed lease, it would appear that only a court of law can enforce a judgment and award damages, if appropriate, in a matter of this nature. Since the parties will ultimately have to rely on the Circuit Court of Baltimore City for final resolution of their dispute, any intermediate administrative deliberations by this agency could hinder rather than help ensure a prompt resolution of the litigation in question.

The Commission has determined, therefore, not to exercise its jurisdiction in this proceeding, and MPA's Petition will be denied. The judicial proceeding already instituted in the Maryland state court appears to be the more appropriate forum to resolve this particular controversy.

THEREFORE, IT IS ORDERED, That the Petition for Declaratory Order of the Maryland Port Administration and the Petition to Intervene of Sea-Land Service, Inc. are denied;³ and

IT IS FURTHER ORDERED, That this proceeding is discontinued.

By the Commission.

(S) FRANCIS C. HURNEY
Secretary

³ The Commission's disposition of MPA's Petition in the manner indicated renders moot Sea-Land's request to intervene.

FEDERAL MARITIME COMMISSION

DOCKET NO. 81-15
UNITED STATES-EUROPEAN TRADE
CARRIERS COOPERATIVE STUDY
AGREEMENT NO. 10318

Proposed amendments to discussion agreement found to meet the standards of section 15 of the Shipping Act, 1916. Agreement is therefore approved on condition that it be refiled, amended as proposed, within 30 days.

Howard A. Levy and Patricia E. Byrne for Proponents.

Roland Ronshausen for Intervenor Outboard Marine Corporation.

Elliott M. Seiden, James R. Weiss, Paul A. Mapes and Cristy W. Passman for Intervenor Department of Justice.

John Robert Ewers and Deana E. Rose for the Bureau of Hearings and Field Operations.

REPORT AND ORDER

December 17, 1981

BY THE COMMISSION: (ALAN GREEN, JR., *Chairman*; THOMAS F. MOAKLEY, *Vice Chairman*; JAMES JOSEPH CAREY, RICHARD J. DASCHBACH AND JAMES V. DAY, *Commissioners*)

This proceeding was instituted by Order served February 10, 1981, directing the parties to Agreement No. 10318 (Agreement) to show cause why the Agreement should not be disapproved pursuant to section 15 of the Shipping Act, 1916 (46 U.S.C. 814) for vagueness and failure of justification.¹ The Department of Justice (DOJ) and Outboard Marine Corporation (OMC) intervened in the proceeding. Proponents of Agreement No. 10318 filed an Affidavit of Fact and Memorandum of Law in support of the Agreement. Replies were filed by the Commission's Bureau of Hearings and Field Operations (Hearing Counsel) and DOJ. OMC filed a reply adopting the position and arguments of DOJ. Proponents were allowed to file rebuttal comments to which Hearing Counsel filed a surrebuttal. No party has requested an evidentiary hearing.

The Commission's Order to Show Cause indicated that the Agreement was vague with regard to its general scope, methods of procedure

¹ The parties to Agreement No. 10318, as stated in the Commission's Order to Show Cause, are: American Export Lines, Inc. (Farrell Lines); Atlantic Container Line, GIE; Baltic Shipping Company; Black Sea Shipping Company; Combi Line; Dart Containerline Co., Ltd.; Euro-Pacific; HapagLloyd AG; Johnson Scanstar; Lykes Bros. Steamship Co., Inc.; Norwegian America Line; Sea-Land Service, Inc.; Thos. and Jas. Harrison, Ltd.; and United States Lines, Inc.

and specific objects of study.² It also noted that its parties belong to a variety of conference, rate, rationalization, and joint service agreements which authorize them to deal, in specific trades, with the matters seemingly covered by the Agreement. A specific objection was raised regarding language in the Agreement which suggests that other agreements may be "transacted" under its terms and only subsequently reported to the Commission.

On the basis of the foregoing, the Order concluded that Agreement No. 10318 would be disapproved, as contrary to the public interest within the meaning of section 15, unless Proponents could demonstrate otherwise.

POSITION OF THE PARTIES

Proponents' Response to Show Cause Order

Proponents initially submitted revisions to the Agreement which they alleged satisfy all of the objections raised in the Commission's Show Cause Order.³ Moreover, they contended that they had submitted evidence of justification for the Agreement which met all section 15 requirements.⁴

Proponents argued that because this Agreement does not on its face involve activity which would be a *per se* violation of the antitrust laws or otherwise restrict competition, they need only justify the degree of anticompetitive impact of the Agreement established on the record by

² Agreement No. 10318 would have allowed its member lines to exchange information and cooperate in developing information relating to cargo movements, including seasonal and other traffic fluctuations, and data bearing on the level, type and frequency of liner services required by shippers; costs of service; practices connected with the receipt and delivery of cargo; relations with trade and similar shipper associations; relations with the business community and shipping; relations with the state-owned and controlled liner shipping services; relevant legislative matters and inter-governmental activities; self-policing systems and their evolution; and studies and reports concerning legal and economic aspects of the liner shipping industry and the conference system. Under the Agreement, the parties could also collectively study problems associated with overtonnaging, intermodal transport, the formation of shippers' councils in the United States, self-policing, state-owned and controlled carriers, and relations with the business community, the shipping public and the general public, for the purposes of producing information which will help solve these problems.

³ The revised version of Agreement No. 10318 is presented as Annex A to the Supplemental Affidavit of Donald F. Wierda. The specific modifications made are delineated and explained at pages 2-7 in the Supplemental Affidavit of Donald F. Wierda and can be summarized as follows: (a) the parties to the Agreement are specified as vessel operating common carriers providing liner shipping services between various ports in Europe and ports in the U.S.; (b) "fuel conservation" has been added as a category of subject matter for discussion; (c) the statement of purpose has been modified to include determining specific serious transportation needs; (d) the word "agreements" has been deleted from the minute filing provisions; (e) the disclaimer as to any limitation on the practices of the parties has been expanded to read "in any respect whatsoever"; (f) provision is made for applications for renewal of the Agreement to be filed four months prior to the Agreement's expiration; (g) the provision extending the term of the Agreement pending Commission action on renewal application has been deleted; and (h) the list of the Agreement's parties has been revised to include only Farrell Lines, Dart Containerline, Hapag-Lloyd, Johnson Scanstar, Lykes Bros., and Sea-Land Service.

⁴ The justification submitted by Proponents consists of the Supplemental Affidavits of Donald F. Wierda, President of U.S. Navigation Company, Inc., which is the general agent in the United States for the North Atlantic services of Hapag-Lloyd A.G.

its opponents. Proponents alleged that in any event a substantial transportation need for the Agreement had been established.⁵ It was therefore argued that a *prima facie* case of justification had been established and that the lack of any substantial evidence of anticompetitive impact or other indication that section 15 requirements had not been met required approval of the Agreement.

Proponents conclude that the Agreement, as revised, was sufficiently clear and precise to remove any potential ambiguity which would otherwise preclude approval by the Commission.

Reply of DOJ

DOJ argued that even with the revisions to the Agreement offered by Proponents, there continued to exist ambiguities in the documents which could permit serious anticompetitive conduct. The revisions offered by Proponents were characterized as trivial and as not adding any precision to the scope of the Agreement, the objects of study, or the applicable procedures.

Specifically, DOJ objected to the fact that under the Agreement: (1) any carrier in the U.S./European trades may join the Agreement; (2) cross-conference and controlled carrier coordination is possible; (3) the scope of the Agreement is broad and amorphous; (4) no specific transportation needs are addressed; (5) no procedures for meetings are specified; (6) the objects of study may include meeting with outside groups to discuss rates; (7) the discussion of cargo movements, costs of service and intermodal transportation could allow rate and service coordination; and (8) the discussion of charges associated with intermodal movements could be beyond the approval jurisdiction of the Commission.

⁵ The essential matters of justification stated in the affidavit can be summarized as follows: (a) the remaining parties to the Agreement are not common parties to any other agreement containing this authority in the covered trades; (b) the conduct of business under the Agreement is not limited to negotiating section 15 agreements; (c) the specific subjects of discussion are alleged to be "the major liner shipping issues of our times"; (d) former Commissioner Kanuk publicly expressed a need to study possible effects of the UNCTAD Code; (e) overtonnaging in the affected trades was the subject of a recent Manalytics, Inc. study undertaken for the Commission; (f) intermodalism has raised serious issues regarding tariff filing requirements and the Commission's jurisdiction leading to serious confusion in the liner industry; (g) the problem of instituting effective and lawful self-policing systems has been recognized by the Commission's recent promulgation of G.O. 7 and ensuing litigation; (h) the problem of maintaining proper relations with shipper organizations was recently emphasized by the Commission's decision in Docket No. 80-74 (NAWFA Wines and Spirits Dual Rate Contract), and the entire field of legally permissible relations between carrier associations and shipper associations is uncertain and in a state of flux; (i) the problems facing the liner industry due to the growth of state-owned and controlled carriers and the statutory/regulatory responses to that problem justify the exchange of information necessary to formulate and initiate proposals with respect thereto; (j) relations with the public to enhance awareness of maritime industry is necessary to encourage solutions to public policy issues which will ultimately affect the economies of all nations; and (k) fuel conservation is essential to the continuing viability of oceanborne commerce, and all current information concerning rationalization methods to conserve fuel should be exchanged to determine if further concerted action is warranted.

To cure the alleged ambiguities and narrow the scope of authority sufficiently to justify approval, DOJ suggested the following changes to the Agreement: (1) discussions of cargo movements, costs of service and intermodal transportation be excluded; (2) provisions prohibiting meeting with outside groups and excluding any discussion of costs, rates and pricing be included; (3) consultations with importers and exporters abroad be prohibited, as well as any exchange of data regarding the costs of service and rates; (4) a reporting requirement, including verbatim transcripts, and a requirement for ten-day notice of all meetings, identifying the specific agenda of matters to be discussed at a meeting, be added; (5) discussions be strictly limited to matters noted on agenda notices; and (6) minutes of meetings specifying the time and place of the meeting and the names of all participants be filed with the Commission together with a verbatim transcript of the proceeding and copies of all documents created for or reviewed at meetings.

Reply of Hearing Counsel

Hearing Counsel is of the opinion that the Agreement is not unduly vague under prior Commission standards but that it has not been justified by a showing of transportation need. Hearing Counsel contends that Proponents have failed to submit probative evidence of specific transportation problems which would be addressed by the authority granted under the Agreement.

Proponent's Rebuttal

In response to the objections and suggested modifications of DOJ, Proponents further revised their proposed Agreement and now state that they are willing to adopt all of the proposed modifications except the one that would require the filing of verbatim transcripts of all meetings.⁶ This modification allegedly is unnecessary and would stifle open and frank discussion by the parties to the Agreement. Proponents

⁶ Attached to Proponents' Rebuttal Memorandum is a Second Supplemental Affidavit of Donald F. Wierda and a Second Revised Agreement No. 10318 delineating the specific changes made to the Agreement in response to the comments of DOJ. These modifications can be summarized as follows: (a) an addition to Paragraph A.4. specifically disclaiming authority to discuss or exchange information concerning cost of service, rates or charges; (b) elimination of "exporters and importers" as entities for which consultation procedures may be established in Paragraph B.; (c) an addition to Paragraph A.1. disclaiming authority for discussions, meetings or agreements with shippers, the business community, public at large and state-owned and controlled lines; (d) an amendment to Paragraph B. to make the establishment of consultation procedures with port authorities discretionary; (e) the addition of procedural safeguards to Paragraph C. requiring ten days advanced notice of agenda meetings to be forwarded to the Commission, and prohibiting the discussion of matters not noted on such agenda notices, except with reference to scheduling matters for the next agenda meeting; (f) an addition to Paragraph D.4. requiring the report of the time, date and place of meetings, names and affiliations of those in attendance in the minutes of meetings to be filed with the Commission; and (g) the addition to Paragraph D.5. requiring the identification and filing of all documents considered at meetings on any substantive matter with minutes filed with the Commission, except that attorney client privileged documents and documents available to the public need not be filed.

reassert that a sufficient transportation need has been shown to justify the minimal potential anticompetitive impact of the Agreement.

Hearing Counsel Surrebuttal

Hearing Counsel submit that while Proponents have satisfied all of the objections of DOJ except one and have remedied the Agreement's vagueness, Proponents still have not established a transportation need for the discussion authority sought.

DISCUSSION

The proposed revised Agreement offered by Proponents' counsel in this proceeding substantially cures the vagueness and ambiguities which originally prompted the Commission to initiate this proceeding. While Proponents are unwilling to file verbatim transcripts of meetings, the balance of the procedural safeguards adopted go beyond those required in prior approved discussion agreements and appear to render the transcripts of marginal oversight value. Although the revised objects of study and the general scope of the Agreement remain rather broad, this is consistent with the basic purpose of the Agreement and does reflect the types of discussion authority previously approved by the Commission.

Section 15 of the Shipping Act requires that the Commission approve an agreement unless it is shown to be inconsistent with its standards.⁷ The Agreement, if modified as suggested by DOJ and agreed to by Proponents, does not authorize conduct which amounts to a *per se* violation of the antitrust laws or is otherwise anticompetitive and accordingly contrary to the public interest. Therefore, the *Svenska* standard does not apply to the Agreement, as so modified, and the burden of establishing that the Agreement contravenes the standards of section 15 of the Act rests on those opposing the Agreement and the Commission itself, through Hearing Counsel. There is nothing in the record in this proceeding to indicate that Agreement No. 10318, as proposed to be modified, is inconsistent with any of those standards.

Therefore, the Commission will approve Agreement No. 10318, as revised in accordance with Proponents' latest proposals. The revised Agreement must be refiled within thirty days. At such time as the amended Agreement is filed this proceeding will be discontinued.

⁷ Section 15 provides, in relevant part, that:

The Commission shall by order, after notice and hearing, disapprove, cancel or modify any agreement, or any modification or cancellation thereof, whether or not previously approved by it, that it finds to be unjustly discriminatory 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.

THEREFORE, IT IS ORDERED, That Agreement No. 10318 is approved pursuant to section 15 of the Shipping Act, 1916, on the condition that the Commission receives within 30 days of the date of this Order a complete and accurate copy of Agreement No. 10318 modified in accordance with Annex I to the Second Supplemental Affidavit of Donald F. Wierda, dated August 18, 1981, and signed by all parties thereto; and

IT IS FURTHER ORDERED, That the approval contained herein shall be effective on the date the Commission receives a complete copy of the Agreement which meets the above conditions; and

IT IS FURTHER ORDERED, That upon receipt of the Agreement modified in accordance with the above, this proceeding is discontinued.

By the Commission.

(S) FRANCIS C. HURNEY
Secretary

FEDERAL MARITIME COMMISSION

INFORMAL DOCKET NO. 1063(1)
BRISTOL MEYERS COMPANY

v.

UNITED STATES LINES, INC.

ORDER ON REVIEW

December 21, 1981

The proceeding is before the Commission on its determination to review the decision of Settlement Officer D. Michael O'Rear.

By complaint filed March 16, 1981, Bristol Meyers Company (Bristol Meyers) seeks reparation from United States Lines for alleged freight overcharges on a shipment of two containers of "nutritional products" transported from Los Angeles, California to Tokyo, Japan. The bill of lading indicates that freight was prepaid.

In reviewing the complaint the Settlement Officer found that the shipper was Mead Johnson Co., the consignee was Bristol Laboratories (Japan) Ltd., and Complainant Bristol Meyers appeared to have no connection with the shipment apart from its corporate relationship with both the shipper and the consignee.¹

On March 19, 1981, the Settlement Officer requested Bristol Meyers to furnish some proof that it had paid the freight charges. A reply was submitted by Ocean Freight Consultant, which sent a copy of a cancelled check indicating that the freight charges had been paid by Almac Shipping Co., Inc. (Almac), the ocean freight forwarder named on the bill of lading. After suggesting that the proper claimant appeared to be Mead Johnson Co., the shipper, the Settlement Officer nevertheless requested that Bristol Meyers submit: (1) proof of payment of the freight charges by Bristol Laboratories (Japan) Ltd.; and (2) an affidavit attesting to the fact that in bringing this claim Bristol Meyers was acting as agent for Bristol Laboratories (Japan) Ltd., as consignee. The Settlement Officer also advised that reparation, if any, would be awarded directly to Bristol Laboratories (Japan) Ltd. Finally, the Settlement Officer noted that the reference to the U.S. export classification Schedule B number listed in the complaint conflicted with the description in

¹ According to Moody's Industrials (1981), Mead Johnson Co. and Bristol Laboratories (Japan) Ltd. are wholly owned subsidiaries of Bristol Meyers.

the export declaration submitted to U.S. Customs and called upon the parties to clarify the matter.

When no replies were received to his June 3rd letter, the Settlement Officer dismissed the complaint on the ground that Bristol Meyers had not proven that it had standing to claim reparation.

DISCUSSION

Recently, in *Rohm & Haas Company v. Italian Line*, Docket No. 81-8,² the Commission allowed a parent corporation an opportunity to obtain subsequent to the period of limitations an assignment of a claim for freight overcharges from a subsidiary, which had paid the charges. Therefore, the fact that Bristol Meyers has not paid the freight charges does not necessarily affect its standing to file a complaint alleging a violation of the Shipping Act and asking reparation for the injury caused thereby.

However, in order to recover reparation, Bristol Meyers must submit evidence that it has either paid freight or has validly succeeded to the claim. There is no indication here on whose behalf the freight forwarder paid those charges and whether and by whom it was reimbursed. Moreover, the record is devoid of any information which would support the Settlement Officer's conclusion that Bristol Laboratories (Japan) Ltd. paid the freight and should, if warranted, be awarded reparation. Finally, there exists, as the Settlement Officer properly noted, a conflict between the description in the export declaration and the complaint.³ On its face, this would indicate different products.

In summary, this record contains no information on who paid the ocean freight and is entitled to recover should freight overcharges be proven and, apart from conflicting references to Schedule B classification numbers, no evidence on the proper description of the product shipped.

THEREFORE, IT IS ORDERED, That this matter is remanded to the Settlement Officer for further proceedings consistent with this Order.⁴

By the Commission.*

(S) FRANCIS C. HURNEY
Secretary

² Order on Appeal served November 13, 1981, 24 F.M.C. 429.

³ The export declaration refers to Schedule B no. 442.7900, whereas the complaint refers to Schedule B numbers 048.8210 and 118.1200.

⁴ In the event Complainant fails to respond once again to the Settlement Officer's inquiries and supply the information necessary to reach a decision on the merits, the complaint should be dismissed for lack of prosecution.

* Commissioner Daschbach's separate opinion is attached.

Commissioner Richard J. Daschbach's separate opinion.

I am not participating because I do not believe that the Commission should review the decisions of Settlement Officers in informal docket proceedings. Under Subpart S of the Commission's Rules of Practice and Procedure (46 C.F.R. 502.301), parties consent to waive the rights and obligations associated with normal adjudicatory proceedings for the express purpose of receiving prompt consideration of a small claim. Commission review precludes the inexpensive and expeditious handling of small claims which is the foundation of the informal docket process. The Settlement Officer's decisions in informal dockets do not have precedential value. Commission review therefore imposes unnecessary expense and delay in an arbitration process designed to settle minor commercial disputes in a prompt and responsive manner.

FEDERAL MARITIME COMMISSION

DOCKET NO. 81-26

AGREEMENT NO. 10247-3

AUSTRALIAN LOADING EXPENSE AGREEMENT

Agreement among common carriers by water providing a method for compensating a carrier serving Northwest Australian ports found subject to section 15 of the Shipping Act, 1916.

Neal M. Mayer, Paul D. Coleman, and Mary Mitchell Armstrong for Atlantrafik Express Service.

Neal M. Mayer for Proponents of Agreement No. 10247-3.

Aaron W. Reese, Joseph B. Slunt, and John Robert Ewers for Bureau of Hearings and Field Operations.

REPORT AND ORDER

December 23, 1981

BY THE COMMISSION: (ALAN GREEN, JR., *Chairman*; THOMAS F. MOAKLEY, *Vice Chairman*; JAMES JOSEPH CAREY, RICHARD J. DASCHBACH, AND JAMES V. DAY, *Commissioners*)

By Order dated April 13, 1981, the Commission directed the parties to Agreement No. 10247-3 to show cause why their agreement is an "agreement" subject to the provisions of section 15 of the Shipping Act, 1916 (46 U.S.C. 814).¹ AES subsequently filed a Motion to Dismiss, which was denied by the Commission on July 10, 1981. AES then filed a Motion for Reconsideration of the Order Denying its Motion to Dismiss to which The Bureau of Hearings and Field Operations (Hearing Counsel) replied. The Proponents of Agreement No. 10247-3 have filed a reply to the Order to Show Cause and have attached thereto a verification of the president of AES in lieu of an affidavit of fact. Hearing Counsel filed a Reply Memorandum.

BACKGROUND

Agreement No. 10247-3 is the third amendment to the Australian Loading Expense Agreement. The original agreement was approved in 1976 and required carriers serving the East Coast of Australia to allocate funds to defray the excess costs of any carrier serving Northwest Australian ports. The Australian Meat Board (AMB), the predecessor

¹ The parties to the Agreement are: Farrell Lines, Inc.; Hamburg-Sudamerikanische Dampfschiffahrts Gesellschaft, Eggert & Amsinch, trading as Columbus Line; Associated Container Transportation (Australia) Ltd.; Australian Shipping Commission, trading as Australian National Line; and Trader Navigation Company, Ltd., trading as Atlantrafik Express Service (AES).

of the Australian Meat and Live-stock Corporation (AMLC), mandated this arrangement to ensure service to the remote Northwest ports, something which was doubtful without the agreement because of the AMB's requirement that rates on meat be uniform from all Australian ports. The subsequent two amendments reflected changes in the carrier designated to serve the Northwest ports. The instant Agreement continues the basic concept of subsidizing the carrier which serves Northwest Australia. However, the method of payment of the subsidy has been somewhat altered. Under Agreement No. 10247-3 all carriers of meat from Australia must pay an amount, not in excess of .6 cents per kilogram of meat carried, and from this fund the AMLC, the "administrator" of the Agreement, pays premiums to the Northwest carrier.

Certain statements made in relation to the predecessor agreements indicated that the AMB and AMLC may have dictated a subsidy program as a condition for doing business in the Australian meat trade. It appeared from these assertions that the parties to Agreement No. 10247-3 may have given their assent to its terms solely to avoid governmental exclusion from the trade. If so, the Agreement might not be one over which the Commission could exercise its jurisdiction. This proceeding was therefore instituted.

POSITIONS OF THE PARTIES

A. Proponents

Proponents initially contend that their Agreement meets the jurisdictional criteria of section 15,² since it results in the taking of revenues from carriers serving certain ports and the giving of a special advantage to a carrier serving another port. They then argue that any involvement of the AMLC does not serve to divest the Commission of jurisdiction, especially because the Commission has assumed jurisdiction over this Agreement on three prior occasions. They note that since 1976, the AMB (and later the AMLC) has: (1) designated which carriers will serve the Australian meat trade; (2) designated one carrier to call at Northwest ports; and (3) established the maximum rates for the carriage of meat from Australian ports. Proponents point out that in the 1976 designation letter to the carriers, the AMB specifically required that the East Coast carriers subsidize the Northwest carrier during 1976 and 1977. It is further noted that this designation letter was approved by the Commission as Agreement No. 10250, and served as the genesis for Agreement No. 10247. However, Proponents aver that, with the desig-

² Section 15 requires the filing for approval of any agreement which: fixes or regulates transportation rates or fares; gives or receives special rates, accommodations, or other special privileges or advantages; controls, regulates, prevents, or destroys competition; pools or apportions earnings, losses, or traffic; allots ports or restricts or otherwise regulates the number and character of sailings between ports; limits or regulates in any way the volume or character of freight or passenger traffic to be carried; or in any manner provides for an exclusive, preferential, or cooperative working arrangement.

nation letter of 1978, the AMLC no longer required or provided for such a subsidy. They contend that at this point the designated carriers simply agreed among themselves to subsidize the Northwest carriers and provided the means for doing so in the instant Agreement. Proponents concede that the Australian government's policy of requiring uniform rates from all ports served as an impetus to the Agreement, but claim that the AMLC had not mandated the subsidy program nor dictated its terms.

Proponents also submit that *Inter-American Freight Conference*, 14 F.M.C. 58 (1970), relied upon by the Commission in its Order to Show Cause, only suggests that the Commission might refuse to exercise jurisdiction over an agreement where governmental involvement is so substantial as to remove the mutuality of assent among the parties, and note that the Commission has never followed that suggestion. They further contend that this interpretation does not fit within the letter or the spirit of section 15 and that the Commission in *Inter-American* may have confused "jurisdiction" with its obligation under section 15 to disapprove discriminatory or unfair quotas even if dictated by a foreign government.

Proponents finally argue that Congress did not intend to limit the scope of section 15 merely to contracts enforceable in a court of law, since it defined "agreement" to include "understandings and other arrangements." This allegedly reflects a Congressional intent to police all group activity by persons subject to the Act which fits within the broad parameters of section 15. Proponents conclude, therefore, that notions of mutuality of assent, duress, and adhesion are not relevant to section 15 agreements.³

B. *Hearing Counsel* ⁴

After reviewing the historical context within which Agreement No. 10247-3 arose, Hearing Counsel concludes that it was not entered into merely to avoid exclusion from the trade. Hearing Counsel contends that the original AMB designation letter, Agreement No. 10250, which directed the formation of the subsidy arrangement, simply implemented an agreement which had been negotiated among the carriers as a

³ Proponents also argue that the Order to Show Cause is procedurally defective, because it shifts the burden of determining jurisdiction from the Commission to Proponents based upon *dicta* contained in *Inter-American*, *supra*, an allegedly distinguishable case. Moreover, because the Commission has previously approved the Agreement on three separate occasions, Proponents contend that the Order to Show Cause must explain in detail the reasons for the Commission's departure from prior policy.

⁴ Hearing Counsel first notes that none of Proponents has filed affidavits of fact detailing the involvement of the AMLC, as required by the Order to Show Cause. Even though AES' president has verified certain factual statements contained in Proponents' reply, Hearing Counsel contends that the Commission may not know whether carriers other than AES may have been coerced into joining the Agreement. Hearing Counsel thus suggests that the Commission could order Proponents to submit additional affidavits on this point or could direct Hearing Counsel to pursue this matter through discovery. However, in light of its further comments, Hearing Counsel believes neither action is necessary.

settlement of a complaint proceeding which had been initiated against them - Docket No. 75-53. See *Refrigerated Express Lines v. Columbus Lines*, 19 F.M.C. 582 (1977).

Even though it concludes that the instant arrangement was not the result of governmental dictate, Hearing Counsel takes the position that even if it were, it would not be outside the Commission's jurisdiction. Hearing Counsel thus believes that section 15 applies to any agreement between persons subject to the Shipping Act which falls within one of the seven enumerated categories of that section, and that the intent or motive of the parties is therefore irrelevant. If the Commission were to exempt certain arrangements from section 15 review because of governmental involvement, Hearing Counsel fears that carriers could enter into agreements which Congress had intended to control but nonetheless escape regulatory supervision. Hearing Counsel notes that the Commission has approved several agreements which were entered into as a result of governmental directives and has never held that any such agreement is not subject to its jurisdiction.

Hearing Counsel concludes that there is no valid regulatory purpose to be served by refusing to exercise jurisdiction over an agreement which was entered into to avoid exclusion from a trade and that, in fact, there may be a more valid regulatory purpose in exercising jurisdiction over such agreements - the Commission would then be in a position to disapprove or modify them pursuant to section 15 and could also cancel them in the future if warranted. Hearing Counsel thus recommends that the Commission retain jurisdiction over all agreements within the seven enumerated categories of section 15 and then deal with each on a case-by-case basis under the standards of that statute.

DISCUSSION

The primary issue before the Commission concerns the extent of the Australian government's involvement in this particular agreement. Proponents have stated that their agreement was not entered into under threat or duress and that it is merely a consensual commercial arrangement. They claim that the AMLC has not mandated a subsidy program nor dictated the terms of such a program. Proponents explain that if the AMLC was ever involved in dictating the terms of certain port service arrangements, it has ceased to be since the designation letters of 1978. They contend, therefore, that the present arrangement is solely the result of a consensual agreement among themselves, necessitated by the Australian policy of uniform rates from all ports.

There is nothing in the record that contradicts Proponents' assertions or otherwise indicates that the instant agreement was the result of governmental dictate or fiat, and is not, for that or any other reason, an agreement subject to section 15. The Commission therefore finds

Agreement No. 10247-3 subject to the approval requirement of section 15. In light of this decision, AES' Motion for Reconsideration will be dismissed as moot.

THEREFORE, IT IS ORDERED, That the Motion for Reconsideration filed by Atlantrafik Express Service is dismissed; and

IT IS FURTHER ORDERED, That this proceeding is discontinued.

(S) FRANCIS C. HURNEY
Secretary

FEDERAL MARITIME COMMISSION

DOCKET NO. 81-68

BRADY-HAMILTON STEVEDORING COMPANY, INC.

v.

PORT OF VANCOUVER

NOTICE

December 29, 1981

Notice is given that no appeal has been taken to the November 19, 1981 dismissal of the complaint in this proceeding and that the time within which the Commission could determine to review has expired. No such determination has been made and, accordingly, the dismissal has become administratively final.

(S) FRANCIS C. HURNEY
Secretary

FEDERAL MARITIME COMMISSION

DOCKET NO. 81-68

BRADY-HAMILTON STEVEDORING COMPANY, INC.

v.

PORT OF VANCOUVER

DISMISSAL OF PROCEEDING

Finalized December 29, 1981

Complainant, Brady-Hamilton, has withdrawn its complaint against the Port of Vancouver and the proceeding is dismissed.

(S) JOHN E. COGRAVE
Administrative Law Judge

FEDERAL MARITIME COMMISSION

DOCKET NO. 80-63

WEST COAST OF ITALY, SICILIAN AND ADRIATIC PORTS,
NORTH ATLANTIC RANGE PORTS CONFERENCE -
TARIFF RULE NO. 26

FURTHER ORDER TO SHOW CAUSE

December 30, 1981

On August 21, 1981, the Commission ordered the member lines of the West Coast of Italy, Sicilian and Adriatic Ports, North Atlantic Range Ports Conference (WINAC), to cancel what was then Rule 26 in their FMC Tariff No. 3. Cancellation was ordered because, among other things, Rule 26 was found to constitute an unreasonable refusal to deliver cargo within the meaning of section 17, second paragraph of the Shipping Act, 1916 (46 U.S.C. 816, second paragraph). *Tariff Rule No. 26, 24 F.M.C. 121 (1981)*.

WINAC has responded to this order by filing an amendment to Tariff No. 3 on September 30, 1981 which deleted Rule 26 and replaced it with a new Rule 27 dealing with the same subject. This new tariff provision does not appear to comply with the Commission's August 21, 1981 Order.¹

The present deficiency in Rule 27 lies in Paragraphs B and C, which provide, in pertinent part, that:

B. . . . the *cargo interests* shall be liable to pay:

(2) . . . a [penalty] amount equal to double such difference of freight . . . [Emphasis supplied].

C. . . . the carrier shall have a lien for the amount equal to double the difference of freight if the carrier or the conference verification service:

- (1) First seeks to collect such amount from the shipper; and
- (2) Has reasonable ground to believe that the consignee is at fault.

In lieu of enforcing any lien by public sale, the carrier shall release the cargo to the consignee if the consignee furnishes a bond or other financial guarantee acceptable to the conference verification service for the total amount claimed by the carrier to be due pursuant to this Rule.

¹ Tariff matter which does not comply with a Commission order is subject to rejection under 536.10(d) of the Rules (46 C.F.R. 536.10(d)). In this instance, however, Rule No. 27 was allowed to take effect to permit full review of WINAC's submission by the Commission.

This procedure for enforcing carrier-imposed penalties by refusing to deliver cargo to the consignee unless the penalty is paid or a bond is posted is inconsistent with the Commission's directive that cargo liens not be used to require payment—either ultimately or in the first instance—from a person not “accurately determined to be the party at fault.” 20 S.R.R. at 1497, n. 29. Although the August 21, 1981 Order did not use language which expressly invalidates any possible penalty system employing a cargo lien to collect penalty amounts, the Order clearly indicated there was to be no room for error concerning the consignee's “guilt.”²

Specifically, Rule 27 is deficient for imposing liability for penalties against the “cargo interests,” permitting the carrier to withhold delivery of the cargo whenever the carrier unilaterally believes the consignee is “guilty” of misdescribing cargo, and requiring that penalty payments be sought from the shipper in all cases, including those where the consignee is believed to be the “party at fault.” The August 21st Order plainly stated that carrier-imposed penalties may be assessed *only* against the party responsible for the cargo misdescription or misdeclaration.

Accordingly, WINAC will be directed to show cause why Rule 27 of its FMC tariff should not be cancelled for noncompliance with the Commission's Order of August 21, 1981.

THEREFORE, IT IS ORDERED, That pursuant to section 22 of the Shipping Act, 1916 (46 U.S.C. 821), Docket No. 80-63 be reopened and the member lines of the West Coast of Italy, Sicilian and Adriatic Ports, North Atlantic Range Ports Conference appear before the Commission and show cause why Rule 27 of their FMC Tariff No. 3 should not be cancelled for noncompliance with the Commission's August 21, 1981 Order in this proceeding insofar as it: (1) makes the “cargo interests” rather than the “party at fault” liable for cargo misdescription penalties (Paragraph B); and (2) attempts to collect penalty amounts by means of a lien against the cargo which could be asserted against a consignee which is not in fact “at fault.” (Paragraph C); and

IT IS FURTHER ORDERED, That the Commission's Bureau of Hearings and Field Operations continue to participate in this proceeding; and

² The Commission's intent was that an innocent consignee never be denied delivery of cargo for failing to pay a carrier-imposed penalty. This intention was expressed in relatively flexible language so as to not interfere unduly with the carriers' business judgment in fashioning penalty provisions properly directed against the “party at fault.” Practically speaking, however, it is improbable that a carrier could *fairly and accurately* establish that a consignee is the party at fault within the time allotted for the delivery of cargo without the assessment of demurrage charges, a period which customarily does not exceed five working days. See WINAC Tariff FMC No. 3, original page 64. The burden is upon WINAC to demonstrate that any tariff rule which uses a cargo lien to collect private penalties cannot possibly deny cargo delivery to a consignee which has not been clearly proven to be the party responsible for the misdescription or misdeclaration.

IT IS FURTHER ORDERED, That this proceeding is limited to the submission of affidavits of fact and memoranda of law and replies thereto. WINAC's affidavits and memorandum shall be filed no later than the close of business January 29, 1982 and served upon all other parties of record. The reply of Hearing Counsel shall be filed and served no later than February 12, 1982. Oral argument may be scheduled if requested by a party prior to February 19, 1982 and deemed necessary by the Commission; and

IT IS FURTHER ORDERED, That a copy of this Order be served upon each of the respondent carriers.

By the Commission.

(S) FRANCIS C. HURNEY
Secretary

FEDERAL MARITIME COMMISSION

DOCKET NO. 81-55

E. I. DU PONT DE NEMOURS AND COMPANY

v.

SOUTH AFRICAN MARINE CORPORATION, LTD.

NOTICE

December 30, 1981

Notice is given that no exceptions have been filed to the November 20, 1981 initial decision in this proceeding and the time within which the Commission could determine to review that decision has expired. No such determination has been made and, accordingly, that decision has become administratively final.

(S) FRANCIS C. HURNEY
Secretary

FEDERAL MARITIME COMMISSION

DOCKET NO. 81-55

E. I. DU PONT DE NEMOURS AND COMPANY

v.

SOUTH AFRICAN MARINE CORPORATION, LTD.

Shipment of "Orlon, Acrylic Staple" improperly rated as "Synthetic Staple, N.O.S."
Reparation awarded.

Don A. Boyd, Raymond Michael Ripple, and James T. Williamson for complainant.
Paul Bauman for respondent.

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

Finalized December 30, 1981

Complainant, Du Pont, seeks an order directing Respondent South African Marine Corporation, Ltd. (Safmarine) to pay reparation of \$174,510.37 because of overcharges on three shipments of Complainant. Safmarine did not file an answer to the complaint. Instead the parties submitted a "Stipulation and Joint Motion for Decision" in which Complainant and Respondent agree that there is no "genuine issue as to any material fact as set forth in the complaint." The complaint states the following relevant facts.

I. The Complainant, E. I. du Pont de Nemours and Company (Du Pont), is a Delaware corporation with principal offices in Wilmington, Delaware 19898, and is engaged in the manufacture, sale, and distribution of chemicals, paints, plastics, man-made fibers, and related products.

II. The Respondent, South African Marine Corporation, Ltd., (Safmarine), a corporation with principal offices at One Bankers Trust Plaza, New York, New York 10006, is a common carrier engaged in transportation by water from United States Atlantic Coast ports to South Africa, and as such is subject to the provisions of the Shipping Act of 1916, as amended.

III. (A) That the Respondent's tariff, South Bound Freight Tariff No. 6, F.M.C. No. 8, of the United States/South and East Africa Conference, effective July 8, 1980, did contain item 1860, which item provided

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

a rate of \$125.00 per cubic meter (CM) for "Synthetic Staple, N.O.S.". Item 1860, page 206 of said tariff, also provided a rate of \$163.50 per metric ton (MT) for "Acrylic Staple".

(B) That Respondent did on three separate shipments transport Du Pont Orlon, an acrylic staple, for Complainant from the United States to South Africa, in November, 1980. The bills of lading for each of these three shipments misdescribed the material being shipped as "Fiber, Synthetic Staple, N.O.S." rather than the proper description, "Orlon, Acrylic Staple". The Respondent invoiced Complainant and Complainant remitted payment for these shipments rated as "Synthetic Staple, N.O.S." but should have been rated as "Acrylic Staple". The application of the higher rate resulted in overcharges in the amount of \$174,510.37. Bills of lading, export invoices, and packing lists for each shipment are attached in Appendix B.

C. That subsequent to the payment of said freight charges Complainant notified Respondent of the billing error. By letter dated July 28, 1981 and letter of August 11, 1981 amending the overcharge figures (Appendix C), Respondent admitted the overcharge error, but requested that refunding be authorized by the Federal Maritime Commission.

IV. A. That on November 18, 1980 Respondent did carry 388,429 lbs. (647.845 CM) of Orlon from Newport News, Virginia to Durban, South Africa per bill of lading No. 7. The commodity was described on the bill of lading as "Fiber, Synthetic Staple, N.O.S." but should have been described as "Orlon, Acrylic Staple". Respondent invoiced Complainant and Complainant paid freight charges of \$103,169.33 based on the rate for "Synthetic Staple, N.O.S." Complainant should have been charged \$36,074.95 based on the rate for "Acrylic Staple". The overcharge for this shipment amounted to \$67,094.38.

B. That on November 26, 1980 Respondent did transport 225,322 lbs. (383.044 CM) of Orlon from Charleston, S.C., to Durban, South Africa, per bill of lading No. 5. The Orlon was again described as "Fiber, Synthetic Staple, N.O.S." Complainant was incorrectly invoiced for \$61,574.33 and should have been charged \$21,222.93, an overcharge of \$40,351.40.

C. That on November 29, 1980 Respondent did transport 388,345 lbs. (642.436 CM) of Orlon from Newport News, VA to Durban, South Africa, per bill of lading No. 4. This bill of lading also contained the commodity misdescription "Fiber, Synthetic Staple, N.O.S." Complainant paid \$67,074.59 in overcharges having remitted \$103,272.66 to Respondent as opposed to the \$36,208.07 which Complainant should have been assessed at the applicable rate.

Attached to the complaint are copies of the bills of lading, export invoices, and packing lists for each of the three shipments. The bills of lading contain the commodity misdescription described in the complaint and the freight charges assessed. The export invoices and the packing

lists demonstrate that the commodity actually shipped was "Orlon, acrylic staple."

On the basis of the foregoing Respondent, South African Marine Corporation, Ltd., is ordered to pay to E. I. Du Pont De Nemours and Company reparation in the amount of \$174,510.37.

(S) JOHN E. COGRAVE
Administrative Law Judge

FEDERAL MARITIME COMMISSION

DOCKET NO. 80-79
TUPPERWARE COMPANY

v.

COMPANIA SUD-AMERICANA DE VAPORES
(CHILEAN LINE)

NOTICE

January 4, 1982

Notice is given that no exceptions have been filed to the November 25, 1981 initial decision in this proceeding and the time within which the Commission could determine to review that decision has expired. No such determination has been made and, accordingly, that decision has become administratively final.

(S) FRANCIS C. HURNEY
Secretary

FEDERAL MARITIME COMMISSION

DOCKET NO. 80-79
TUPPERWARE COMPANY

v.

COMPANIA SUD-AMERICANA DE VAPORES
(CHILEAN LINE)

Settlement approved.

Proceeding discontinued with prejudice.

David L. Weiser, Registered FMC Practitioner No. 950, for the complainant.

George E. Dalton and *Elmer C. Maddy* of Kirlin, Campbell & Keating (New York), for the respondent.

INITIAL DECISION ¹ OF WILLIAM BEASLEY HARRIS, ADMINISTRATIVE LAW JUDGE

Finalized January 4, 1982

The Commission determined it would review the May 19, 1981, Order of the Administrative Law Judge which granted the parties' joint motion to dismiss the complaint with prejudice and discontinue the proceeding. In an Order served August 26, 1981, the Commission reversed dismissal of the complaint and remanded the proceeding to the Presiding Officer with instructions to make a specific finding whether the third criterion of *Organic Chemicals (Glidden-Durkee) Division of SCM Corp. v. Atlantrafik Express Service*, Docket Nos. 78-2, 78-3, 18 SRR 1536(a) (1979), can be met. If it cannot, the Presiding Officer shall disapprove the settlement agreement and proceed with the adjudication (24 F.M.C. 140, 141 (August 26, 1981)).

In a Notice on Order Reversing Dismissal of Complaint served August 27, 1981, the Presiding Administrative Law Judge pointed out the position he took in granting the motion to dismiss the complaint with prejudice and discontinuing the proceeding was that "It certainly is within the province of the complainant to ask for the dismissal of the complaint and for the respondent to join in that request. Wherefore, the motion to dismiss the complaint with prejudice should be granted." It

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

was this position that prompted dismissal of the complaint. There was no approval of the settlement proposal.

The respondent, without objection from the complainant, requested and was granted an extension of time from September 8, 1981, to September 21, 1981, to allow a full and adequate response herein to the remand.

The following affidavit of George H. Houghton, sworn to September 21, 1981, was received September 23, 1981:

AFFIDAVIT

I, George H. Houghton, being first duly sworn on oath depose and says that:

1. I am Vice President of Tupperware Company.
2. I am familiar with the above-referenced action as well as the terms of the settlement reached therein, as set forth in the April 7, 1981 letter of Chilean Line Inc., previously submitted in this proceeding as Exhibit B to the May 6, 1981 letter of Administrative Law Judge Harris.
3. This settlement is a bona fide effort by the parties to terminate their dispute and it is not a means of obtaining transportation at rates other than those set forth in the tariff of respondent.
4. A genuine dispute exists as to certain facts in connection with the movements of cargo in that the bills of lading prepared by a freight forwarder and the shipper's export declaration, while written in Spanish, generally describe the goods, as plastic articles for domestic use. These goods were, therefore, rated by respondent as plastic goods N.O.S. However, it is the contention of complainant that these goods should have been rated in a less costly category of the tariff.
5. The goods were transported in sealed, house-to-house containers and, therefore, the primary factual dispute is dependent on identification of the exact goods that were transported under each of the eleven bills of lading. This may not be possible in view of the differing descriptions contained in the bills of lading, the shipper's export declaration and the commercial invoices.
6. It is appropriate to settle this factual dispute rather than engage in litigation which is costly both in terms of legal fees and employee man-hours of preparation.

(S) GEORGE H. HOUGHTON

The following affidavit of John M. Dillon, sworn to September 18, 1981, was received September 22, 1981:

AFFIDAVIT

I, John M. Dillon, being first duly sworn on oath deposes and says that:

1. I am Vice-President, Traffic of Chilean Line, Inc.;
2. I am familiar with the above-referenced action as well as terms of the settlement reached therein, as set forth in the April 7, 1981 letter of Chilean Line Inc. as previously submitted in this proceeding as Exhibit B to the May 6, 1981 letter to Administrative Law Judge Harris;
3. The settlement is a bona fide effort by the parties to terminate the instant proceeding thereby avoiding the cost of litigation which would be necessary to unravel the factual dispute involved;
4. The settlement is not a method of providing transportation at rates other than the applicable rates of Respondent's tariff;
5. A genuine factual dispute exists. The shipper's freight forwarder telephoned the Rates Department of Respondent prior to sending the bills of lading. Relying on the description given by the shipper's forwarder, Respondent quoted a rate applicable to Plastic Goods N.O.S. The bills of lading prepared by the shipper's forwarder substantiated the description previously given. The Shipper's Export Declarations also confirmed in its reference to the Schedule B commodity number that the goods were correctly rated as Plastic Goods N.O.S.

After Respondent had applied the rate for Plastic Goods N.O.S., Complainant, through their representative, received a letter of September 10, 1980, which explained that the shipper themselves had confirmed that the goods were plastic articles. The Secretary of the Atlantic and Gulf/West Coast of South America Conference, after reviewing Complainant's claim confirmed that the goods were properly rated in accordance with the tariff.

6. After reviewing the applicable bills of lading, the Shipper's Export Declarations and considering the telephone conversations with Complainant's freight forwarder in which the freight forwarder confirmed and accepted the rating of the goods as Plastic Goods N.O.S., as well as the advice of the Conference Secretary, Respondent believes that the goods were correctly rated. However, since Complainant has asserted that the articles were incorrectly rated and have variously described the goods as "plastic articles," "plastic containers for domestic use," plastic housewares including kitchenware and that "all commodities can be classified as kitchen utensils," we believe there is a significant amount of uncertainty as to the true nature and description of the goods. This is particularly true, since it is unclear whether the commercial invoices relied upon by Complainant actually represents those goods carried by Respondent. These goods were transported in

sealed, house-to-house containers. Since these movements took place during a period ranging from approximately two to three years ago, it may be impossible to ascertain the exact contents of these containers. Additionally, packing lists were not submitted at the time of shipment making it even more difficult to determine the goods carried. Accordingly, Respondent believes that it is appropriate to settle this factual dispute and urges that the settlement be approved.

(S) JOHN M. DILLON

The affidavit of Mr. Dillon was annexed as Exhibit A to a joint response motion, pursuant to 46 CFR 502.73, requesting that the complaint be dismissed with prejudice based upon the settlement which has been agreed upon by the parties and the response to the notice served August 27, 1981. The parties contend the criteria for settlement contained in *Organic Chemicals, supra*, with which the Commission expressed concern, have been met by the affidavit of Mr. Dillon: i.e., the parties filed with the settlement agreement an affidavit setting forth the reasons for the settlement and attesting that the settlement is a bona fide attempt by the parties to terminate their controversy and not a device to obtain transportation at other than the applicable rates and charges or otherwise circumvent the requirements of the Shipping Act, 1916, or of the Intercoastal Shipping Act, 1933, as amended, as the case may be; the complaint on its face presents a genuine dispute and the facts critical to the resolution of the dispute are not reasonably ascertainable, citing *Organic Chemical*.

The parties say that, at page 3 of the order, the Commission has interpreted Exhibit A, Part II, to the Settlement Agreement dated May 6, 1981, as an admission of overcharge. The parties explain they submitted that exhibit merely as a guide to the Commission and such exhibit simply incorporates the *allegations* of overcharge and the claim of complainant. It should not be construed as an admission by the parties that there have been any freight overcharges.

In an Answer to Notice on Order Reversing Dismissal of Complaint, dated and served September 18, 1981 (received September 21, 1981), the complainant asserts that since the inception of these proceedings, counsel for both complainant and respondent have been attempting to reach an agreement which would be satisfactory to both parties. Then the complainant states, "It has been well settled in the courts and before the Commission that the law and Commission policy encourage settlements that are fair, correct and valid and that every presumption may be indulged in which favors such settlements, *Merck, Sharp & Dohme v. Atlantic Lines*, 17 FMC 244, 247 (1973)." The said case of *Merck, Sharp and Dohme*, Docket No. 73-59, is one in which the

complainant sought reparation, claiming that the respondent overcharged complainant on a shipment of a commodity described on respondent's bill of lading as "Dextrose Anhydrous USP (Glucose)," in violation of section 18(b)(3) of the Act. Respondent classified the shipment as "Cargo N.O.S." Complainant contends the shipment should have been assessed the rate applicable to "Sugar, Corn, not liquid." In support of its contention that the subject commodity was in fact dry corn sugar, complainant cites the bill of lading description, the relevant invoice, a chemical dictionary definition, a Schedule B Classification, a verified statement authorized by itself, and a letter offering to settle. None of this evidence, however, establishes the validity of its claim. 17 FMC 244, 247.

As to the fact that at one time there was made an offer of settlement, it is said, in *Merck supra*, "The offer of settlement . . . merely indicates that the respondent desired to avoid further litigation, not that respondent admitted to a violation of law. The law, of course, encourages settlements and every presumption is indulged which favors their fairness, correctness and validity generally." (*Ibid.*) In *Merck, supra*, the claim for reparation was denied and the complaint dismissed. Thus, *Merck* hardly stands for the proposition cited by complainant that the law encouraged settlements, etc., such is not the holding of *Merck*, the statement is *obiter dictum*.

The complainant argues the Rules of Practice and Procedure of the Commission itself encourage and favor settlement of the claims before the Commission, 46 CFR 502.91 and 502.94. Also, it is argued that all requirements of the *Organic Chemicals* case have now been met.

The respondent served on September 21, 1981, its memorandum of facts and arguments in support of the joint response. Respondent contends the identification of the factual dispute at issue is simple—what goods were carried by respondent under eleven bills of lading. Identification of those goods, on the other hand, is difficult and may be impossible.

The respondent argues that the parties bargained in good faith to reach a fair compromise of a dispute which was uncertain on the merits and as to the ultimate outcome; a dispute, which would undeniably be costly and which would probably adversely affect a long-standing and excellent relationship between Tupperware and Compania Sud-Americana de Vapores.

The respondent asserts that the commercial invoices which claimant hereby relies upon were not viewed by the carrier until the instant dispute was initiated and there is no reference to the bills of lading, shipper's export declaration or the voyage number contained in these invoices. It would be difficult, time consuming and costly in terms of legal fees and man-hours to provide an exact description for goods

shipped nearly two and up to three years ago. In fact, their task may be impossible (p. 4).

Yet, continues the respondent, seemingly, this is what the Commission expects the parties to do. This expectation is directly contrary to the philosophy that settlements should be encouraged. (*Ibid.*) The respondent says it has been long-established that both the Commission and the law encourage fair and equitable compromise; that the parties have settled this case on a good-faith basis and respectfully request the settlement be approved and the complaint dismissed with prejudice.

This instant case is one in which the respondent and complainant continue to join in desiring to have the settlement approved and the complaint dismissed. While there appears to be as much reason to deny as to grant approval, the arguments in favor, bolstered by the law and Commission favoring settlements, tip the balance in favor of approval of the settlement.

Neither the respondent nor the Commission was concerned by the representation of the complainant in this case, pointed out by the Presiding Administrative Law Judge in his January 12, 1981, Notice of Withholding of Approval, that the proceeding be conducted under the shortened procedure.

The complaint in this proceeding was served November 12, 1980; the parties have consistently sought approval of their settlement. The parties agree that there is difficulty of proof but to avoid costly litigation and further time are apparently eager for settlement. At this point, there does not seem to be any regulatory benefit to be served in further consideration of whether this settlement should be approved. The settlement, under the circumstances, should be approved.

Wherefore, it is ordered, subject to review by the Commission, as provided in the Commission's Rules of Practice and Procedure:

(A) The settlement is approved.

(B) The proceeding is discontinued, with prejudice.

(S) WILLIAM BEASLEY HARRIS
Administrative Law Judge

FEDERAL MARITIME COMMISSION

DOCKET NO. 81-69

**DAMAR CARGO SERVICES, INC. - INDEPENDENT
OCEAN FREIGHT FORWARDER APPLICATION**

NOTICE

January 11, 1982

Notice is given that no appeal has been taken to the December 4, 1981 Order of Discontinuance in this proceeding and that the time within which the Commission could determine to review has expired. No such determination has been made and, accordingly, the discontinuance has become administratively final.

(S) FRANCIS C. HURNEY
Secretary

FEDERAL MARITIME COMMISSION

DOCKET NO. 81-69

DAMAR CARGO SERVICES, INC. - INDEPENDENT
OCEAN FREIGHT FORWARDER APPLICATION

DISCONTINUANCE OF PROCEEDING

Finalized January 11, 1982

Damar Cargo Services, Inc., has withdrawn its application for a license as an independent ocean freight forwarder. Damar now asks that the subject proceeding be discontinued. Hearing Counsel support the request for discontinuance.

The only issue in this proceeding is whether Damar is fit, willing and able properly to carry on the business of forwarding in accordance with the provisions of the Shipping Act, 1916. The withdrawal of the application for a license is good cause for discontinuance of the proceeding.

The subject proceeding hereby is discontinued.

(S) CHARLES E. MORGAN
Administrative Law Judge

FEDERAL MARITIME COMMISSION

DOCKET NO. 81-19

ELI LILLY S.A. PUERTO RICO BRANCH

v.

MITSUI O.S.K. LINES, LTD.

An injured party's assignment of a claim to the Complainant is not barred by the two-year statute of limitations in section 22 of the Shipping Act, 1916.

Respondent violated section 18(b)(3) of the Shipping Act, 1916 when it rated a mixture containing antibiotics as "Antibiotics" instead of "Artificial mixtures containing antibiotics." The Initial Decision is reversed and reparations are awarded subject to Complainant's obtaining a valid assignment of its claim.

Henry B. Blackwell and James A. Fishback for Complainant.

Charles Lagrange Coleman III and Robert B. Yoshitomi for Respondent.

REPORT AND ORDER

January 12, 1982

BY THE COMMISSION: (ALAN GREEN, JR., *Chairman*; THOMAS F. MOAKLEY, *Vice Chairman*; JAMES JOSEPH CAREY, RICHARD J. DASCHBACH AND JAMES V. DAY, *Commissioners*)

This proceeding was instituted by complaint filed February 20, 1981 by Eli Lilly, International Corporation, claiming that Eli Lilly S.A. Puerto Rico Branch's March 7, 1979 shipment of "Tylan 80 Premix" from Oakland to Kobe was improperly rated by Respondent Mitsui O.S.K. Lines, Ltd. in violation of section 18(b)(3) of the Shipping Act, 1916 (46 U.S.C. 817), and requesting reparations in the amount of \$8,250.70. Respondent's Motion to Dismiss the Complaint on jurisdictional grounds was denied by Administrative Law Judge William Beasley Harris. He also permitted the amendment of the complaint, substituting Eli Lilly S.A. Puerto Rico Branch as Complainant. The Presiding Officer subsequently issued an Initial Decision which concluded that the commodity was correctly rated by Respondent, and dismissed the complaint. Exceptions to the Initial Decision were filed by Complainant, to which Respondent replied.

POSITION OF THE PARTIES

Complainant lists six numbered exceptions, which basically take issue with the Presiding Officer's general conclusion that Respondent correctly rated the commodity under the following tariff description:

Antibiotics (except Erythromycin, penicillins, and tetracycline-type) including those chiefly used as animal feed additives, antineoplastic agents, or agricultural pesticides, in bulk form not packed for retail sale.

Complainant contends that the shipment should have been rated under the following tariff item:

Artificial mixtures containing one or more antibiotics which have been mixed or compounded together for therapeutic or prophylactic uses not put up in measured doses nor in forms or packages of a kind sold at retail. Ordinary stowage.

Complainant objects to the Presiding Officer's reference to the Condensed Chemical Dictionary for a definition of "Tylan," which listed it as "trademark for tylosin phosphate, used as an antibiotic in veterinary medicine." Complainant argues that the Presiding Officer erroneously concluded that the shipment was of tylosin phosphate, rather than Tylan 80 Premix, as both parties stipulated. It argues that the Presiding Officer's extra-record use of the dictionary lent erroneous support to his confusion of the Premix with its active ingredient, the antibiotic tylosin phosphate.

Complainant further notes that the product Tylan 80 Premix is a mixture of three ingredients—antibiotic (tylosin phosphate), diluents (soybean mill run and gelatin), and stabilizer (sulfamethazine)—and is not, therefore, a pure antibiotic. Thus, Complainant argues, the tariff item for "artificial mixtures containing one or more antibiotics" is more descriptive of the commodity than "antibiotics."

Respondent replies that the Presiding Officer was correct in concluding that Tylan 80 Premix is essentially tylosin phosphate. Respondent argues that the intended use of the commodity is of critical importance in determining the proper tariff description. Because Tylan 80 Premix is to be used as an antibiotic additive in pig feed, and because the tariff item "antibiotics" by its terms includes "those chiefly used as animal feed additives," Respondent submits that tariff item is the more applicable.

Respondent maintains that the diluents and stabilizer added to the tylosin phosphate in Tylan 80 Premix are "purely subsidiary" in nature to the active ingredient, and do not change the basic identity of the Premix as an antibiotic. Respondent contends that the Commission's ruling in *Merck Sharp & Dohme International v. Kawasaki Kisen Kaisha, Ltd.*, 22 F.M.C. 396 (1979) supports its contention that the addition of diluents to a highly concentrated antibiotic does not change the identity of that antibiotic for tariff purposes.

Respondent also obliquely raises a jurisdictional issue. It notes in a footnote in its Reply to Exceptions that the Presiding Officer permitted an amendment to the complaint substituting the complainant, more than

two years after the cause of action arose. Respondent submits that this raises a "non-waivable jurisdictional question."

DISCUSSION AND CONCLUSION

The May 22, 1981 decision permitting an amendment to the complaint presents a threshold jurisdictional issue which must be addressed prior to discussing the merits of the Exceptions. The amendment occurred beyond the two-year period prescribed in section 22 of the Shipping Act, 1916 (46 U.S.C. 821) for the filing of complaints. The argument raised by Respondent in its unsuccessful Motion to Dismiss and again in its Reply to Exceptions is that the complaint as amended is time-barred under section 22.

A similar issue arose in *Rohm & Haas Co. v. Italian Line*, 24 F.M.C. 429 (1981). That proceeding was brought by a United States corporation although the disputed freight charges were paid by its foreign subsidiary. The Commission allowed the complainant 60 days to obtain an assignment of the claim from its subsidiary. Respondent in the instant proceeding, anticipating the *Rohm & Haas* decision,¹ attempts in its Reply to distinguish it. Respondent claims that the *Rohm & Haas* decision was based on the parent-subsidiary relationship of the former and substituted complainants, and that substitution of parties under other circumstances would be barred by section 22.

The *Rohm & Haas* decision, however, was not based upon the parent-subsidiary relationship of the parties. Moreover, the Commission did not permit an amendment of the complaint, but rather permitted an assignment of the claim, thus obviating the need for an amendment. By obtaining an assignment of the claim, the complainant is adducing proof of injury, which is a matter of evidence unrelated to standing or to the time limitation on filing the complaint. The perfection of a claim is not a matter subject to the two-year statute of limitations.

Although the Presiding Officer departed from Commission precedent in permitting the amendment to the complaint, the Commission concludes that this proceeding should not be dismissed on that ground. The principles of the *Rohm & Haas* decision are applicable here. Therefore, the Commission will reinstate as Complainant the Eli Lilly International Corporation, granting it permission to obtain and file with the Commission a valid assignment of the claim from its affiliated corporation, the shipper of the commodity in issue, Eli Lilly S.A. Puerto Rico Branch. If Complainant can obtain a valid assignment of the claim, it will be

¹ Respondent's Reply to Exceptions in the instant proceeding makes reference to the *Rohm & Haas* decision. The decision in *Rohm & Haas* was reached at an open Commission meeting, prior to the filing of Exceptions in this proceeding, although the Order implementing that decision was not served until after those Exceptions were submitted.

adducing proof of injury and thus perfecting its claim in a manner not subject to the two-year statute of limitations.

On the merits of the claim, it appears that Complainant has partially misinterpreted the Presiding Officer's Initial Decision, wherein he concludes that what was shipped was tylosin phosphate, and that the proper tariff item was applied. Contrary to Complainant's contention, the Presiding Officer did not misunderstand the parties' stipulation, but rather found that Tylan 80 Premix is tantamount to tylosin phosphate, the pure antibiotic, and concluded that the "antibiotics" rate applied. The Commission has concluded, however, that this finding does not comport with the evidence of record or the proper application of law.

It is clear that tylosin phosphate, the active ingredient in Tylan 80 Premix, would be properly rated under the "antibiotics" tariff item if it were the commodity shipped. It appears that the addition of the diluent and stabilizing ingredients, which comprise approximately 91% of Tylan 80 Premix,² substantially alters the product such that another tariff item—"artificial mixtures containing one or more antibiotics"—applies.

Respondent's reliance on *Merck* to the contrary is misplaced. In that proceeding, the complainant argued that the presence of diluents in a pharmaceutical preparation intended for use as a chicken feed supplement converted the products from "pharmaceutical preparations" to "animal feed," those being the two tariff items in controversy. The Commission rejected that argument, concluding that the commodity remained essentially a pharmaceutical preparation which was substantially distinguishable from mere animal feed. In the instant proceeding, it is unclear whether the tariff item applied by the carrier, "antibiotics," even covers the Premix, for unlike the governing tariff item in *Merck* applying to "pharmaceutical preparations," "antibiotics" may not include mixtures of ingredients. There is considerable merit to Complainant's argument that "antibiotics" should be read to mean pure antibiotics and not mixtures composed of antibiotics.

Moreover, unlike in *Merck*, in which the "animal feed" tariff description did not accurately define the chicken feed supplement, there is in the instant proceeding a second tariff item which can apply—"artificial mixtures containing one or more antibiotics." Tylan 80 Premix clearly can be described as such, and more accurately than it can be described as "antibiotics." But even assuming *arguendo* that "antibiotics" is the better description, there is more than one reasonably applicable tariff description, and the resulting ambiguity must be resolved by application of the lower-rated item. Where a tariff is ambiguous or doubtful it must be construed against the carrier who prepared it. *United States v. Hel-*

² Tylosin phosphate is contained in Tylan 80 Premix at a ratio of 88 gm per kg, or at 8.8% intensity. The Premix also contains sulfamethazine at a ratio of 20 gm per kg, or 2%.

lenic Lines, Ltd., 14 F.M.C. 255, 260 (1971). Application of this principle in the instant proceeding results in a determination contrary to that in the Initial Decision, *i.e.*, the application of the "artificial mixtures" description to the Premix shipment. The Initial Decision will therefore be reversed, and reparations awarded, subject to Complainant's compliance with the Commission's above-mentioned directions to obtain an assignment of the claim from the shipper. If an assignment is not filed with the Commission within the prescribed time, reparations will not be awarded and the complaint will be dismissed.

THEREFORE, IT IS ORDERED, That the Exceptions of Eli Lilly S.A. Puerto Rico Branch are granted to the extent indicated above; and
IT IS FURTHER ORDERED, That the Initial Decision is reversed; and

IT IS FURTHER ORDERED, That Eli Lilly International Corporation is reinstated as the complainant in this proceeding; and

IT IS FURTHER ORDERED, That Eli Lilly International Corporation shall file with the Commission, before February 12, 1982, a valid assignment of the claim in this proceeding from Eli Lilly S.A. Puerto Rico Branch; and

IT IS FURTHER ORDERED, That if the above condition is met, Mitsui O.S.K. Lines, Ltd. shall pay reparations in the amount of \$8,250.70 to Eli Lilly International Corporation, with simple interest at 11.93 percent from the date of payment of the freight to the date on which reparations are paid, at which time the proceeding will be discontinued; and

IT IS FURTHER ORDERED, That if such an assignment is not received by the Commission by the prescribed date, no reparations will be awarded and the complaint will be dismissed.

(S) FRANCIS C. HURNEY
Secretary

FEDERAL MARITIME COMMISSION

[46 C.F.R. PART 547]

[DOCKET NO. 81-36, GENERAL ORDER NO. 45, AMDT. 1]
PROCEDURES FOR ENVIRONMENTAL ASSESSMENT

January 20, 1982

ACTION: Final Rule

SUMMARY: This amends section 547.4(a) of the Commission's environmental rules (46 C.F.R. 547) by clarifying certain existing categorical exclusions and adding several new exclusions. Based upon its experience with these rules since their publication in May, 1980, the Commission has concluded that several additional exclusions are warranted to avoid unnecessary environmental assessments for actions having no potential for significantly affecting the environment. This action will reduce paper work and will allow the Commission to more effectively pursue actions before it.

DATE: Effective March 1, 1982.

SUPPLEMENTARY INFORMATION:

This proceeding was initiated by Notice of Proposed Rulemaking published June 10, 1981 (46 FR 30667). The Commission proposed to amend section 547.4(a) of its environmental rules (46 C.F.R. 547) to clarify existing categorical exclusions and to add certain new exclusions. Comments were received from, or on behalf of: (1) the Port of Seattle (Seattle), (2) the Port Authority of New York and New Jersey (N.Y.-N.J.), (3) the Maryland Port Administration (MPA), (4) Sea-Land Service, Inc. (Sea-Land), (5) the Port of Long Beach, (6) the United States Environmental Protection Agency (EPA), (7) the Pacific West-bound Conference, (8) the Pacific/Indonesian Conference and (9) the Pacific Straits Conference. The rule was also submitted to the Council on Environmental Quality [CEQ] for review pursuant to 40 C.F.R. 1507.3(a). CEQ subsequently determined that the proposed amendments are consistent with its regulations.

All comments received were considered during preparation of the final rules. Those raising substantive issues are discussed below.

Seattle questions proposed section 547.4(a)(30)(ii), which excludes from analysis marine terminal agreements involving construction of facilities or structures of less than 50,000 square feet, contending that the exclusion should not be restricted by a 50,000 square foot threshold.

Instead, the Port suggests that the rule simply exempt *all* marine terminal agreements from General Order 45 because (1) most terminal agreements involve nothing more than terms of occupation and use of facilities rather than actual construction, and (2) section 547.4(c) of General Order 45 already gives the Commission the flexibility to assess actions otherwise excluded when it believes such actions offer a reasonable potential of having a significant environmental impact. N.Y.-N.J. and MPA also suggested broader exclusions of marine terminal agreements than were provided by the proposed rule. The Commission agrees, and has therefore excluded all marine terminal agreements from environmental analysis in its final rule [section 547.4(a)(30)]. It has been the Commission's experience that virtually all agreements concerning marine terminal facilities have no significant impact on the quality of the human environment. However, the Commission's Office of Energy and Environmental Impact (OEEI) will continue to review all terminal agreements. When the OEEI identifies an action involving substantial levels of construction, dredging, land-fill, energy usage and other activities which may have significant environmental effects, it will prepare an environmental impact analysis pursuant to section 547.4(c).

Sea-Land also suggested that the scope of the proposed rule be expanded to categorically exclude general rate increases as defined in the Intercoastal Shipping Act, 1933 (46 U.S.C. 843). Since rate increases were not discussed in the proposed rule as published in the *Federal Register*, they cannot be considered in the final rule.

The EPA suggested that section 547.4(a) of the proposed rule be modified to give the Commission authority to complete environmental assessments on unusual actions before it, usually excluded under new section 547.4(a)(30), that could have a significant environmental impact. The change proposed by EPA was not incorporated into the final rule. Section 547.4(c) of the original rule (46 C.F.R. 547) already provides a mechanism for initiating assessments on Commission actions that would routinely be categorically excluded from analysis when the actions appear to have a reasonable potential for significant environmental impact. Expanding the final rule to emphasize this point would be redundant.

Pursuant to 5 U.S.C. 603, the Commission examined the impact the proposed rule might have on small businesses, organizations and/or governmental jurisdictions; *i.e.*, "small entities" as described in section 601 of the Regulatory Flexibility Act, P.L. 96-354, 94 Stat. 1164. This rule will not impose additional reporting or record-keeping requirements which might result in a significant compliance or reporting burden on small entities. On the contrary, it will add six new classes of Commission actions which will be excluded from environmental assessment, thereby reducing reporting requirements of all businesses subject

to it. Accordingly, neither a full regulatory evaluation nor a regulatory impact analysis is required.

Therefore, pursuant to section 4 of the Administrative Procedure Act (5 U.S.C. 533) and section 43 of the Shipping Act, 1916 [46 U.S.C. 841 (a)], Part 547 Title 46, Code of Federal Regulations, is amended as follows:

1. The last sentence of section 547.4(a) is amended to read, "The following Commission actions, and rulemakings related thereto, are therefore excluded:";

2. Section 547.4(a)(3) is amended to read, "Certification of financial responsibility for water pollution cleanup pursuant to 46 C.F.R. parts 542, 543 and 544";

3. Section 547.4(a)(12) is amended to read, "Consideration of exclusive or non-exclusive equipment interchange or husbanding agreements filed for section 15 approval";

4. Present section 547.4(a)(18) is deleted and replaced with a new section 547.4(a)(18) which reads, "Consideration of actions solely affecting the environment of a foreign country";

5. The following new subparagraphs are added to section 547.4(a):

(30) Consideration of all agreements involving marine terminal facilities and/or services except those requiring substantial levels of construction, dredging, land-fill, energy usage and other activities which may have a significant environmental effect;

(31) Consideration of agreements regulating employee wages, hours of work, working conditions or labor exchanges;

(32) Consideration of general agency agreements involving ministerial duties of a common carrier such as internal management, cargo solicitation, booking of cargo, or preparation of documents;

(33) Consideration of agreements pertaining to credit rules;

(34) Consideration of agreements involving performance bonds to a conference from a conference member guaranteeing compliance by the member with the rules and regulations of the conference; and

(35) Consideration of agreements between members of two or more conferences or other rate-fixing agreements to discuss and agree upon common self-policing systems or cargo inspection services.

By the Commission.

(S) FRANCIS C. HURNEY
Secretary

FEDERAL MARITIME COMMISSION

DOCKET NO. 80-50
CERTIFIED CORPORATION AND SEAWAY
DISTRIBUTION CORPORATION POSSIBLE VIOLATION
OF SECTION 16, INITIAL PARAGRAPH

ORDER OF PARTIAL ADOPTION

January 21, 1982

This proceeding was instituted by Order of Investigation and Hearing served August 1, 1980 to determine whether Certified Corporation and Seaway Distribution Corporation (Seaway) violated section 16, initial paragraph, of the Shipping Act, 1916 (46 U.S.C. 815) by knowingly and willfully misdeclaring the contents and/or weight or cube of four shipments and, if so, whether penalties should be assessed for such violations.¹ Administrative Law Judge Paul J. Fitzpatrick issued an Initial Decision in which he found that Seaway had violated section 16, initial paragraph, of the Act, and that penalties in the amount of \$20,000 should be assessed. Seaway filed Exceptions to the Initial Decision to which the Commission's Bureau of Hearings and Field Operations (Hearing Counsel) filed a Reply.

DISCUSSION

The issues before the Commission on Exception are whether stipulated violations on the four shipments at issue are time-barred under section 32(e) of the Shipping Act for the purpose of assessing civil penalties,² and if not, whether the \$20,000 penalty assessed by the Presiding Officer is excessive.

Jurisdiction

The issue of whether the violations in question are time-barred necessarily turns on when those violations are deemed to have occurred.

Seaway maintains that the Presiding Officer erred in finding that the violations of section 16, initial paragraph, occurred upon payment of the freight charges and urges the Commission to reverse the Initial

¹ Although Certified Corporation, which wholly owns Seaway, is named in the style of the case, it was not involved in the subject shipments.

² Section 32(e) empowers the Commission to assess civil penalties provided "a formal proceeding under section 22 of this Act shall be commenced within five years from the date the violation occurred." 46 U.S.C. 831(e). This proceeding was instituted on August 1, 1980. According to the joint stipulation, the four shipments were tendered to the carrier on or before July 31, 1975. Freight charges were paid on September 17 and 24, 1975.

Decision. Seaway contends that the payment of freight charges is not an element of a violation of section 16, initial paragraph, and may not therefore serve as the basis for computing the five-year statute of limitations period. The alleged offense is argued to have been completed upon tender of the cargo to the carrier with false documentation. Seaway submits that nothing more was needed to constitute an offense, and that therefore the time of occurrence of the violation for section 32(e) purposes is the time of tender of the cargo for shipment.³

Hearing Counsel takes the position that Seaway's violation of section 16, initial paragraph, in its capacity as a consignee, did not occur until the payment of the freight charges.

While the tender of the misdescribed cargo by the terminal managers constitutes a violation of section 16, initial paragraph,⁴ the transaction did not end there. By paying charges assessed on the basis of its agents fraudulent misrepresentations, Seaway ultimately obtained transportation at less than the applicable charges. Thus, while Seaway's liability for the acts of its employees arose upon tender of the cargo, the determination of when the violation occurred for purposes of section 32(e) must take into account the last act performed in violation of the statute. The Presiding Officer therefore properly concluded that, in this instance, Seaway's violations of the Act occurred upon payment of the ocean freight at less than the applicable rates.

Penalty

Seaway maintains that in view of the explicit reference in the Initial Decision to 56 misrated shipments, the assessment of the maximum penalty of \$20,000 premised on a total of 56 shipments and not on the four shipments described in the Commission Order of Investigation and Hearing is excessive and was intended to penalize Seaway for violations which were not the subject of this proceeding. Such assessment, Seaway contends, amounts to an abuse of discretion and is contrary to the Commission's policy of assessing penalties at some fraction of the maximum assessable penalty.⁵

³ The federal court cases cited by the parties in support of their respective positions, *Davis v. United States*, 104 F. 131 (6th Cir. 1900); *In re Belknaps*, 96 F. 614 (D.Ky. 1899) and *United States v. Union Manufacturing Co.*, 240 U.S. 605 (1916), decided under section 10(3) of the Interstate Commerce Act (now 49 U.S.C. 11904(a), a provision similar to section 16, initial paragraph of the Shipping Act) present dissimilar factual situations and do not directly address the issue presented here.

⁴ Seaway erroneously states that the Initial Decision is incorrect in finding that the actions of Seaway's terminal managers could not be imputed to Seaway in Hawaii until a reasonable amount of time had passed for Seaway to review the work product of its employees. The Presiding Officer, in fact, found that principle of agency law inapplicable under the factual circumstances of this case. In any event, the determination of when the violation occurred did not rest on agency principles.

⁵ Seaway also argues that the Commission should summarily reverse the Presiding Officer's assessment of a civil penalty on the basis that his finding of a lack of "any appreciable contrition" was premised on Seaway's challenge to the Commission's jurisdiction.

Hearing Counsel argues that the assessment of the \$20,000 penalty assessed by the Presiding Officer is appropriate under the circumstances and should be affirmed by the Commission particularly because the four shipments were among 56 shipments which Seaway admitted misrating. Hearing Counsel also observes that there is no indication that the penalty would cause financial hardship to Seaway, and points out that the Presiding Officer found no mitigating factor which would support the assessment of less than the maximum penalty.

Only four violations are involved here, the maximum statutory penalty for which is \$20,000. In determining the amount of the penalty ultimately assessed, the Commission takes into account the particular circumstances of each case, including any mitigating factor, as well as the policy underlying the assessment of penalties generally.⁶ The Commission finds that, in this case, the payment of the freight deficiency on one of the shipments, the relatively small amount of the underpayments,⁷ and the fact that Seaway has since ceased its activities as a non-vessel operating common carrier, warrant a reduction of the proposed penalty from \$20,000 to \$10,000.

All other arguments and contentions not specifically discussed have been carefully considered and found to be without merit.

THEREFORE, IT IS ORDERED, That, except as hereby modified, the Presiding Officer's decision issued in this proceeding is adopted by the Commission and made a part hereof; and

IT IS FURTHER ORDERED, That the Exceptions of Seaway Distribution Corporation are granted to the extent indicated above and denied in all other respects; and

IT IS FURTHER ORDERED, That Seaway Distribution Corporation is assessed penalties in the total amount of \$10,000 for four violations of section 16, initial paragraph, of the Shipping Act, 1916; and

IT IS FURTHER ORDERED, That Seaway Distribution Corporation shall contact the Bureau of Hearings and Field Operations within 20 days of the service of this Order to discuss the form and manner of payment of the civil penalty imposed by this Order; and

FINALLY, IT IS ORDERED, That this proceeding is discontinued.

By the Commission.

(S) FRANCIS C. HURNEY
Secretary

⁶ *Independent Ocean Freight Forwarder License No. 1778, Crescent Navigation, Inc., 24 F.M.C. 72, 94 (1981).*

⁷ Underpayments on the four shipments amounted to \$1,402.31 of which \$309.00 was remitted to the carrier.

FEDERAL MARITIME COMMISSION

DOCKET NO. 80-50

CERTIFIED CORPORATION

SEAWAY DISTRIBUTION CORPORATION

POSSIBLE VIOLATIONS OF SECTION 16, INITIAL PARAGRAPH

Claim that proceeding to assess civil penalties should be dismissed since Commission failed to satisfy condition of section 32(e) of the Shipping Act, 1916, in that it did not initiate proceeding within five years from the date of alleged violations of section 16, Initial Paragraph, denied.

Under the circumstances shown in this proceeding, cause of action does not arise solely at the time of tender of shipment and documents which knowingly and willfully misdeclare the contents therein.

Claim for dismissal of proceeding based upon alleged inordinate delay in the institution of the proceeding must fail absent showing of dilatory attitude on part of the Commission or its staff.

Respondents found to have knowingly and willfully violated section 16, Initial Paragraph, on four shipments. Penalty assessed at \$20,000.

Jacob P. Billig and Jeffrey F. Lawrence for Respondents.

C. D. Miller and John Robert Ewers for the Bureau of Investigation and Enforcement.

INITIAL DECISION ¹ OF PAUL J. FITZPATRICK ADMINISTRATIVE LAW JUDGE

Partially Adopted January 21, 1982

By its Order of Investigation and Hearing (Order) served August 1, 1980, the Commission instituted this proceeding in order to determine whether the Respondents violated section 16, Initial Paragraph, of the Shipping Act, 1916 (46 U.S.C. 815) by "knowingly and willfully misdeclaring the contents and/or the weight or cube" of four shipments (listed in the Appendix) "in order to obtain transportation at less than the applicable rate; and (2) whether penalties should be assessed against Respondents if they are found to have violated section 16, Initial Paragraph, and if so, the amount of such penalties; . . ."

The Order named Seaway Distribution Corporation (Seaway), a non-vessel operating common carrier in the trade to Hawaii from the U.S. West Coast, and Certified Corporation (Certified), a wholesale distributor of grocery products in Hawaii, which wholly owns Seaway, as

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

Respondents. Seaway was formerly known as Transway Corporation (Transway), and the change of name in 1978 was accomplished without any variation to the existing ownership or corporate identity.² The Order also recites that an investigation conducted by Commission's "Bureau of Enforcement" (Bureau or BIE) indicates that between December 1, 1974, and August 5, 1975, Seaway had tendered a total of sixty-five shipments to itself in Hawaii which appear to have been knowingly misdeclared. Also, between March 4, 1975, and July 15, 1975, Seaway, as an agent for Certified, tendered five shipments to Matson Navigation Company which appear to have been misdeclared. Of the sixty-five shipments, the Order states, "[t]he statute of limitations has run on 61 of these shipments." As to the latter five shipments, the Commission also observes, "[h]owever, the statute of limitations has run on all shipments." Thus, the number of shipments subject to the investigation is four and appear in the Appendix of the Order as follows:

B/L No.	Date
615429	8/4/75
615423	8/4/75
519426	8/2/75
519427	8/2/75

The Bureau and Respondent Seaway entered into a stipulation of facts in order to resolve outstanding factual issues and present the "sole outstanding issue remaining between the parties, namely, whether enforcement action by the Commission regarding the four remaining shipments is also time-barred under the statute of limitations." In addition to the stipulation, the parties filed simultaneous opening and reply briefs principally addressing the statute of limitations issue.

JOINT STIPULATION OF FACTS ³

A. THE CORPORATE STRUCTURE OF TRANSWAY/SEAWAY

1. Seaway Distribution Corporation (formerly Transway Corporation), which is wholly owned by Certified Corporation, was a non-

² During the period relating to the shipments involved in this proceeding, the corporate name was Transway. The present name (Seaway) and Transway are used interchangeably throughout this decision.

³ According to the terms of the joint stipulation and for the purpose of reaching the statute of limitations issue, the parties did not contest certain factual showings presented in the stipulation. In that respect, the stipulation provides:

Seaway will not contest BIE's position that available documentation supports a finding that Seaway misdescribed the four subject shipments. Seaway will not contest this position for several reasons: First, Seaway personnel who were directly involved in the subject shipment are no longer employed by Seaway and, because of the passage of over five years since the subject shipments took place, such personnel no longer have any actual recollection of the events surrounding these shipments. Second, virtually all documents that are available existed

Continued

vessel operating common carrier (NVOCC) in the U.S. West Coast/Hawaii trade. The corporate headquarters of Transway Corporation was located in Honolulu, Hawaii, during the period of the shipments enumerated in the Commission's Order of Investigation and Hearing.

2. The change of name from Transway Corporation to Seaway Distribution Corporation, which occurred in 1978, signifies no change in ownership or identity, but is solely a change in name. In 1980, Seaway's customer lists, goodwill and accounts were sold to a third party not related to Seaway or Certified. Seaway is no longer engaged in activity as an NVOCC. Respondent's present name (Seaway) and its former name (Transway) will hereinafter be used interchangeably.

3. George Madden was employed by Transway from approximately 1971 to November 1977 and was Vice President during the period of the shipments enumerated in the Commission's Order of Investigation and Hearing. Mr. Madden's current business address is 511 Kawaihoni Street, Hilo, Hawaii.

4. Jerome J. Wolf was employed by Transway from approximately 1974 to November 1976 and was California District Manager during the period of the shipments enumerated in the Commission's Order of Investigation and Hearing. Mr. Wolf's last known address was American Pacific Container Lines, Ampac Corp., Los Angeles, California.

5. David Samson was employed by Transway Corporation as terminal manager at the Oakland facility from January 25, 1975, to October 25, 1975. Mr. Samson's current home address is 1246 Marionda Way, Pinole, California.

6. Phillip Harris was employed by Transway and its successor Seaway from 1973 to 1980. He was Los Angeles terminal manager during the period of the shipments enumerated in the Commission's Order of Investigation and Hearing. Mr. Harris' last known business address is Seaway Dist. Cor., 4423 Hawthorne Avenue, Vernon, California.

solely within the files of BIE as a result of the 1975-1977 BIE investigation of Seaway. Finally, it would be economically prohibitive for Seaway to defend itself in any oral hearing in this matter. Expenditures of the magnitude which would be required for this purpose would be especially unjustifiable since, as stated below, Seaway has sold its NVOCC operation and is no longer engaged in such activities.

Likewise, for purposes of resolving the factual issues in this proceeding, BIE will not contest Seaway's factual showing reflected herein (see paragraphs 12-14) that available documentation and Matson's policies regarding the timing of tender to it of shipments, support a finding that the subject shipments were all tendered to and received by Matson on or before July 31, 1975. It was Matson's general policy to employ a truck company for Store-Door service and pick up containers during business hours at least twenty-four hours prior to the time the vessel sailed. Applying this policy, all four shipments would have been picked up prior to July 31, 1975. BIE does not possess any documents which would indicate that Matson's general practice was not followed in the case of the four subject shipments.

The parties have also stipulated to the authenticity of the copies of documents attached hereto and have agreed that such documents may be admitted into the record without the formalities of proof and tender of originals.

7. Sharla Buffet was employed by Transway Corporation from October 28, 1975, to June 9, 1978. Ms. Buffet's current business address is CPM & F Express Inc., 285 Sand Island Access Road, Honolulu, Hawaii.

B. TRANSWAY'S METHOD OF OPERATION

8. David Samson's responsibilities as Oakland terminal manager included preparation and supervision of the preparation of profit and loss statements for the Oakland facility and the dock receipts for each container Transway shipped. Mr. Samson was compensated by Seaway solely on a salary basis and not on the basis of the profit/loss statement prepared by him.

9. Phillip Harris' responsibilities as Los Angeles terminal manager included preparation and supervision of the preparation of profit and loss statements for the Los Angeles facility and the dock receipts for each container Transway shipped. Mr. Harris was compensated by Seaway solely on a salary basis and not on the basis of the profit/loss statement prepared by him.

10. It was generally the practice of Transway personnel to prepare the container manifest from the inland bill of lading or shipper's description accompanying the goods received for carriage. The container manifest shows Transway's container number, the shipper and consignee, the goods shipped, their weight and cube and the number of pieces. Transway personnel also prepared a dock receipt. Finally, a profit/loss statement for each shipment was prepared by or under the supervision of the Transway terminal manager using the carrier's tariff. The profit/loss statement shows ocean charges, stuffing charges, gross revenue and the resultant profit/loss. (See Attachments B & C.)⁴

11. After tender of a container to the carrier, the manifest, dock receipt, and profit/loss statement pertaining to that particular shipment were sent by air courier to Transway's main office in Honolulu.

12. The documents were normally sent by the California Transway offices to Honolulu either the same day or the next business day after the container was picked up by the Matson trucker and were received in Honolulu on either the very same day they were sent (due to the time difference between the West Coast and Hawaii) or the next business day after being sent. The documents were never sent prior to the pickup of a container by the carrier.

⁴ Throughout the joint stipulation there are numbered paragraph references to the Attachments provided. Since the parties have chosen to present the stipulation in this fashion and rely upon the exact numbered paragraphs in their argument on brief, the stipulation is set forth herein in the form offered by the parties. The joint stipulation and the Attachments A-OO will be received in evidence as Exhibit No. 1.

13. In Honolulu the handwritten Seaway manifest was typed up by office personnel, and the date of receipt of the document in Honolulu was typed in on the upper left-hand corner of the page.

14. It was Transway's normal practice for the date of pickup of the container to be inserted in the space for "Sailing Date" on the typed Seaway manifest.

15. Mr. Madden had personnel who audited the documents sent to him by his managers in California. Mr. Wolf confirmed the existence of an audit system. Neither District Director Nordgren nor the FMC staff visited the Honolulu office of Transway to verify the extent of the auditing system, whether or not the auditing system ever truly functioned, and whether or not the four subject shipments were ever audited.

16. Attachment D is a true copy of a letter dated January 15, 1975, which was sent by Mr. Wolf to Mr. Harris and Mr. Samson regarding a company policy against misdescribing freight.

17. Seaway has a policy of retaining documents for a period of three years after the shipment has moved.

18. Unless a matter is under active consideration by the carrier and/or Seaway, Seaway will not retain shipping documents for the purposes of adjustment of undercharges. The shipping documents are also no longer in the possession of Matson or its truckers.

C. SHIPMENTS 615429, 615423, 519426, 519427

19. Shipments 615429, 615423, 519426, 519427 were transported by Matson Navigation Company. Attachments E through O are portions of Matson's Tariff (F.M.C. - F. No. 153) which are on file with the Commission.

20. For all four shipments Matson provided "store-door" service, that is the containers were picked up and taken to the pier by a Matson trucker.

21. It was Matson's general policy to employ a truck company for store-door service and pick up containers during business hours at least twenty-four hours prior to the time the vessel sailed.

22. Since the typed Transway manifest all indicate pickup of the shipments from Transway's California offices on or before July 31, 1975 (see paragraph 14), and in light of Matson's policy regarding the tender of shipments (see paragraphs 20-21), all four shipments would have been tendered to and received by Matson on or before July 31, 1975.

23. Vessel sailing times and numbers identifying the subject shipments are as follows:

Shipment No.	Container No.	Vessel/ Voyage No.	Port of Loading	Sailing Date	Sailing Time
615429	50025	Queen 162	Oakland	7/30/75	2250 hrs.
615423	17354	Lurline 59	Oakland	8/2/75	0025 hrs.
519426	50018	Progress 109	Los Angeles	8/2/75	0450 hrs.
519427	202326	Progress 109	Los Angeles	8/2/75	0450 hrs.

24. The dock receipts for each shipment were prepared by Seaway personnel who retained the "shippers (carbon) copy" of the dock receipt form. Other copies of the form were tendered to Matson with the shipments.

25. Attachment P is a true copy of the shipper's carbon copy of the dock receipt for shipment No. 519426, which was prepared in the Los Angeles office of Transway.

26. Attachment Q is a true copy of the shipper's carbon copy of the dock receipt for shipment No. 615423, which was prepared in the Oakland office of Transway.

27. Attachment R is a true copy of the shipper's carbon copy of the dock receipt for shipment No. 615429, which was prepared in the Oakland office of Transway.

28. Attachment S is a true copy of the shipper's carbon copy of the dock receipt for shipment No. 519427, which was prepared in the Los Angeles office of Transway Corporation.

Paragraph 29 is intentionally omitted.⁵

30. The Matson Audit File Copy (Form F-208-G) (Attachments H through K) is not prepared by the shipper nor is it tendered to Matson with the shipment. It is prepared by Matson after tender of the shipment on the basis of information appearing on the Dock Receipt which is tendered with the shipment. The date appearing thereon is the date on which the information was processed in the Matson computer and on which the document was produced. Copies of Form F-208-G are sent only to Matson's San Francisco and Honolulu offices for audit purposes, although photocopies are available to shippers upon request.

31. Normally, at the time the Audit File Copy is issued by the Matson computer billing system, separate forms entitled Bill of Lading (Form 208C) and Notice of Arrival (Form F-208-E) are also issued containing essentially the same information as the Audit File Copy. The

⁵ See fn. 4. *supra*.

parties have no knowledge of the existence of either Form 208E or Form 208C with respect to the four subject shipments.

32. Attachment T is a true copy of the Matson Audit File Copy for shipment No. 519426, which was prepared by Matson Navigation Company from the dock receipt.

33. Attachment U is a true copy of the Matson Audit File Copy for shipment No. 615423, which was prepared by Matson from the dock receipt.

34. Attachment V is a true copy of the Matson Audit File Copy for shipment No. 519427, which was prepared by Matson from the dock receipt.

35. Attachment W is a true copy of the Matson Audit File Copy for shipment No. 615429, which was prepared by Matson from the dock receipt.

36. Although the dock receipt and Audit File Copy were prepared in multiple copies, the only copies of the Audit File Copy and the dock receipt which were not destroyed are those attached hereto.

37. Attachment X is a true copy of the manifest for shipment No. 615429, which was typed in the Honolulu office of Transway from the container manifest prepared in the Oakland office of Transway.

38. Attachment Y is a true copy of the manifest for shipment No. 519426, which was typed in the Honolulu office of Transway from the container manifest prepared in the Los Angeles office of Transway.

39. Attachment Z is a true copy of the manifest for shipment No. 519427, which was typed in the Honolulu office of Transway from the container manifest prepared in the Los Angeles office of Transway.

40. Attachment AA is a true copy of the manifest for shipment No. 615423, which was typed in the Honolulu office of Transway from the container manifest prepared in the Oakland office of Transway.

41. Phillip Harris was responsible for the preparation of dock receipt 519427 for container UFCU 202326, *Progress* Voyage 109, describing the cargo therein. Comparison of the dock receipt with the container manifest shows the following inconsistency of contents and/or weight and cube:

The dock receipt declared cleaning compound (Item 495) weight 43,082 but the container manifest showed the commodity as compressed gas and cleaning compound with total weight of 43,082 lbs. and 1,060 cubic feet.

42. Phillip Harris was responsible for the preparation of dock receipt 519426 for container 50018, *Progress* Voyage 109. Comparison of the dock receipt with the container manifest shows the following inconsistencies of contents and/or weight and cube:

a. "Candy" was described on the dock receipt as being 2,385 lbs. in weight; however, the container manifest showed one

shipment alone from "Empire Terminal" to "A. C. Lyau" as 2,600 lbs.

b. Several other items labeled "candy" were noted on the manifest but were not included on the dock receipt.

43. David Samson was responsible for the preparation of dock receipt 615429 for container 50025, *Queen Voyage* 162, describing the cargo therein. Comparison of the dock receipt with the container manifest shows the following inconsistency of contents and/or weight and cube:

The dock receipt describes the cargo as "FAK Item 3000 weight 43,983." The container manifest shows that the weight of one of the commodities, "liquor" weight 27,118 lbs. 722 CFT, is more than 50% of 43,983 lbs. which disqualifies the container for FAK rate. (A container must consist of five or more commodities with no one commodity weighing more than 50% of the total shipment weight. Note 2 of Item 3000.)

44. David Samson was responsible for the preparation of dock receipt 615423 for container 17354, *Lurline Voyage* 59, describing the cargo therein. Comparison of the dock receipt with the container manifest, which is prepared by Transway, shows the following inconsistencies of contents and/or weight and cube:

a. Champagne was declared on dock receipt as 17,000 lbs. vs. 17,600 shown on the container manifest,

b. Iron pipe (11 CFT and 80 lbs.) was not declared on the dock receipt but was shown on the container manifest,

c. Burned rock (Item 375, 14,000 lbs. and 363 CFT) is shown on dock receipt but the container manifest reflects 14,000 lbs. of stone shipped as Stucco Stone,

d. Cargo NOS Item 5 was declared as 59 CFT on the dock receipt but shown on the container manifest as 223 CFT, furthermore, if stone is added to the list of commodities moving pursuant to cargo NOS, the total cube of cargo should be 586 (223 + 363).

45. The parties have no knowledge of any visual inspection of the goods comprising the shipments enumerated in the Commission's Order of Investigation and Hearing.

46. The ocean freight for the shipments enumerated in the Commission's Order of Investigation and Hearing was paid by Transway's Honolulu office as the consignee.

47. Mr. Madden's office had a copy of all pertinent documents relating to shipments 615429, 615423, 519426, and 519427 at the time Transway made payment to Matson on September 17, 1975, and September 24, 1975.

48. The total freight paid by Transway to Matson on September 17, 1975, for shipment 519426 was \$907.69, an amount \$464.98 less than the Matson related figure. (See Attachments BB and CC.)

49. The total freight paid by Transway Corporation to Matson on September 17, 1975, for shipment 519427 was \$814.25, an amount \$310.72 less than the Matson rerated figure. (See Attachments DD and EE.)

50. The total freight paid Transway to Matson on September 24, 1975, for shipment 615429 was \$1,019.00, an amount \$300.09 less than the Matson rerated figure. (See Attachments FF and GG.)

51. The total freight paid by Transway to Matson on September 17, 1975, for shipment 615423 was \$952.39, an amount \$326.52 less than the Matson rerated figure. (See Attachments FF and HH.)

D. FINDINGS OF FEDERAL MARITIME COMMISSION INVESTIGATION

52. On May 28, 1975, the Federal Maritime Commission sent Transway a Notice of Claim for Civil Penalty based on alleged misdescriptions of cargo which were believed to have occurred between June 13, 1973, and May 14, 1974. On October 15, 1975, a \$9,000 settlement was reached and approved by the FMC's General Counsel. It was expressly agreed that the settlement was ". . . not to be construed as an admission of guilt by undersigned respondents to the alleged violations."

53. District Director (D. D.) Leonard J. Nordgren would, if on the witness stand in this case, testify under oath to the following facts:

a. David Samson was first contacted in connection with the subject shipments on September 10, 1975. On that date, Mr. Samson admitted that he had been systematically misdeclaring shipments to Matson for the past three to four months. He said this was done without the knowledge of Mr. Wolf or Mr. Madden. He stated it was done to hold expenses down and improve the profit and loss figures he submitted to Mr. Madden.

b. Eleven files pertaining to June shipments were examined. Eight appeared to have misdescribed (five Transway and three Certified shipments). Copies were made of the container load manifest prepared by Transway, Matson's dock receipt and the profit/loss statement on each shipment. From these a handwritten list of the goods in each container was made and presented on September 11, 1975, to Thomas Fitzgerald, Manager, Revenue Accounting, of Matson for rating against the tariff. Copies of pertinent Matson bills of lading were also requested at this time. It was found that all five of the Transways shipments had been misdeclared and two of the three Certified. Samson admitted these misdescriptions when confronted with them on September 15, 1975.

c. On September 15, 1975, a similar review was undertaken of shipment files for January 1975. Forty-two files were examined and eight were copied for further review. Six were found

by Matson to have been misdeclared. Mr. Samson made a similar admission on September 15, 1975.

d. On September 17, 1975, nine files were reviewed on July shipments, and all nine were noted as being suspect. Re-ratings by Matson confirmed the misdescription. Again, Mr. Samson admitted misdescribing these shipments.

e. On September 22, 1975, twenty-six files on shipments moved in April were seen. Ten appeared to be suspect, and it was later confirmed through re-rating that seven had been misdeclared. Two others were misdeclared but caught by Matson and rated correctly. They were not cited in the investigative report.

f. Subsequent to September 30, 1975, and prior to October 6, 1975, Mr. Madden was called by D. D. Nordgren at his Honolulu office and advised that a number of Oakland shipments had been misdeclared to Matson Navigation Co., in apparent violation of the law. He was advised that D. D. Nordgren was prepared to meet in San Francisco or Oakland with him or his General Manager on the matter. On October 8, 1975, the results of the audit were reviewed at Transway's facility in Oakland with Mr. Wolf. Mr. Wolf agreed to review the cited files. He volunteered that he would redeclare them to Matson and pay the underfreightment. (See Attachment II.)

54. In a letter dated September 10, 1976 (see Attachment JJ), Jerome Wolf presented D. D. Leonard J. Nordgren the findings of an audit of Los Angeles containers for the period of 1974/1975. In the letter Mr. Wolf acknowledged \$2,202.04 in underfreightments without any indication as to whether the misdescriptions were accidental or intentional.

55. In a letter to Mr. Madden dated June 7, 1977 (see Attachment KK), D. D. Leonard J. Nordgren indicated that the FMC investigation revealed \$11,176.28 in underfreightments as compared to the \$2,202.04 figure proposed by Mr. Wolf. District Director Nordgren requested documents from Transway which would clarify that discrepancy.

56. In a letter dated June 13, 1977 (see Attachment LL), George Madden stated that if there were misdescriptions, such misdescriptions were errors and not intentional actions on the part of Transway.

57. In a letter dated June 30, 1977 (see Attachment MM), Sharla Buffet indicated that she reaudited the thirty-nine Los Angeles freight bills in question and acknowledged underfreightments of \$4,869.92.

58. The documents supporting Ms. Buffet's re-rating of the shipments in containers 50018 and UCFU 202326 are Attachments NN and OO respectively.

59. According to Matson's records, Matson has not received adjustment payments for the shipments enumerated in the Commission's Order of Investigation.

60. The file resulting from this investigation was referred to the Commission's Office of General Counsel on June 30, 1976. However, the investigation in Los Angeles was reopened on September 20, 1976, and was concluded on June 7, 1977. Seaway was notified of the Commission's claim for civil penalties on January 22, 1980, the date of the Commission's letter to Seaway giving notice of the claim.

SUMMARY OF THE EVIDENCE

Transway operated as an NVOCC in the trade from the U.S. West Coast to Hawaii with corporate headquarters in Honolulu, Hawaii, and terminal operations in Oakland and Los Angeles. Mr. George Madden, as Vice President in Honolulu, was primarily responsible for the corporate operations. Mr. Jerome Wolf, as the District Manager for California, was the supervisor over Mr. Samson, the Oakland terminal manager, and Mr. Phillip Harris, the Los Angeles manager.

The terminal manager's responsibilities included preparation and supervision of the preparation of shipping documents relating to shipments moving between California and Hawaii. These documents included a dock receipt, a container manifest and a profit and loss statement. The container manifest, a Transway internal document, was not turned over to the ocean carrier, Matson Navigation Company (Matson), in the case of the four shipments involved. The manifest was prepared by Transway from descriptions on the inland bill of lading or shipper description of the goods and discloses the container number, the shipper consignee, the goods shipped, their weight and cube and number of pieces. The four shipments moved under "store-door service," *i.e.*, they were picked up and tendered to Matson at the shipper's place of business as part of the through transportation service being provided. It was Matson's policy to have the containers picked up by its truckers during business hours at least twenty-four hours prior to the time the vessel sailed. At the time of tender, the dock receipt was tendered with a container load movement form or equivalent document. Rule 65 of Matson Tariff No. 14D (FMC-F No. 153) required the documents to contain "sufficient information to enable the carrier to completely prepare, rate and extend a bill of lading." The profit and loss statement, another internal Transway document, was prepared by or under the supervision of the terminal manager using the carrier's tariff and reflects the ocean carrier's charges, charges for stuffing the container, gross revenues and the resulting profit or loss.

Documents prepared by the California Transway offices were usually sent by air courier to its Honolulu office the same day or the next business day after the container was picked up by the Matson trucker. The container manifests show the following dates of receipt by Transway's Honolulu office:

B/L No.	Container No.	Received
615429	50025	August 1, 1975
615423	17354	August 4, 1975
519426	50018	July 31, 1975
519427	UFCU 202326	July 31, 1975

The ocean freight charges were paid by the Transway's Honolulu office, and the dock receipts for the four shipments were marked "Collect—Consignee to pay charges." The consignee was shown as "Transway Corporation, 320 B Waiakamilo, Honolulu," and the Transway California office was shown as shipper.

On June 15, 1975, approximately six months before the shipments, Mr. Wolf sent the following letter to Transway's California terminal managers:

SUBJECT: Descriptions of containers

It is against company policy and has always been Transway's policy that all Dock Receipt descriptions must meet all requirements of the Steamship Company's Tariff.

There cannot be any deviation. Actual weight, cube, and commodity must be shown.

If there is any questions as to these rules and regulations regarding the rating of the containers, you must contact me directly.

Any deviation from this policy will mean immediate dismissal.

Mr. Madden also had personnel who audited the documents sent to him by his managers in California. In Honolulu, the handwritten Seaway manifest was typed by office personnel, and the date of receipt of the document in Honolulu was typed on the upper left-hand corner of the page. And it was Transway's normal practice for the date of pickup of the container to be inserted in the space for "Sailing Date" on the typed Seaway manifest. The date in the space for "Sailing Date" on each of the manifests is July 31, 1975.

The Matson Audit File Copy (Form F-208-G) is neither prepared by the shipper nor tendered to Matson with the shipment. It is prepared by Matson after tender of the shipment on the basis of information appearing on the dock receipt tendered with the shipment. The date appearing thereon is the date on which the information was processed in the Matson computer and on which the document was produced. Copies are sent only to Matson's San Francisco and Honolulu offices for audit purposes, although photocopies are available to shippers upon request. Normally, at the time the Audit File Copy is issued by the Matson computer billing system, separate forms entitled Bill of Lading (Form 208C) and Notice of Arrival (Form F-208-E), containing essentially the same information as the Audit File Copy, are also issued. However, the

parties have no knowledge of the existence of either Form 208E or Form 208C with respect to the four shipments.

According to Respondents, the "bill of lading date" referred to in the Commission's Order represents the date Matson prepared its Audit File Copy, i.e., after the tender of the shipments, on the basis of information appearing on the dock receipt, thus it is the date upon which the shipping information was processed in the Matson computer and on which the document was produced and does not reflect the date of tender of any shipment.

It is the Bureau's position that available documentation supports a finding that Seaway had knowingly and willfully violated section 16 of the Act as to the four shipments under investigation. On brief, Respondents indicate that "because of the passage of time since the acts here at issue occurred and the financial burden that would have been involved in conducting an oral hearing, Respondents are not contesting the substance of BIE's allegations in this regard."

Since the Bureau recommends an assessment of the maximum penalty of \$20,000 here, a discussion—as presented by the Bureau and not contested on brief by Respondents—is warranted regarding the misdescription of the cargo involved in the shipments. Accordingly, the presentation by the Bureau will be set forth next in substantially the same form as presented.

The dock receipts prepared by Transway's California offices for the shipments seemingly contain numerous discrepancies when comparing the dock receipt, profit/loss statement or Audit File Copy with the container manifest.

The Commission's staff investigators compared dock receipt 519426, submitted by Transway (Los Angeles) to Matson as its declaration of cube and weight and a description of the commodities in container 50018 moving on the *Progress*, voyage 109, with the appropriate Transway container manifest and noted several discrepancies.

While "Candy" was described on the dock receipt as 2,385 lbs. in weight, one entry on the container manifest for candy alone, from "Empire Terminal" to "A.C. Lyau" was noted to be 2,600 lbs., heavier than the weight declared. Several other items labeled "Candy" were noted on the manifest which were not included on the dock receipt.

A copy of the manifest was submitted by the investigators to Matson which related the shipment. Matson grouped into "Cargo NOS" (Item 5) at a rate of \$.98 per CFT the following:

Commodity	Shipper	Consignee	Lbs.	Cube
Foodstuff	York Barbell	Taiyo Inc.	1,000	66
Foodstuff	El Molino Mills	Taiyo Inc.	3,986	229
Foodstuff	Arrowhead Mills	Vim D Vigor	9,978	447
Candy	"Tootsie Rool"(sic)	Certified Corp.	575	26
Candy	Ben Myerson Candy	Certified Corp.	400	16
Iron Fittings	Marden Susco	Wai Utilities	1,816	44
Iron Valves	Marden Susco	Wai Utilities	318	11
Candy	Nabisco	Yick Lung Candy	585	37
Toys	Mattel, Inc.	Sears Roebuck	389	69
TOTAL			19,045	945

Matson grouped into "Candy" (Item 110) at a rate of \$3.01 per 100 lbs. (cwt):

Manifest Commodity	Shipper	Consignee	Lbs.	Cube
Candy	Empire Terminal	A.C. Lyau	2,600	52
Candy	Hollywood Brands	Diamond Bakery	800	25
			3,400	77

Matson rated the 12,335 lbs. of "Foodstuff" from "Arrowhead Mills" to "Laiyo Inc." as "canned goods" (Item 115) at a rate of \$2.42 per cwt.

Matson rated the drayage on the 19,045 lbs. of cargo NOS with a deficient weight of 5,520 lbs. and gave a "Loading/Unloading allowance" on total weight of 31,380 at a rate of \$.05 per cwt.

	Cube	Weight		
Cargo NOS (Item 5)	945	19,045	\$.98/cft.	926.10
Drayage		19,045	\$.25/cwt.	47.61
Deficient		5,520	\$.25/cwt.	13.80
Candy (Item 110)		3,400	3.01/cwt.	102.24
Canned Good (Item 115)		12,335	2.42/cwt.	298.51
				1,388.36
Less Loading/Unloading Allowance: 31,380 X \$.05				15.69
				1,372.67
Difference: \$1,372.67 - 907.69 =				464.98

Transway has subsequently challenged this rerating and proposed the shipment be rated Freight, All Kinds (FAK) (Item 3000) for a freight deficit of only \$57.83. However, a single commodity took up well over 50 percent of the weight of the shipment, thus disqualifying it from the FAK rate.

Dock receipt 615423 prepared by Mr. Samson and submitted by Transway to Matson for rating purposes with container 17354, *Lurline*, Voyage 59, described the cargo contained therein as consisting of:

	Item	Cube (CFT)	Weight
Cargo Nos.	5	59	2,152
Envelopes	295		250
Printed Matter	365		235
Liquor, Nos	55		7,500
Burned Rock	375		14,000
Champange (sic)	60		17,000
TOTAL			41,737

The container manifest executed by Transway lists the cargo loaded into the container. A review of the manifest confirms the envelopes, printed matter, liquor, and champagne; however, champagne is shown as 17,600 lbs., as contrasted to 17,000 lbs. as declared.

Iron pipe (11 CFT and 80 lbs.) shown on the Transway manifest was not shown on the dock receipt. Had it been declared, it would have been rated pursuant to Item 415, which specifies a rate of \$2.41 per 100 lbs. for a total of \$1.93 for 80 lbs.

One of the remaining items was described by Mr. Samson as burned rock, Item 375, 14,000 lbs. and 363 CFT. The manifest does not show burned rock but reflects 14,000 lbs. of stone shipped as Stucco Stone. Item 375 in Matson's tariff 14-D, FMC-F No. 153, effective April 25, 1975, through date of shipment covers:

ROCK, bituminous, burned, crushed or ground, in packages.

LIMESTONE, ground calcium carbonate, in sacks.

Webster's New World Dictionary, College Edition, describes bituminous as being either mineral pitch or any of several hard or semi-solid materials obtained as asphaltic residue in the distillation of coal tar. There is neither a specific rate for stone in the tariff nor a specific rate for stucco or stucco rock, and according to the Bureau, it should be rated as Cargo NOS.

The remaining items shown on the manifest should properly move under cargo NOS:

	WT	CFT
Syringes	1,550	165
Syringes	134	13
Syringes	80	8
Plastic Arts	unknown	13
Display materials	83	23
Cash register	125	1
TOTAL	1,972	223

Of the total of 223 CFT shown on the manifest, only 59 CFT was declared on the dock receipt. If stone is added to this list of commodities moving pursuant to Cargo NOS, the total cube of cargo moving should be 586 (223 + 363).

By describing stone as burned rock, Transway paid a rate of \$1.68 per 100 lbs. X 14,000 lbs. or \$235.20. The Bureau contends that since there is no specific rate for stone or stucco stone, as Cargo NOS it is properly rated at 98¢ per CFT times 363 CFT, or 355.74, a difference of \$120.54. And by omitting 527 CFT of Cargo NOS from the declaration, Transway obtained transportation at less than the applicable rate (527 CFT X 98¢). As a consequence, the total underfreightment amounted to \$292.04; however, due to various allowances, the champagne weight difference and the iron pipe, the final difference amounted to \$326.52 (\$1,278.52 - \$952.39).

The third dock receipt 615429, prepared by Mr. Samson and submitted by Transway to Matson for rating purposes with container 50025, *Queen Voyage 162*, described the cargo contained therein as "FAK Item 3000 Weight 43,983." Note 2 of Item 3000 requires that "each shipment of one or more containers must consist of five or more commodities with no one commodity weighing more than 50% of the total shipment weight. . . ."

Transway's manifest on this container reflects the first item listed as "Liquor," weight 27,118 lbs., measure 722 CFT, the shipper as Pearl Brewing, and Bevway Corp. as the consignee. Block 3 reflects another shipment of Liquor, 12,843 lbs., 373 CFT to Bevway from Hiram Walker.

The Bureau argues that even assuming the first shipment was beer (Item 50 in Matson's tariff), and the second Liquor, NOS (Item 55), the shipment still failed to meet the weight requirement for the FAK rate since 27,118 lbs. exceeds 50 percent of 43,983 lbs. And, rating the Transway manifest on shipment under the tariff results in \$1,319.09 as opposed to the FAK rate of \$1,019, resulting in Transway paying \$300.09 less through the misdescription of the cargo.

Finally, dock receipt 519427, submitted to Matson for rating purposes for container UFCU 202326, *Progress Voyage 109*, described the cargo as consisting of: cleaning compound (Item 495), weight 43,082. Transway's manifest reveals that the commodity was written as compressed gas and cleaning compound with total weight of 43,082 lbs. and 1,060 cubic feet. The weight and cube for each commodity was not given.

The Commission's investigators submitted the information to Matson, which rerated the compressed gas and cleaning compound as Cargo NOS for a total charge of \$1,124.97 as compared to the original total of \$814.25—a difference of \$310.72.

By way of summary, on September 17, 1975, Transway paid \$907.69 for shipment 519426, an amount \$464.98 less than Matson's subsequent

rerating. On the same date, it paid \$814.25 for shipment 519427, an amount \$310.72 less than the rerated figure. Similarly, it paid \$952.39 for shipment 615423, an amount \$326.52 less than the rerated figure. And on September 24, the amount paid for shipment 615429 was \$1,019.00, an amount \$300.09 less than the subsequent rerating by Matson.

DISCUSSION AND CONCLUSIONS

A crucial issue, the one that received the most attention on brief, was stated by Respondents as: Whether a cause of action under section 16, Initial Paragraph, arises at the time of tender of the shipment to the carrier by the consignor with shipping papers which knowingly and willfully misdeclare the contents thereof?

The opening paragraph of section 16 provides:

That it shall be unlawful for any shipper, consignor, consignee, forwarder, broker, or other person, or any officer, agent, or employee thereof, knowingly and willfully, directly or indirectly, by means of false billing, false classification, false weighing, false report of weight, or by any other unjust or unfair device or means *to obtain or attempt to obtain* transportation by water for property at less than the rates or charges which would otherwise be applicable. (Emphasis added.)

The August 1, 1980, Order instituting this investigation seeks to determine whether Respondents violated section 16 by knowingly and willfully misdeclaring the contents and/or weight or cube of four shipments in order to obtain transportation at less than the applicable rate; whether penalties should be assessed; and if so, the amount of such penalties. As to the imposition of any penalties, the Commission is authorized to assess civil penalties only if a formal proceeding instituted under section 22 of the Act is commenced within five years from the date when the violation occurred.⁶

Here the parties have stipulated that each of the four shipments under investigation, with all documents which allegedly misdescribed their contents, were tendered to the carrier (Matson) on or before July 31, 1975. The Respondents argue that since the alleged violations occurred on or prior to the commencement of this proceeding (August 1, 1980), the Commission is precluded from assessing any civil penalties under the five-year statute of limitations contained in section 32. The Bureau takes the position that the cause of action runs from the last act

⁶ Section 32(e) provides:

Notwithstanding any other provision of law, the Commission shall have authority to assess or compromise all civil penalties provided in this Act: *Provided, however,* That, in order to assess such penalties a formal proceeding under section 22 of this Act shall be commenced within five years from the date when the violation occurred.

necessary to constitute the claimed offense—in this case, the payment of the ocean freight charges in September 1975. Section 16 involves questions of fraudulent conduct and the Commission has not directly determined, as yet, the time when an act embracing a section 16 violation exists.

In order to buttress their contention that any offense under section 16 is committed at the time of tender of the shipment with documents misdeclaring their contents, Respondents rely heavily upon *Davis v. United States*, 104 Fed. Rep. 136 (6th cir. 1900). This case was brought under section 10(3) of the Interstate Commerce Act (March 2, 1889. c. 382, 25 Stat. 855) before its amendment of 1910.⁷ Before that amendment, the language of section 10(3) read as follows:

Any person and any officer or agent of any corporation or company who shall deliver property for transportation to any common carrier subject to the provisions of this act, or for whom, as consignor or consignee, any such carrier shall transport property, who shall knowingly and willfully, by false billing, false classification, false weighing, false representation of the contents of the package, or false report of weight, or by any other device or means, whether with or without the consent or connivance of the carrier, its agent or agents, obtain transportation for such property at less than the regular rates then established and in force on the line of transportation, shall be deemed guilty of fraud. . . .

The purpose of section 10(3) was similar to that of section 16 since both were enacted to protect against false billing, classification, weights or contents and fraudulent damage claims. In *Davis*, the government contended that the crime of misrepresenting the property tendered to a carrier was not complete at the time and place of tender in Ohio, but only when the requested transportation of the goods to the destination in Texas had been performed. Rejecting this contention, the *Davis* court held that it was not the transportation of the goods that was prohibited, but the act of obtaining transportation which marks the completion of the crime. In that respect, the court stated:

It is not the transportation of the goods which is prohibited and punished, but the obtaining of the transportation by means of false and fraudulent conduct which is the gist of the offense.

⁷ Public Law 95-473, an Act to "revise, codify and enact without substantive change the Interstate Commerce Act," was signed by President Carter on October 17, 1978. (92 Stat. 1337.) The new law constitutes a substantial revision and reorganization of the laws administered by the Interstate Commerce Commission. It repeals the Interstate Commerce Act (49 U.S.C. § 1 *et seq.*, § 301 *et seq.*, § 901 *et seq.*, and § 1001 *et seq.*) and certain related statutes. These laws have now been replaced by a new subtitle IV of title 49 of the United States Code, 49 U.S.C. § 10101 through § 11916. Section 10(3) is now designated at 49 U.S.C. 11904(a).

* * *

Ordinarily, a delivery to the carrier is a delivery to the consignee. Every act which the consignor can do about the goods, all representations which he can make concerning them, the weight and classification thereof, are complete, and the goods turned over to the carrier for the consignee. Then the crime has been accomplished which the statute seeks to punish, namely, obtaining by the shipper of transportation at rates which others in a similar business, who pay the regular rates, do not secure. p. 139.

Since the offense by the consignor under section 10(3) was carried out at the time of obtaining transportation, the court held that it was indictable in Ohio where the property had been tendered, and not in Texas where the transportation services had been completed upon delivery of the shipment to the consignee.

The Bureau, on the other hand, while recognizing the similarity between the language and purpose of the two statutes, points to an important variation. Under the earlier language of section 10(3), unlike section 16, the attempt to obtain transportation was not included as a separate offense. The statutory language "or attempt to obtain" was added to section 10(3) by the amended Interstate Commerce Act in 1910 (June 10, 1910, c. 309, 36 Stat. 549) and included in section 16 of the Act. Consequently, the court in *Davis* was not required to differentiate between the factors necessary to establish the "attempt" as opposed to the actual "obtaining" of transportation through fraudulent means. And this is not a distinction without merit. As the Bureau points out:

[T]he admitted rules of statutory construction declare that a legislature is presumed to have used no superfluous words. Courts are to accord a meaning, if possible, to every word in a statute. In *Commonwealth v. Alger* (7 Cush. (Mass.) 53-89), it was said that in putting a construction upon any statute every part must be regarded, and it must be so expounded, if practicable, as to give some effect to every part of it. So, in *People v. Burns* (5 Mich. 114). it was held that some meaning, if possible, must be given to every word in a statute, and that where a given construction would make a word redundant, it was reason for rejecting it. To the same effect is *Dearburn and Others v. Inhabitants of Brookline* (97 Mass. 466); and in *Gates v. Salmon* (35 Cal. 576) it was ruled that no words are to be treated as surplusage or as repetition.

Platt v. Union Pacific Railroad, 99 U.S. 48. 58-59 (1878).

In addition to the differences in the statutory language, the circumstances presented to the *Davis* court are dissimilar to those under consideration in this proceeding. The court, in addressing the "time of tender," commented:

Then the fraudulent conduct of the shipper has borne its fruit, and every act and intent which constitutes the offense is complete. p. 139.

Moreover, the Supreme Court in *United States v. Union Manufacturing Co.*, 240 U.S. 605 (1916), reached an opposite result where the consignee was the wrongdoer. In distinguishing *Davis* and a similar case, *In re Belknap*, 96 Fed. Rep. 614 (D.C. Ky. 1899), the Supreme Court stated:

These cases are not in point with the present. In each of them the fraud was that of the consignor. Here it is the consignee and its agent against whom fraud is charged. (The fact that the consignee was also the consignor is of no significance, since the fraud alleged was in what it did as consignee.) There the fraud inhered in the making of the contract of carriage; here it had to do with the liquidation of the amount payable for freight at destination. p. 609.

The Court also noted that *Davis* "arose under the [Interstate Commerce] Act as it stood before the amendment of 1910" and did not apply its decision, which was governed by the Act after the 1910 amendment, to the facts in *Davis*:

We are not called upon to either concede or question the propriety of this decision upon the facts that were there presented. General expressions contained in the opinion are of course to be interpreted in the light of those facts. *supra*.

In this proceeding, while the misrepresentations occurred prior to the transportation of the cargo, these same representations were made on behalf of the consignee—the party responsible for the payment of the ocean freight charges for the four shipments. The dock receipts reflect that the consignee was the party responsible for the payment. The distinction is that the benefit derived from the misdescription was accomplished at the time the consignee rendered payment of the freight charges. The factual presentation here differs from those under consideration by the courts and also relied upon by the Respondents. Those cases—by and large—were either decided prior to the amendment to section 10(3) in 1910 or presented considerations unlike those ultimately controlling the disposition of this proceeding.⁸ Clearly, the considered violation of section 16 here relates to the language employed in the statute, i.e., "to obtain transportation" and is not limited to the "attempt to obtain transportation" at rates or charges which would otherwise be applicable. Accordingly, it is found that the five-year statute of limitations contained in section 32 would apply from the date when the

⁸ For example, *In Re Belknap*, *supra*; *Armour Packing Co. v. United States*, 209 U.S. 56 (1908); *United States v. Saluloff Bros.*, 79 F. 2d 846 (2nd Cir. 1935).

violations occurred or, in this proceeding, it would be at the time of payment of the ocean freight charges in September 1975.

Respondents also presented numerous arguments in support of their position including the language used by the Commission in its Order and the claim that the "inordinate delay in the initiation of this proceeding" merits "dismissal" of the investigation.

As to the former, Respondents consider that the Commission recognized in its Order the date of tender as the controlling date in determining the period for the application of the statute of limitations. Respondents claim that the Order concludes that the statute had run on all but four shipments and cites each shipment by reference to the bill of lading dates—a date generally recognized in the industry as the date of tender of the goods by the shipper. As stated by the Respondents:

What the Commission apparently did not recognize in its August 1, 1980 Order, but which has now been recognized by the parties and stipulated by them, is that although the bill of lading is normally issued at the time of tender of the shipment, the carrier for the four shipments here involved, consistent with its tariff, relied upon a dock receipt, not a bill of lading, to evidence the tender of the shipments and for the provision to it by the shipper of all necessary information as to the content of the shipments required to prepare its billing documents.

As the parties have further stipulated, the "bill of lading" relied upon by the FMC in its August 1, 1980 Order was issued subsequent to the tender by Seaway to Matson of the shipment and accompanying documentation. Since, as noted, the "bill of lading dates" upon which the Commission relied are merely the dates of processing by the Matson computer of the Audit File Copy and not the date of tender of the shipment, these dates are not evidence of the time of tender of the goods, nor are they evidence of the time the contract for carriage was made. Obviously, they lack any legal significance and are not determinative of whether the Commission has issued its Order with respect to the four shipments in compliance with Section 32(e) of the Act. As shown, it is the date of tender of these shipments which constitutes the act subject to Section 16, rather than another subsequent date including the one capriciously assigned by the carrier's computer system. Since all four shipments were tendered to Matson with the accompanying dock receipts on or prior to July 31, 1975, the requirement of Section 32(e) that the proceeding be instituted within five years of the date of the alleged violation has obviously not been satisfied. The charges against Seaway must therefore be dismissed and this proceeding discontinued.

Initially, it should be observed that the Order itself does not provide an in-depth explanation as to why the Commission concluded that the

statute had run on certain shipments and not on others. The Order does recite that Seaway tendered "a total of 65 shipments destined to itself in Hawaii" "between December 1, 1974 and August 5, 1975" and that the statute "has run on 61 of these shipments." In short, the Order neither specifies the dates those shipments were tendered nor the Commission's rationale for concluding that the statute had run as to those shipments. Whatever constituted the underlying reasons for the Commission's determination to exclude certain shipments from this investigation, any inquiry here concerning those shipments obviously would be outside the province of this Judge who is guided by the issues set forth in the Order and the record presented by the parties. Furthermore, the Commission in *Unapproved Sect. 15 Agt.—Coal to Japan/Korea*, 7 FMC 295 (1962), has stated:

If the order [of investigation] was not as exact as it might have been, it is nevertheless to be remembered that it was an order for an administrative investigation and not a statement of charges in a penal action. It constituted adequate notice to the parties of the matters of fact and law under inquiry which is all that is required in this type of proceeding. p. 302.

Here, as the record developed by the parties reflects, the dates on which the ocean freight charges were paid were unknown at the time this proceeding was instituted and were obtained later from Matson. The failure of the Commission to reference the dates of payment as the determining factor in deciding which shipments were barred by the statute should not operate as a prohibition against the use of such a standard in assessing the violations presented here. What appears to be the case is that in instituting this proceeding, the Commission simply utilized the date appearing on the bills of lading and then provided the opportunity to the parties to develop the record and present their arguments for determination based upon that record. As the Bureau points out—"It would be strange indeed for the Commission to simply assume the date on the bill of lading (Audit File copy) was the date of delivery to the carrier. It would be stranger still if the Commission, without any discussion of its rationale contrary to its decision in *Hermann Ludwig*⁹ chose to use the date of delivery to the carrier in order to calculate when the statute of limitations began to run."

Respondents claim that the Commission waited until "the last possible moment to initiate this proceeding," thereby precluding any "meaningful opportunity" to factually refute the allegations presented. Respondents point to the discarding of documents in the normal course of

⁹ In *Hermann Ludwig, Inc. v. Waterman Steamship Corp.*, 20 F.M.C. 670 (1970), the Commission in deciding a proceeding under section 18(b)(3) stated ". . . either the date of delivery of the cargo to the carrier or the date of the on board bill of lading may properly serve as the start-up date for computing the 180-days statutory period of limitations." p. 671.

business and that employees have left Seaway's employ. They also point to the period of time which elapsed from when the Commission's staff first investigated the involved shipments in September 1975, less than two months after the shipments were made, the referral of the investigative file to Washington on June 30, 1976, and the institution of this proceeding more than four years after that date.

However, Respondents have failed to convincingly demonstrate how the passage of time involved here constitutes an unreasonable delay in a proceeding of this kind. "Absent proof of normal time necessary to dispose of a similar proceeding or of facts tending to show a dilatory attitude on the part of the Commission or its staff . . ." the defense of unreasonable delay is inadequate, *Federal Trade Commission v. Weingarten*, 336 F.2d 687, 691 (5th Cir. 1964), cert. denied, 380 U.S. 908 (1965) (where approximately three and one-half years was held not unreasonable).

Here the record reveals that despite repeated notifications that the Commission believed the shipments to have been misrouted, Respondents otherwise disposed of records pertaining to these shipments "in the normal course of business." Furthermore, although all of the Transway employees that could be expected to testify are no longer in the employ of Seaway, the joint stipulation discloses that all could be located. The test of the accuracy of memories of these witnesses would be based upon the individuals involved and the refreshing of their recollection, if any, as to the involved shipments. In other words, more is needed than the claim of diminution of memory of witnesses.¹⁰ Under these circumstances, Respondents have not demonstrated how the passage of time has seriously affected the presentation of their defense or resulted in any other specific identifiable harm. In the absence of proof of such injury, a defense of unreasonable delay has been disallowed because petitioner "failed completely to show how the Commission caused him prejudice by waiting [over six years from the time of the institution of the proceedings until issuing an order] to revoke his registration." See, *Irish v. Securities and Exchange Commission*, 367 F.2d 637, 639 (9th Cir., 1966).¹¹

Moreover, it bears emphasis that the timing of litigation is matter within the discretion of the Commission. "The matter of time with

¹⁰ See: *United States v. Fitzpatrick*, 437 F.2d 19 (2nd Cir., 1970); *United States v. Avalos*, 541 F.2d 1100, 1108 (5th Cir., 1976); *United States v. Mays*, 549 F.2d 670 (9th Cir., 1977); and *United States v. Villano*, 529 F.2d 1046 (10th Cir., 1976), cited by the Bureau.

¹¹ The Court of Appeals, Third Circuit, has disallowed a defense of unreasonable delay alleged against a federal agency, stating:

It is important to note that the delay of which [petitioner] complains did not prove prejudicial because of the mere passage of time or the occurrence of some independent circumstance. *Bucks County Cable T.V., Inc. v. United States*, 427 F.2d 438, 446 (1970).

See also *Buotte v. United States*, 350 F.2d 389, 394 (9th Cir., 1965).

regard to the issuance of a complaint [investigation] by an administrative body must necessarily be one of the matters within the discretion of that body." *Berkshire Employees Ass'n. v. National Labor Relations Board*, 121 F.2d 235, 237 (3d Cir., 1941). Cf. *Petroleum Exploration Commission, Inc. v. Public Service Commission*, 304 U.S. 209, 222 (1938).

Furthermore, the law is clear that the doctrine of laches or estoppel cannot be invoked against the Government acting in a sovereign capacity to protect the public interest.¹²

In addition to these arguments, the parties have devoted considerable discussion to Commission proceedings and court cases involving situations where the cause of action accrues at the time of payment. For instance, the Bureau points to *Louisville Cement Co. v. Interstate Commerce Commission*, 246 U.S. 638 (1918), where the Supreme Court held, in a reparation case for overcharges under the then section 16 of the Interstate Commerce Act (49 U.S.C. 16), a cause of action "not to have accrued until payment has been made of the unreasonable charges." (p. 644.) However, it is recognized in actions involving the seeking of reparations, damages is an essential element and one not necessary to a consideration in a proceeding such as this. The Bureau also seeks support in cases involving conspiracy and common law fraud but again a major consideration in such cases is the showing of damages as contrasted to this proceeding which seeks the possible assessment of a civil penalty based upon an actionable public wrong. This is not to say that any analogy fails to exist in viewing the considerations contained in some Commission proceedings.

The Bureau points out that in proceedings involving 18(b)(3) of the Shipping Act, the statute of limitations begins to run at the time of payment of the freight. Section 18(b)(3) is similar to section 16 since both prohibit the attempt as well as the completed act. In other words, a carrier may violate section 18(b)(3) by charging or demanding or collecting or receiving "greater or less compensation. . . ." And the carrier may demand the compensation and never receive it; however, once having demanded and received the compensation, the date of payment is used for statute of limitations purposes. *Hellenic Lines, Ltd.—Violation of Section 16, (First) and 17*, 7 F.M.C. 673 (1964). Also a carrier may violate section 18(b)(3) when the shipper obtains transportation at less than the applicable rate in violation of section 16. *Pacific Far East Line, Inc. v. Federal Maritime Commission*, 410 F.2d 257 (D.C. Cir., 1969); *Pacific Far East Lines—Alleged Rebates to Foremost Dairies, Inc., Connell Brothers Co., Ltd. and Advance Mill Supply Corp.*, 11 F.M.C. 357 (1968). Moreover, if the carrier pays a rebate, it violates both

¹² *Haight & Company, et al.*, 44 S.E.C. 481, 511 (1971); *Richard N. Cea*, 44 S.E.C. 8, 21 (1969); *Costello v. United States*, 365 U.S. 265, 281-284 (1961); *Guaranty Trust Co. v. United States*, 304 U.S. 126, 132 (1938).

18(b)(3) and section 16 Second, which prohibits carriers from allowing shippers to obtain transportation at less than the applicable rate by "false billing, false classification, false weighing, false report of weight or by any other unjust or unfair device or means." These principles lend support to the proposition that the time of the running of the statute should be followed in proceedings under either section of the Act.

Next the Bureau argues that Transway's failure to make a simple comparison of the shipping documents before making payment demonstrated that it was "plainly indifferent" to the requirements of section 16. The claim is that it was not the acts of the terminal managers in tendering the shipments to Matson that form the crux of obtaining transportation at less than otherwise applicable rates. Citing *Equality Plastics, Inc. and Leading Forwarders, Inc.—Possible Violations of Section 16, First Paragraph, Shipping Act, 1916*, 17 FMC 217 (1973); *Denial of Petition for Reconsideration, Equality Plastics*, No. 71-94, served May 16, 1974; and *Viking Importrade, Inc. and Bernard Lang & Co., Inc. Possible Violations of Section 16, First Paragraph, Shipping Act, 1916*, 18 FMC 1 (1974). To the Bureau, Transway was in possession of sufficient facts to raise a doubt as to the accuracy of the bills of lading description. And as the consignee responsible for paying the freight, Transway, unlike the customs brokers in *Viking* and *Equality Plastics*, had a duty to compare shipping documents in its possession.

It is true, as Respondents argue, that in neither *Viking* nor *Equality* did the Commission indicate that the Shipping Act is not violated until the occurrence of an act subsequent to the tender of the false bill. But what the Bureau is drawing attention to here is the clear failure on the part of Transway to adequately supervise the acts of its terminal operators, the notice that Transway had from the Commission of problems on alleged misdescriptions of cargo before the involved shipments, and the duty of Transway, under the circumstances, to review the documentation. Those are the acts subsequent to the tender present here and represent the type of transactions covered in the concern of the Commission in both proceedings.

The Bureau has also argued that, under the law of agency, the acts of Seaway's terminal managers would not be imputed to Seaway until it reviews the copies of their work product. The argument is that if the principal is charged with informing himself as to the acts of the agent through corporate records, and the agent must report his acts to the principal, a reasonable period of time must pass for this to occur before knowledge will be "imputed to the principal." Although Respondents and the Bureau present an abundance of citations in support of their respective positions, the issue is really resolved by a review of the factual considerations present here. Moreover, although certain principles of law can be excised from court and agency decisions, a fair

reading of those decisions relied upon ultimately are resolved under factual circumstances unlike those under consideration. In any event, as a starting point, this Commission has stated the principle controlling this proceeding, i.e., the principal is expected to exercise adequate supervision over the activities of the agent. *Hellenic Lines, Ltd.—Violation of Section 16 (First) and 17, supra.*

Transway's California terminal managers were responsible for the furnishing of copies of the container manifest and the profit/loss statement to Transway's corporate headquarters in Hawaii shortly after the shipments were tendered to the carrier. Transway had warned the managers not to misdescribe shipments under a threat of dismissal. By requiring the shipping documents from the managers, the corporate office had the means to insure that shipments were correctly described before paying the ocean freight. In so doing, Transway went beyond the simple warning to its agents which the Commission found ineffective in *Hellenic*.

The system Transway employed for ensuring that the documents were forwarded to the corporate headquarters prior to payment of the freight appeared sound. Thus, the terminal managers provided the corporate headquarters with all of the necessary documents relating to the four shipments. However, despite receiving the documents reflecting the cargo misdescriptions, the headquarters personnel failed to take any corrective action. The eventual payment of freight charges based upon the misdeclaration evidenced an endorsement by the principal of the acts of its agents. The obvious inference is that the corporate personnel condoned the misdescriptions evident on the face of the documents. On the other hand, if the Respondents' view was to prevail, Transway would be held to have violated section 16 only from the moment the managers tendered the shipments to Matson with the resulting effect of the running of the statute of limitations at that time. However, the Bureau correctly observes that "in a far flung industry such as the steamship industry one of the most effective means of policing the activities of agents which may be thousands of miles away, is by reviewing copies of their work product. In some cases it is the only effective means of control. Yet if the principal is guilty of a knowing and willful violation of the Shipping Act from the moment the agent acts, the incentive is removed for reviewing the agent's work. If the principal is already guilty there is no reason whatsoever to take corrective action. To the contrary, the principal has an incentive to conceal the acts of the agent." A review of this record clearly supports the view espoused by the Bureau over that of Respondents.

Section 16 imposes a civil penalty "of not more than \$5,000 for each offense." The Bureau urges that Seaway¹³ be assessed the maximum penalty on each of the four shipments for a total of \$20,000.

Although only four shipments are in issue, the joint stipulation indicates that they are among a total of fifty-six shipments Seaway admitted were misrated. The amounts involve a total of \$2,202.04 in underfreightments at Oakland and \$4,869.92 at Los Angeles. The record is silent as to whether these amounts were repaid; but, as to the four under investigation, Seaway has paid the corrected freight on only one shipment (#615429). As far as any possible mitigating circumstances, Respondents have indicated that "Seaway has sold its non-vessel operating common carrier operation and is no longer engaged in any such activities. In these circumstances, it would find it economically prohibitive to defend itself in any oral hearing on this matter."

This record fails to reflect a showing of any appreciable contrition or even a display of a good faith effort by Seaway to comply with the requirements of the Act. The record is also silent as to an accurate portrayal of the current financial circumstances of Seaway beyond the intimations of Respondents' counsel. But what does emerge from this record is that Seaway has profited from the activities engaged in for at least three of the four shipments. In my view, the regulatory purposes in assessing penalties here are served by imposing the maximum penalty on each shipment for a total of \$20,000.

ULTIMATE FINDINGS

Upon consideration of all the evidence of record, this Administrative Law Judge ultimately finds and concludes:

(1) That Respondent Seaway Distribution Corporation violated section 16, Initial Paragraph, by knowingly and willfully misdeclaring the contents and/or the weight or cube of four shipments in order to obtain transportation at less than the applicable rate; and

(2) Penalties in the amount of \$20,000 should be assessed against Respondent Seaway Distribution Corporation for the violations of section 16, Initial Paragraph.

(S) PAUL J. FITZPATRICK
Administrative Law Judge

¹³ No shipments by Certified are involved in this proceeding.

FEDERAL MARITIME COMMISSION

DOCKET NO. 79-68
MILITARY SEALIFT COMMAND,
DEPARTMENT OF THE NAVY

v.

MATSON NAVIGATION COMPANY, INC.

ORDER

January 26, 1982

This proceeding was instituted as a result of a complaint filed by the Military Sealift Command (MSC) against Matson Navigation Company (Matson), alleging that Matson charged and collected rates that were unjust and unreasonable in violation of section 18(a) of the Shipping Act, 1916 (46 U.S.C. § 817(a)) and requesting reparations therefor. The complaint relies on the Commission's findings in Docket No. 76-43—*Matson Navigation Company Proposed Rate Increases in the United States Pacific Coast/Hawaii Domestic Offshore Trade*, 21 F.M.C. 532 (1978) and 21 F.M.C. 987 (1979) (Order on Reconsideration).¹

The first cause of action alleged in the complaint seeks reparations in the approximate amount of \$59,000 resulting from the general increase in rates in effect from August 2, 1976 to July 31, 1977, found to be unjust and unreasonable in Docket No. 76-43. The second cause of action seeks reparations in the approximate amount of \$100,000 resulting from a subsequent general rate increase implemented on July 31, 1977, part of which included rates determined to be unlawful in Docket No. 76-43.

Matson filed an answer to the complaint denying that reparations are due MSC under either cause of action and asserting eight affirmative defenses. The Commission's Bureau of Hearings and Field Operations (Hearing Counsel) intervened in the proceeding.

¹ Docket No. 76-43 was a Commission-instituted investigation into the justness and reasonableness of a 3.5% general rate increase instituted by Matson in the U.S./Hawaii domestic offshore trade. In its Report and Order issued December 12, 1978, the Commission held that a portion of Matson's rate increase was unjust and unreasonable. In its Order on Reconsideration the Commission further held that: (1) because the rates found unreasonable were superseded by a subsequent general rate increase, the remedy available to shippers who paid the rates determined to be unreasonable was a cause of action for reparations under section 22 of the Shipping Act (46 U.S.C. § 821); and (2) the two year statute of limitations provided in section 22 ran from the date of the Commission's December 12 decision finding the rate increase unjust and unreasonable.

The legal issues raised by Matson's second, third, fourth, fifth, seventh and eighth affirmative defenses and MSC's second cause of action were severed from the proceeding and separately briefed and considered. On an appeal by MSC the Commission here reviews an order of Administrative Law Judge Seymour Glanzer dismissing MSC's second cause of action and sustaining Matson's fourth, seventh and eighth affirmative defenses. The Presiding Officer also dismissed Matson's fifth affirmative defense. Leave to appeal Judge Glanzer's decision was granted pursuant to Rule 153 of the Commission's Rules of Practice and Procedure (46 C.F.R. § 502.153). In addition to MSC's appeal, the Commission has before it replies of Matson and Hearing Counsel.

DISCUSSION

Upon consideration of the Presiding Officer's Order of May 13, 1981, the appeal of MSC and responses of Matson and Hearing Counsel, the Commission affirms and adopts the Presiding Officer's findings and conclusions as to Matson's eighth affirmative defense and MSC's second cause of action, and reverses his rulings as to Matson's fourth and seventh affirmative defenses. Each of these matters is addressed below in the sequence considered by the Presiding Officer's Order.²

I. *Matson's Seventh Affirmative Defense—The Statute of Limitations* A. *Presiding Officer's Ruling*

The Presiding Officer sustained Matson's seventh affirmative defense. Matson contends that the Commission lacks jurisdiction to entertain MSC's complaint insofar as it relates to freight charges paid on or before June 28, 1977 because of the two-year statute of limitations in section 22 of the Act. The Presiding Officer disagreed with the Commission's determination in Docket No. 76-43 that a cause of action for reparations accrued to shippers upon the date of the Commission's decision finding Matson's rates to be unjust and unreasonable. He held that any cause of action arose when the freight charges for each shipment were paid.

Further, the Presiding Officer ruled that Matson is not collaterally estopped from asserting the two-year limitation period. He described

² Matson's first affirmative defense, that MSC is not a real party in interest in this proceeding, and its sixth affirmative defense, that it is entitled to an offset for undercharges due it from MSC, were disposed of at the prehearing conference held in connection with this proceeding. These were, accordingly, not briefed and were not addressed by the Presiding Officer. Also not addressed in the Presiding Officer's Order were Matson's second and third affirmative defenses, which Matson abandoned during the course of the proceeding. Matson's second affirmative defense alleged that MSC's claim is in the nature of one for refund which the Commission lacks jurisdiction to award in this proceeding. Matson's third affirmative defense was that the Commission lacks jurisdiction to award reparations for the past unreasonableness of rates under section 18(a) of the Act. Finally, no party has appealed the Presiding Officer's dismissal of Matson's fifth affirmative defense, which contended that certain revenues included in Matson's rate of return in Docket 76-43 should now be excluded for purposes of awarding reparations.

the Commission's finding that the shippers' cause of action accrued on the date of the decision in Docket No. 76-43 as dicta and not necessarily a final disposition of the issues presented. The Presiding Officer therefore concluded that MSC would be precluded from introducing evidence of overpayments made more than two years prior to the filing of its complaint, that is, prior to June 29, 1977.

B. *Position of the Parties*

MSC

MSC believes that the Presiding Officer erred in his analysis of the Commission's discussion in Docket No. 76-43 as to when MSC's cause of action for reparations accrued. MSC argues that Matson's defense is barred under the doctrines of *res judicata* and collateral estoppel and maintains that the Commission correctly decided that the cause of action accrued at the time Matson's rate increases were determined to be unreasonable.

Matson

Matson argues that section 22 causes of action based on alleged unreasonable rates always accrue at the time freight charges are paid.

Matson also argues that *res judicata* and collateral estoppel do not apply to the findings of the Commission concerning shippers' remedies in its Order On Reconsideration in Docket No. 76-43. These findings were allegedly not an adjudication of the rights of the parties, but rather dicta. Matson submits that a rate making proceeding is legislative in nature and issues concerning reparations could not be entertained in such a proceeding.

C. *Conclusions*

The Commission has carefully reviewed the determinations made in Docket No. 76-43 in light of the Presiding Officer's order and arguments of the parties in this proceeding. We reaffirm our prior decision.

In concluding that the Commission's prior decision was erroneous, the Presiding Officer relies upon authority concerning the accrual of causes of action for reparations for unreasonable commodity rates. He also finds that the Supreme Court case relied upon by the Commission in its Order On Reconsideration in Docket No. 76-43, *Crown Coat Front Co. v. U.S.*, 386 U.S. 503 (1966) is inapposite in this proceeding. The point is made that unlike the facts in *Crown Coat*, shippers charged rates found unlawful in Docket No. 76-43 had the right to file reparation claims on any basis at the time Matson imposed its general rate increase. Accordingly, the Presiding Officer finds that a shipper's unqualified right to file a reparation claim when freight charges are paid precludes the accrual of their cause of action at any later date or the assertion that a new and distinct cause of action arose from the Commission's decision.

In its Order On Reconsideration in Docket No. 76-43, the Commission specifically recognized that claims for reparation on individual commodity rates generally accrue at the time they are paid. However, the Commission noted that claims for reparations due to an unreasonable general rate increase are separate and distinct "causes of action". They are based upon the general revenue levels of the carrier and not on the carrier's rate structure or the specific transportation factors affecting a commodity rate. Applying the rationale of *Crown Coat*, we further held that a shipper's right to reparations based upon an unreasonable general rate increase did not accrue until the Commission issued a final decision in its investigation proceeding.³

The rationale underlying the *Crown Coat* decision is that statutes of limitations generally do not specify when a cause of action accrues but only speak to the time available to file an action once it does accrue. The determination of when a cause of action actually accrues should not be restricted by rigid theories but should be made on the facts of a particular case in light of the purposes of the statute of limitations. Thus, in addressing prior decisions regarding the accrual of causes of action in analogous situations, the Court explained:

The Court has pointed out before, however, the hazards inherent in attempting to define for all purposes when a "cause of action" first "accrues." Such words are to be "interpreted in the light of the general purposes of the statute and of its other provisions, and with due regard to those practical ends which are to be served by any limitation of the time within which an action must be brought." (Citations omitted) 386 U.S. at 517.

Section 22 was promulgated to enable the Commission to enforce the other provisions of the Act, S. REP. No. 689, 64th Cong., 1st Sess. 13 (1916), including the prohibition of section 18(a) against the imposition of unreasonable rates. Both sections 18(a) and 22 of the Act are remedial in nature and generally should be so construed. *Oakland Motor Car Co. v. Great Lakes Transit Corp.*, 1 U.S.S.B.B. 308, 311-312 (1934).

The objective of statutes of limitations is to prevent stale claims of which the defendant had no prior notice and the facts and merits of which become less susceptible of determination due to the fading of memories and loss of records and evidence. *Order of Railroad Telegraphers v. Railway Express Agency*, 321 U.S. 342 (1944). This objective is

³ Although notices of Commission determinations not to suspend or investigate a carrier's general rate increase have uniformly advised that they are without prejudice to persons' right to file complaints with the Commission under section 22 of the Act, the institution of a general rate increase investigation does to some degree affect the right of such persons. Where a general rate increase is investigated the Commission would generally not finally adjudicate a section 22 complaint based on the same activity pending in the general rate investigation. However, the institution of a general rate increase investigation *would not* affect the right of shippers to file section 22 claims concerning individual commodity rates if such claims are based on the specific transportation factors affecting a commodity rate and *not* on the overall revenue needs of the carrier.

not contravened in this case. The claim was not stale⁴ and the evidence to support it had already been collected in the Commission's prior proceeding. Matson is well prepared to interpose its subsequent operational results as a defense and was on notice of MSC's challenge to the lawfulness of the rate increase and demand for remedial action from its inception.

In *Crown Coat* the argument was made that the plaintiff could have filed a protective suit which could remain inactive pending the conclusion of the administrative proceedings. This is similar to the argument advanced here that shippers could have filed reparations claims when Matson implemented its general rate increase even though the Commission was investigating those same rates. In disposing of the "protective suit" argument in *Crown Coat*, the Court advised:

Since it would remain quiescent until the administrative decision is rendered, the protective suit would be a sheer formality in any event—a procedural trap for the unwary and an additional complication for those who manage the dockets of the courts. Certainly it would be no help to those contractors for whom it is already too late to file such a suit, which is true of the petitioner in this case. 386 U.S. at 503.

Under the Presiding Officer's approach, shippers would have had to file reparation claims within two years of the time each payment of freight under Matson's rate increase was made. As a result, most of these claims would have had to be filed before a final decision in Docket No. 76-43 was issued. Because the Commission has repeatedly held that reparation claims will not be considered in a general rate increase investigation, *General Increase In Rates-Pacific/Atlantic/Guam Trade*, 7 F.M.C. 423, 426 (1962); *Pacific American Fisheries, Inc. American-Hawaiian Steamship Co.*, 2 U.S.M.C. 270 (1940), these many claims could not be consolidated with the rate investigation and would have had to be stayed to preclude the possibility of conflicting decisions. Shippers' rights to reparations in such a situation are effectively dependent upon the outcome of the general rate increase investigation. Accordingly, because of the pendency of Docket No. 76-43, shippers did not *in fact* have a cause of action based upon Matson's general rate increase until the Commission issued its decision in that proceeding.

However, even if it is assumed that MSC's cause of action accrued when the freight charges were paid, under the *Crown Coat* rationale, the running of the limitations period would be tolled pending the disposition of the general rate increase investigation.⁵ See *Mt. Hood*

⁴ The earliest shipment at issue occurred less than three years before this complaint proceeding was initiated.

⁵ Equitable tolling of the statute of limitations has long been judicially recognized. *American Pipe & Construction Co. v. Utah*, 414 U.S. 538, 558 (1973). Whether it is proper in any particular situation to

Continued

Stages v. Greyhound Corp., 616 F.2d 394 (9th Cir. 1980) (the period of limitations for an antitrust action is tolled pending the disposition of an ICC proceeding involving issues essential to the suit), *cert. denied* 49 L.W. 3246 (1980). Moreover, tolling the statute under the circumstances of this case provides for enforcement of the Act without unnecessary procedural complications and congestion of the Commission's dockets.⁶ Accordingly, the Commission rejects Matson's seventh affirmative defense and reaffirms its earlier ruling.

II. *Matson's Fourth Affirmative Defense—Actual Operational Results*

A. *Presiding Officer's Ruling*

The Presiding Officer sustained Matson's fourth affirmative defense that reparations under section 22 must be based upon actual results of operations. He held that although those findings in Docket No. 76-43 based on estimates *could* be used as a basis for reparations, Matson had the right to interpose its actual operating results as an equitable defense. The Presiding Officer explained, however, that Matson would have the burden of proof to establish the actual results of its operations.

B. *Position of the Parties*

MSC

MSC challenges the Presiding Officer's action in sustaining Matson's fourth defense. MSC submits that because the Presiding Officer dismissed Matson's fifth affirmative defense on the basis of *res judicata* and collateral estoppel he should have rejected Matson's fourth affirmative defense for the same reason.⁷ MSC again asserts its arguments concerning the applicability of the doctrines of *res judicata* and collateral estoppel.

Matson

Matson generally supports the findings of the Presiding Officer as to its fourth affirmative defense and reiterates its arguments as to the inapplicability of the doctrines of *res judicata* and collateral estoppel.

C. *Conclusions*

Matson's fourth affirmative defense is essentially a collateral attack on the findings of fact in Docket No. 76-43. While actual operating results may be considered in determining whether reparations should be

toll a statute of limitations is not necessarily a function of whether the limitation period is procedural or substantive, but rather whether tolling is consonant with the legislative scheme. *Id.* It should be pointed out, however, that the legislative history of section 22 indicates that at the time of its enactment it was considered to be a procedural proscription for the institution of complaints. S. REP. No. 689, 64th Cong., 1st Sess. 6 (1916).

⁶ The ICC specifically provides for situations where the statute of limitations is tolled for reparation claims. See 49 C.F.R. § 1100.23(f); *Thompson Phosphate Co. v. Atlantic Coast Line R. Co.*, 434 F.2d 180 (2d Cir. 1970).

⁷ The Presiding Officer dismissed Matson's fifth affirmative defense on the grounds that the arguments included in that defense could and should have been raised in Docket No. 76-43 but were not.

awarded in section 22 proceedings,⁸ the carrier's projections are sufficient evidence to support a finding of unjustness and unreasonableness. *Alaska Steamship Co. v. F.M.C.*, 356 F.2d 59 (9th Cir. 1966). Evidence of actual operating results is not an absolute prerequisite to an award of reparations under section 22 on rates alleged to be unjust and unreasonable. See *Fleetwood Aluminum Products v. Sea-Land Services, Inc.*, 19 S.R.R. 96 (1979).

Accordingly, the essence of Matson's fourth affirmative defense is reduced to an assertion of equitable considerations and as such falls within the scope of its eighth affirmative defense discussed below. However, because Matson's fourth affirmative defense specifically avers that actual operating results are a *jurisdictional prerequisite* to an award of reparations, it is dismissed.

III. *Matson's Eighth Affirmative Defense—Equitable Considerations*

A. *Presiding Officer's Ruling*

Matson's eighth affirmative defense interposed equitable considerations including: (1) the lack of Commission guidelines as to what constitutes a reasonable rate of return; (2) prior Commission decisions as to the permissible level of Matson's rate of return; (3) Matson's historically low rates of return; and (4) the small amount of excess return found in Docket No. 76-43. The Presiding Officer sustained this defense. He noted that the Commission's denial of a Matson Petition to Reopen expressly held that Matson could raise these matters in this proceeding.

B. *Position of the Parties*

MSC and Matson reargue essentially the same contentions advanced by them in support of their positions on Matson's fourth affirmative defense.

C. *Conclusions*

The matters presented by Matson's eighth affirmative defense are properly raised in this proceeding. See Docket No. 76-43, Order, 19 S.R.R. 1691, issued May 2, 1980; Order on Reconsideration, 21 F.M.C. 987. These assertions were not litigated or decided in Docket No. 76-43 and Matson is not collaterally estopped from raising them now. However, while Matson may raise these matters and offer actual operating results in mitigation of the reparations sought, it may not assert matters which simply amount to a reargument of the reasonableness and justice of its rate increase at issue in Docket No. 76-43.⁹ For example, it

⁸ See also *Consolo v. F.M.C.*, 383 U.S. 607 (1966).

⁹ It is generally recognized that collateral estoppel is applicable to *factual* determinations made in administrative proceedings. *United States v. Utah Construction & Mining Co.*, 385 U.S. 394, 422 (1966). Matson had an adequate opportunity to fully litigate all the relevant factual issues concerning the reasonableness of its rates in Docket No. 76-43. It took full advantage of these opportunities. Therefore, Matson will not be allowed to collaterally attack the findings of fact in Docket No. 76-43.

may not show that due to marginal errors in its projections or technical changes in Commission rate investigation methodology, its rate of return is arguably below that which was found in Docket No. 76-43.¹⁰ Therefore, while Matson's eighth affirmative defense will not be dismissed, it has the burden of proof as to the matters raised.

IV. MSC's Second Cause of Action—Continuing Unreasonableness

A. Presiding Officer's Ruling

The Presiding Officer dismissed in part MSC's second cause of action. MSC alleged that the unreasonable portion of the rate increases investigated in Docket No. 76-43 continued to be charged as an incremental part of subsequent rate increases in violation of section 18(a). The Presiding Officer held that nothing in the Commission's Orders in Docket No. 76-43 can be construed as a finding that Matson's rates continued to be unreasonable after they were subsequently increased. He based this finding on the fact that: (1) the Commission reviewed the subsequent rate increases and on July 31, 1977 found that the suspension or investigation of those rate increases was not warranted; (2) the Commission's Decision in Docket No. 76-43 specified that subsequent increases were not joined in the investigation and that the rates found unjust and unreasonable were only those in effect from August 2, 1976 to July 31, 1977; and, (3) there is no presumption of continuing unreasonableness resulting from a decision that past rates are unjust and unreasonable. Any subsequent rate increases must be examined with regard to the circumstances and conditions extant at the time they are proposed. The Presiding Officer did not, however, preclude MSC from attempting to show the unreasonableness of the subsequent rate increases, but only from relying on the findings in Docket No. 76-43 to prove such unreasonableness.

B. Position of the Parties

MSC

MSC submits that the Presiding Officer misunderstood MSC's position in support of its second cause of action. MSC submits that its position is based on the Commission's intent as derived from its Order On Reconsideration in Docket No. 76-43 which indicates that Matson's rates continued to be unreasonable after July 31, 1977. MSC asserts that it can still maintain an action against Matson for assessing unreasonable rates beyond July 31, 1977 and that a presumption of continuing unreasonableness exists, establishing a *prima facie* case in its second cause of action. This presumption allegedly acts to shift the burden of proof to

¹⁰ The substitution of actual operating results for projections was expressly rejected in Docket No. 76-43 on the basis of the facts of that proceeding. The retroactive application of the revisions to Commission General Order 11 in Docket 78-46 was also rejected in the Commission's denial of Matson's Petition to Reopen.

Matson to prove that its rates were in fact reasonable. MSC submits that although the Commission did decline to suspend or investigate Matson's subsequent rate increases, it never found them to be just and reasonable. Finally, MSC advises that it is not seeking reparations for the subsequently imposed rate increases but only that portion of the underlying level of rates which the Commission held unreasonable in Docket No. 76-43.

Matson

Matson argues that there is nothing in the record or decision in Docket No. 76-43 to support MSC's allegation that its rates continued to be unreasonable after July 31, 1977. The findings in that proceeding are allegedly limited to the rates then under investigation. Matson points out that its subsequent rate increases were not investigated by the Commission. It further contends that the Commission's notice that those rate increases did not warrant suspension or investigation rebuts MSC's contention that a presumption of continued unreasonableness results from the decision in Docket No. 76-43. Matson has submitted an offer of proof which it argues proves its subsequent rates to be reasonable.

Hearing Counsel

Hearing Counsel argues that MSC is attempting to improperly extend the findings of Docket No. 76-43. The Commission's Order On Reconsideration allegedly was only intended to create a remedy for those rates actually investigated and found unreasonable. Hearing Counsel contends that there is no presumption of continuing unreasonableness. A new rate increase is a separate act by the carrier under circumstances different than those which existed at the time prior rate increases were imposed. Therefore, Hearing Counsel concludes that while the claim of reasonableness of Matson's subsequent rate increases is an issue in this proceeding, it is one upon which MSC has the burden of proof.

C. Conclusion

The Presiding Officer's analysis and conclusions rejecting MSC's second cause of action are correct and will be affirmed. The findings in Docket No. 76-43 were clearly restricted to the rates in effect between August 2, 1976 and July 31, 1977. The subsequent rate increases were not investigated and no evidence of record was obtained regarding those increases in Docket No. 76-43. Moreover, because the subsequent rate increases were allowed to go into effect without suspension or investigation, any subsequent challenge to those rates places the burden of proof on the party alleging their unlawfulness.¹¹

¹¹ However, Matson bears the burden of placing before the Commission operational results and establishing the reliability of this data. See, *International Harvester Co. v. Ruckelshaus*, 478 F.2d 615, 643 (D.C. Cir. 1973); *Alabama Power Co. v. F.P.C.*, 511 F.2d 383, 391 n. 14 (D.C. Cir. 1974); *Environmental Defense Fund v. E.P.A.*, 548 F.2d 998, 1017 (D.C. Cir. 1976).

MILITARY SEALIFT COMMAND V. MATSON NAVIGATION 581
COMPANY, INC.

THEREFORE, IT IS ORDERED, That the ruling of the Presiding Officer in his Order of May 13, 1981 in the above-captioned proceeding as to the eighth affirmative defense of Matson Navigation Company and the second cause of action of the Military Sealift Command is sustained and the rulings as to the fourth and seventh affirmative defenses of Matson Navigation Company are reversed in accordance with this Order, and,

IT IS FURTHER ORDERED, That the appeal of Military Sealift Command is sustained to the extent indicated in this Order and denied in all other respects.

By the Commission.*

(S) FRANCIS C. HURNEY
Secretary

* Commissioner James Joseph Carey did not participate. Commissioner Richard J. Daschbach's concurring opinion is attached.

DOCKET NO. 79-68

MILITARY SEALIFT COMMAND, DEPARTMENT
OF THE NAVY V. MATSON NAVIGATION COMPANY, INC.

Commissioner Richard J. Daschbach, concurring.

I disagree with the instant Order's treatment of Matson's seventh affirmative defense, which addresses the appropriate accrual date of a cause of action for reparations. Although the Order here does not present a *legal* argument sufficiently compelling to overturn the Administrative Law Judge's May 13, 1981 finding on this matter, a *common sense* approach to this issue will yield the same result which the Commission is trying to achieve through a strained interpretation of legal precedent.

It is simply illogical to expect shippers to file informed claims for refunds of a specific portion of an ocean freight rate until the Commission has determined what portion of that rate, if any, is unjust and unreasonable, and that is all the Commission's order needs to say here. In order to find a "real world" solution to the problem of when a shipper's claim for reparations begins to accrue, it is preferable for the Commission to rely on this simple logic than to undertake a labored effort to make case law produce the result desired in the instant case.

Davis' *Administrative Law Treatise* (Volume 1, Chapter 1) is instructive on the subject of overreliance on legal precedent at the cost of sensible exercise of agency discretion. In criticizing the so-called "extravagant approach" to the rule of law, Davis argues that regulatory agencies should not be hamstrung by precedent in exercising a common sense approach to the law, citing *Merchandise Transport Ltd. v. British Transport Commission*, [1962] Q.B. 173. Danckwerts, L.J.: "If the tribunal makes a practice of relying on previous decisions in respect of other applications . . . there is, in my opinion danger that the discretion of the tribunal may not be applied in an unfettered and proper manner having regard to the merits of the particular case."

This admonition is applicable in this proceeding, where there is no case law cited in the instant Order which is directly on point, but logic squarely addresses the issue. Rather than attempting to bolster its decision through a strained application of inapposite case law, the Commission should demonstrate enough faith in its own discretion to rely on the common sense approach to Matson's seventh affirmative defense which yields the same result.

FEDERAL MARITIME COMMISSION

DOCKET NO. 80-80

PAULSSEN & GUICE LTD. -

INDEPENDENT OCEAN FREIGHT FORWARDER

LICENSE NO. 1166

PAULSSEN & GUICE MIDWEST, INC.

APPLICANT FOR A LICENSE AS AN INDEPENDENT
OCEAN FREIGHT FORWARDER

Settlement agreements entered into between the Commission's Bureau of Hearings and Field Operations and Paulssen & Guice Ltd. (PG) and Paulssen & Guice Midwest, Inc. (PGM) for violations of the Shipping Act, 1916 approved. PG is permitted to retain its freight forwarding license and PGM's application for a freight forwarding license is granted. Penalties of \$10,000 and \$5,000 are assessed against PG and PGM respectively.

Gerald H. Ullman for Paulssen & Guice Ltd. and Paulssen & Guice Midwest, Inc.

Joseph B. Slunt, Stuart James and John Robert Ewers for the Bureau of Hearings and Field Operations.

REPORT AND ORDER PARTIALLY ADOPTING INITIAL DECISION

January 27, 1982

BY THE COMMISSION: (ALAN GREEN, JR., *Chairman*; THOMAS F. MOAKLEY, *Vice Chairman*; JAMES JOSEPH CAREY, RICHARD J. DASCHBACH, AND JAMES V. DAY, *Commissioners*)

This proceeding was initiated by the Commission on November 25, 1980, to determine whether Paulssen & Guice, Ltd. (PG), an independent ocean freight forwarder, has violated section 44(e) of the Shipping Act, 1916 (the Act),¹ and sections 510.24(e), 510.23(a) and 510.5(c) of the Commission's General Order 4,² and, if such violations occurred, whether civil penalties should be assessed against PG and its license revoked or suspended. The Commission also sought to determine whether Paulssen & Guice Midwest, Inc. (PGM), a corporation partially owned by PG, violated section 44(a) of the Act,³ and if such

¹ 46 U.S.C.A. §841(b).

² 46 C.F.R. §510.

³ 46 U.S.C.A. §841(b).

violations occurred, whether they warrant the imposition of a civil penalty against PGM and the denial of its application for a freight forwarder license. During the course of the proceeding, PG, PGM and the Commission's Bureau of Hearings and Field Operations (Hearing Counsel) submitted a joint stipulation of fact and a proposed settlement agreement. Under the terms of the agreement, PG agreed to pay the Commission \$10,000 and PGM agreed to pay the Commission \$5,000, but neither admitted that any violation it may have committed was willful.

On September 3, 1981, Administrative Law Judge William Beasley Harris issued an Initial Decision in which he concluded that PG should be permitted to retain its independent ocean freight forwarder license. He also approved the civil penalty settlements in the amounts of \$10,000 and \$5,000 entered into between Hearing Counsel and PG and PGM respectively, but refused to "consent" to certain sections of the stipulated record and denied PGM's application for an independent ocean freight forwarder license.

This proceeding is now before the Commission on Exceptions of PGM and Hearing Counsel. The Commission agrees with the Presiding Officer's decision to approve the settlement agreements and permit PG to retain its freight forwarding license but, for the reasons set forth below, believes that the Presiding Officer erred when he refused to accept certain parts of the stipulated record and denied PGM's application for a freight forwarding license.

BACKGROUND

The following summary of the essential facts is based upon a joint stipulation submitted, pursuant to Rule 162 of the Commission's Rules of Practice and Procedure,⁴ by Hearing Counsel and counsel for PG and PGM.

PG, a New York Corporation, was granted an independent ocean freight forwarder license by the Commission on August 1, 1967. On December 27, 1976, PG established a branch office in Kansas City under the name Paulssen & Guice, Ltd. This arrangement was approved by the Commission. The Kansas City branch was managed by Leo Moore.

On January 31, 1977, PGM was incorporated under the laws of Missouri. Leo Moore, who became President of PGM, owns 55% of the stock. The remaining stock is owned by PG (35%) and another individual (10%). Siegfried Paulssen, President of PG, is also Vice-President of PGM.

⁴ 46 C.F.R. §502.162.

After its incorporation, PGM continued to use PG's forwarding license. Between January 31, 1977 and May 31, 1979, 922 shipments were handled by PGM under PG's license. It mistakenly believed that the Commission's approval of the Kansas City branch sanctioned the continued use of PG's license. Because PGM was operating under PG's license, steamship companies frequently sent commissions earned by PGM to PG in New York. To correct this problem, and to gain complete autonomy over its operations, PGM applied for its own license on May 23, 1978.

The Commission's Office of Freight Forwarders (OFF) learned of PGM's use of PG's license in December of 1978 and in March of 1979 informed PGM that until it received its own license, it would have to operate as a branch of PG. PGM promptly complied with OFF's directive, sending all commission checks to PG and returning all PGM employees to PG's payroll.

In 1976, 1977, 1978 and 1979, several changes were made in the operations of PG's Houston, Cleveland, Miami, Baltimore and Los Angeles offices. These included changes of personnel and the opening and closing of certain offices. The Commission was not informed of these changes in a timely fashion because PG was in the midst of an effort to recover its financial health, which had been in a precarious state since at least early 1976.

INITIAL DECISION AND POSITION OF THE PARTIES

In his Initial Decision, the Presiding Officer approved the civil penalty settlement agreements entered into between Hearing Counsel and PG and PGM and permitted PG to retain its license. Citing Rule 162 of the Commission's Rules of Practice and Procedure,⁵ the Presiding Officer refused, however, to "consent" to Paragraphs 5, 6 and 8 of the stipulated record agreed upon by the parties because he felt that these matters could best be shown from official records.⁶

He also denied PGM's application for a license on the grounds that: (1) it was not clear that PGM was independent; and (2) PGM had not proved itself fit. The Presiding Officer observed that but for the addition of "Midwest," PG and PGM would have the same name, and he believed that granting a license to PGM would be akin to granting a second license to the parties that forwarded 922 shipments without a license. He also stated that PG needed to devote its full attention to its

⁵ 46 C.F.R. §502.162.

⁶ Paragraphs 5, 6 and 8 indicate that: (1) PGM was formed as a separate profit center and incorporated to simplify record keeping; (2) PGM continued to use PG's license after incorporation because it mistakenly believed such conduct was lawful; and (3) PGM applied for its own license so it could be completely autonomous and because commission checks earned by it were being sent to PG in New York.

own affairs, not to the establishment of a new corporation in one of its branch offices with a name almost identical to its own. The Presiding Officer noted that shippers who might deal with PGM would really be dealing with the same individuals who violated the Shipping Act, 1916, 922 times.

In its Exceptions to the Initial Decision, PGM states that a license should not be denied unless there has been a willful failure to comply with the Act or the relevant regulations. PGM stresses that its unauthorized forwarding was not the result of intentional or wanton disregard of the Shipping Act, 1916, but of the mistaken belief that its forwarding activities could be performed under PG's license.

PGM is particularly disturbed by the Presiding Officer's decision not to "consent" to paragraphs 5, 6 and 8 of the stipulation for, without these, the record is stripped of any evidence proving that the unauthorized forwarding was not willful. It is PGM's belief that the Presiding Officer's decision to delete from the record certain facts stipulated by the parties is completely without legal basis. PGM argues that a stipulation may be set aside only when it is a mistake or misunderstanding.

PGM further argues that the Presiding Officer misconstrued Rule 162 of the Commission's Rules, which he read as giving him the authority to admit to the record certain portions of a stipulation while excluding others. PGM believes that Rule 162 only gives the Presiding Officer the authority to decide whether or not to permit the parties to develop a record through stipulation, instead of through other means. By refusing to accept facts which PGM feels are critical to its case, PGM believes the Presiding Officer erred and denied it the opportunity to present its case and establish its right to a license.⁷

PGM also believes that the Presiding Officer placed disproportionate importance upon the number of shipments which it forwarded unlawfully. Allegedly, all 922 shipments in question were the result of the single misunderstanding by PGM that it could operate under PG's license, and neither Moore nor PGM enjoyed any financial advantage as a result of the unauthorized forwarding.⁸

PGM points out, that in the past, the Commission has issued licenses to applicants who have performed unauthorized forwarding when mitigating circumstances exist and that the Interstate Commerce Commission and the courts have taken a similar approach. PGM believes it is entitled to the same treatment. To deny Moore a license, according to

⁷ PGM argues that the Presiding Officer, in finding that the deleted portions of the stipulation "are best shown from official records," not only failed to indicate what records he had in mind, but also neglected to give PGM an opportunity to use these records to present its case.

⁸ PGM notes that Moore was already paid as a branch manager and that steamship lines paid the same brokerage to PGM which they would have paid to PG.

PGM, would be punitive and inconsistent with the remedial purpose which underlies section 44.

PGM disagrees with the Presiding Officer's finding that granting a license to PGM would be akin to granting a second license to the parties charged with violating section 44. First, it is noted that most of PGM's stock is owned by Moore and that PG is only a minority stockholder. Second, Moore is allegedly not part of PG's operation. Finally, PGM points out that, if granted, the license would go to a separate corporation, not to PG.

PGM also feels that the Presiding Officer did not provide a reasoned basis for his conclusion that PGM may not be independent and erred in deciding that it had not met its burden of proving that it was fit. Except for the unauthorized forwarding, Moore allegedly has an unblemished record. Because of the mitigating circumstances surrounding this conduct, PGM believes that it is fit to obtain a license.

Finally, PGM takes issue with the Presiding Officer's assertion that it should be denied a license because PG needs to direct its attention to its own operation. PGM again notes that PG is only a minority stockholder in PGM, and PGM believes that the Presiding Officer's conclusion that PG's operation in New York would suffer if PGM were to receive a license was speculation.

In challenging the Presiding Officer's denial of a license to PGM, Hearing Counsel points out that: (1) although PGM serves as PG's Kansas City branch office, it is separately incorporated; (2) if it is granted its own license, PGM will become a separate and distinct freight forwarder; and (3) PGM seeks its own license so that it can be completely independent of PG. These facts convince Hearing Counsel that the Presiding Officer's concerns about granting a second license to the same parties involved in 922 unauthorized shipments are unfounded. Hearing Counsel adds that although PG's President owns 35% of PGM's stock and is its vice-president, his interests in PGM stem from his role as a stockholder and officer, not as president of PG.

Responding to the Presiding Officer's concern that PG needed to direct all of its attention to its own affairs, not operate a new corporation in the same branch office, Hearing Counsel argues that if PGM receives a license, PG will have one less office with which to concern itself. This will allegedly allow it to devote more time to the remaining branch offices.

Hearing Counsel also contends that PGM has met its burden of proving it is fit to receive a license. Allegedly, the only question concerning PGM's fitness stems from the forwarding performed under PG's license and this, Hearing Counsel notes, was the result of a mistake which was promptly corrected when brought to PG's attention. This is viewed as mitigating the gravity of the 922 violations of the Act.

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Hearing Counsel also notes that the Commission has stated that the freight forwarding laws are remedial in nature, not punitive, and contends that it would be consistent with this philosophy for the Commission to fine PGM but not deny its application for a license.

Hearing Counsel agrees with PGM that paragraphs 5, 6 and 8 of the stipulation were improperly excluded. Hearing Counsel notes that courts generally look favorably upon reasonable stipulations of fact which simplify and shorten litigation. If the Presiding Officer felt that the stipulation was inadequate, Hearing Counsel believes that he should have either requested the parties to amend it or excluded the entire stipulation, providing the parties with an opportunity for a hearing. By excising certain portions of the stipulation, the Presiding Officer allegedly precluded the parties from completing the record. Hearing Counsel submits that the stipulation does not, in its truncated form, reflect the intent of the parties.

DISCUSSION

Because the arguments of both PGM and Hearing Counsel in favor of granting PGM a license depend in part upon the paragraphs in the stipulation which the Presiding Officer has chosen to discard, the Commission must first determine whether the Presiding Officer incorrectly excluded certain portions of the stipulated record.

Any matter which involves the individual rights or obligations of the parties to a judicial proceeding may properly be made the subject of a stipulation between them, provided that the stipulation is not illegal, unreasonable, or against good morals or sound public policy, and does not interfere with the general powers, duties and prerogatives of the courts.⁹ Once created, stipulations are the equivalent of proof and prevent an independent examination by a judicial officer or body of the matters which have been stipulated.¹⁰ Stipulations are used to dispense with the need to prove facts through the normal judicial process.¹¹

It is well settled that in civil cases stipulations of fact fairly entered into are controlling and conclusive and that courts are bound to enforce them.¹² Once a set of facts has been stipulated, a court loses its freedom to alter it. Courts may not pick and choose at will¹³ or adopt findings of fact which contradict those which have been stipulated,¹⁴

⁹ 83 C.J.S., Stipulations, §10, p. 12.

¹⁰ *Id.* at §12, p. 30.

¹¹ *Burstein v. United States*, 232 F.2d 19, 23 (8th Cir. 1956).

¹² *Id.* at 22, 23; *Fenix v. Finch*, 436 F.2d 831, 836 (8th Cir. 1971); *United States v. 3,788.16 Acres of Land, Emmons Co., N.D.*, 439 F.2d 291, 294 (8th Cir. 1971); *Furniture Forwarders of St. Louis v. Chicago, Rock Island and Pacific Ky. Co.*, 393 F.2d 537, 358 (8th Cir. 1968); *Osborne v. United States*, 351 F.2d 111, 120 (8th Cir. 1965).

¹³ *Stanley Works v. Federal Trade Commission*, 469 F.2d 498, 506 (2d. Cir. 1972).

¹⁴ *Verkouterren v. District of Columbia*, 346 F.2d 842, 844 (D.C. Cir. 1965).

but have a duty to treat stipulated facts as having been established by the clearest proof.¹⁵

The Commission has prescribed its own rule concerning stipulations. The parties in a Commission proceeding may, by stipulation, agree upon any facts involved in the proceeding and include them in the record with the consent of the presiding officer.¹⁶

The Presiding Officer here chose to read this rule as permitting him to consent to the stipulation of certain facts while denying the stipulation of others. PGM and Hearing Counsel feel that the rule should be interpreted as permitting the Presiding Officer to decide whether or not to permit the use of the stipulation process, but not to consent to the stipulation of certain facts while denying others once the decision to permit the use of stipulation has been made. In light of the judicial treatment of stipulations discussed above, the Commission adopts the interpretation favored by PGM and Hearing Counsel.¹⁷

There is nothing in the record which contradicts the facts which the parties stipulated in paragraphs 5, 6 and 8 of the stipulation. PGM was formed as a separate profit center and incorporated to simplify record keeping.¹⁸ After incorporation, it continued to use PG's license because it mistakenly believed that the Commission's approval of the Kansas City branch office sanctioned such use.¹⁹ PGM applied for its own license on May 23, 1978, because it wanted to be completely autonomous and because the use of PG's license was causing steamship companies to send commission checks to PG's New York office.²⁰ With the inclusion of these three paragraphs in the record, the Commission must now weigh the exceptions to the Presiding Officer's decision to deny PGM's application for a freight forwarder's license.

Access to the ocean freight forwarding profession is restricted to those who are fit, willing and able.²¹ An applicant or licensee must demonstrate to the Commission that it maintains the highest degree of business responsibility and integrity with clients, carriers and the public.²² In determining an applicant's fitness, there can be no doubt

¹⁵ *Schlemmer v. Provident Life & Ass. Ins. Co.*, 349 F.2d 682, 684 (9th Cir. 1965).

¹⁶ 46 C.F.R. §502.162.

¹⁷ Even if the Presiding Officer had been correct in his interpretation of the stipulation rule, he should not have waited until the Initial Decision to announce his refusal to accept the facts stipulated in paragraphs 5, 6 and 8 of the stipulation. Had the parties been advised of the Presiding Officer's concerns before he rendered his Initial Decision, they might have chosen other means to prove the facts they stipulated. By failing to so inform the parties, the Presiding Officer led them to believe that their entire stipulation would be accepted and deprived them of the opportunity to present important elements of their case. Such conduct appears to infringe upon Respondents' due process rights.

¹⁸ Paragraph 5.

¹⁹ Paragraph 6.

²⁰ Paragraph 8.

²¹ *Independent Ocean Freight Forwarder License Application—Guy G. Sorrentino*, 15 F.M.C. 127, 128 (1972).

²² *Id.* at 134.

that it intends to comply with the Commission's rules and policies.²³ Other factors taken into consideration by the Commission in evaluating the fitness of an applicant or licensee include experience,²⁴ character, integrity, veracity²⁵ and technical ability.²⁶ An applicant must not only be honest, but must affirmatively strive to meet the regulatory requirements prescribed by the Commission.²⁷

Occasionally an applicant for a forwarding license has engaged in conduct which is violative of the Shipping Act, 1916, or other statutes. Past violations of law are a major factor in deciding whether a license will be granted.²⁸ In such cases the Commission has tried to determine whether the applicant acted in good faith and whether there are circumstances surrounding the misconduct which tend to mitigate culpability.²⁹ If the violation was not accompanied by fraud or moral turpitude, the Commission has sometimes found that it will not bar the granting of a license.³⁰

Even after receiving a license, a forwarder remains subject to the Commission's scrutiny and may have its license revoked for unlawful conduct. In applying section 44 to forwarders that have behaved unlawfully, the Commission is aware that section 44 is remedial, not punitive in nature.³¹ Remedies fashioned by the Commission are tailored to the facts of the particular case after taking into account evidence of mitigation.³²

The Presiding Officer found that PGM had not proved itself fit but, except for the stipulated violations of the Shipping Act, 1916, there is no evidence in the record which indicates that PGM is unfit. Between January 31, 1977 and May 31, 1979, PGM forwarded 922 shipments

²³ *Harry Kaufman D/B/A International Shippers Co. of N.Y.—Independent Ocean Freight Forwarder License No. 35*, 16 F.M.C. 256, 271 (1973).

²⁴ *Anthony G. O'Neil—Freight Forwarder License*, 12 F.M.C. 68, 71 (1968).

²⁵ *Independent Ocean Freight Forwarder License Application L.T.C. Air Cargo, Inc.*, 13 F.M.C. 267, 276-277 (1970).

²⁶ *Independent Ocean Freight Forwarder License Application—Guy G. Sorrentino*, 15 F.M.C. 127, 139 (1972).

²⁷ *Independent Ocean Freight Forwarder License Application—Lesco Packing Co., Inc.*, 19 F.M.C. 132, 137 (1976).

²⁸ *Cargo Systems International—Independent Ocean Freight Forwarder Application and Possible Violations of Section 44, Shipping Act, 1916*, 22 F.M.C. 57 (1979).

²⁹ *Continental Forwarding, Inc.—Independent Ocean Freight Forwarder Application and Possible Statutory Violations*, 23 F.M.C. 623 (1981); *Concordia International Forwarding Corp. Independent Ocean Freight Forwarder Application and Possible Violations of Section 44, Shipping Act, 1916*, 21 F.M.C. 587 (1978); *Avion Forwarding, Inc. Independent Ocean Freight Forwarder License Application*, 23 F.M.C. 232 (1980).

³⁰ *Independent Ocean Freight Forwarder Application Fabio A. Ruiz d/b/a/ Far Express Co.*, 22 F.M.C. 583 (1972); *Independent Ocean Freight Forwarder Application—Air-Mar Shipping, Inc.*, 14 S.R.R. 97 (1973); *All-Freight Packers & Forwarders, Inc.—Independent Ocean Freight Forwarder License Application*, 23 F.M.C. 131 (1980).

³¹ *E. Allen Brown—Independent Ocean Freight Forwarder License No. 1246*, 22 F.M.C. 585, 596 (1980); *Independent Ocean Freight Forwarder License E.L. Mobley, Inc.*, 21 F.M.C. 849 (1978).

³² *E. Allen Brown—Independent Ocean Freight Forwarder License No. 1246*, 22 F.M.C. 585, 596 (1980); *Independent Ocean Freight Forwarder License E.L. Mobley, Inc.*, 21 F.M.C. 845, 846 (1979).

without a freight forwarder license. While this conduct clearly amounts to 922 separate violations of section 44(a), mitigating circumstances are present. First, all 922 violations resulted from a single misunderstanding by PGM that it was permitted to operate as a forwarder under PG's license. Although clearly unlawful, this conduct is distinguishable from that of a person who acts as a freight forwarder without even attempting to operate under the authority of a license. Second, once PGM learned that its activities were unlawful, they were curtailed promptly. Third, there is no indication that prior to this set of violations PGM ever violated the Shipping Act, 1916, or otherwise ignored the legal requirements incident to ocean freight forwarding.

It also appears that PGM's violations were not the product of fraud or moral turpitude, but only of a misunderstanding. There is no evidence that any shipper suffered as a result of PGM's unlawful activities, or that PGM received improper financial gain from its violation. Finally, PGM appears technically well qualified to perform forwarding duties, as its president has operated a branch office for PG since 1976, and committed to adhering to the requirements of section 44 in the future, as it has retained counsel, familiar with the legal requirements of freight forwarding, to prevent the recurrence of regulatory problems.

The Presiding Officer found that PGM was not "independent." There is nothing in section 44 which requires a forwarder to be independent. The only restriction is that a forwarder may not receive compensation with respect to: (1) any shipment in which it has a beneficial interest; or (2) any shipment in which any holding company, subsidiary, affiliate, officer, director, agent, or executive of the forwarder has a beneficial interest. There is no evidence in the record which indicates that PGM will operate in a manner which is not consistent with this restriction.

The Presiding Officer also stated that PGM should not be granted a license because PG needs to devote its full attention to its own affairs. PGM is a separate corporation from PG and, if granted a license, would presumably operate independently of PG. There is nothing in the record which indicates that the Presiding Officer had any knowledge of how much attention PG did or should have devoted to its operation but, to the extent that granting PGM a license would relieve PG of its responsibility for PGM, it could actually increase the amount of attention which PG devotes to its own affairs.

In light of the above discussion, the Commission believes that, pursuant to section 44 of the Shipping Act, 1916, it is appropriate to grant PGM a freight forwarding license.

THEREFORE, IT IS ORDERED, That the Initial Decision in Docket No. 80-80 is adopted by the Commission to the extent indicated above; and

IT IS FURTHER ORDERED, That the Exceptions of PGM and Hearing Counsel are granted to the extent indicated above and denied in all other respects; and

IT IS FURTHER ORDERED, That Paulssen & Guice Midwest, Inc. is granted an independent ocean freight forwarder license pursuant to section 44 of the Shipping Act, 1916; and

IT IS FURTHER ORDERED, That Hearing Counsel and counsel for PG and PGM shall arrange for the payment of the fines agreed upon in the settlement agreements; and

IT IS FURTHER ORDERED, That this proceeding is discontinued.

By the Commission.

(S) FRANCIS C. HURNEY
Secretary

FEDERAL MARITIME COMMISSION

DOCKET NO. 80-80

PAULSSEN & GUICE LTD. - INDEPENDENT OCEAN FREIGHT
FORWARDER

LICENSE NO. 1166

PAULSSEN & GUICE MIDWEST, INC. -
APPLICANT FOR A LICENSE AS AN INDEPENDENT
OCEAN FREIGHT FORWARDER

Proposed civil penalty settlements in the amount of \$10,000 as to Paulssen & Guice, Ltd., and \$5,000 as to Paulssen & Guice Midwest, Inc., each payable within 30 days, are approved.

Paulssen & Guice, Ltd., are permitted to retain independent ocean freight forwarder license.

Paulssen & Guice Midwest, Inc.'s application for license as independent ocean freight forwarder is denied. Granting such a license to applicant would be akin to granting a second license to the same parties, at the same stand where 922 shipments concerning them and PG in violation of rules and regulations were made and civil penalty settlements therefor received. It is not clear that PGM is independent or that it has met its burden of proving to be fit under the circumstances and record herein.

*Joseph B. Slunt, Stuart James and John Robert Ewers, Director of the Commission's Bureau of Investigation and Enforcement,*¹ for the Commission.

Gerald H. Ullman, P.C., and Gerald H. Ullman, individually, for Respondents; W. Edward Coen, Jr., of Meise, Cope, Coen and Jester (Kansas City, Missouri), as co-counsel on behalf of Respondent Paulssen and Guice Midwest, Inc.

REVIEW OF SETTLEMENT AGREEMENT INITIAL DECISION ² OF WILLIAM BEASLEY HARRIS, ADMINISTRATIVE LAW JUDGE

Partially Adopted January 27, 1982

The Commission's Order of Investigation and Hearing in this proceeding served November 28, 1980, pursuant to sections 22, 32 and 44 (U.S.C. 821, 831 and 841(b)) of the Shipping Act, 1916, and section 510.9 of General Order 4 (46 CFR 510.9) was published in the *Federal*

¹ Title changed (July 1981) to "Bureau of Hearings and Field Operations" with two distinctly identified offices—The Office of Hearing Counsel and the Office of Investigation. The title of Hearing Counsel was restored.

² This decision will become the decision of the Commission in the absence of review thereof by the Commission (Rule 227, Rules of Practice and Procedure, 46 CFR 502.227).

Register, Vol. 45, No. 247, Monday, December 22, 1980, pp. 84145, 84146. This proceeding was instituted to determine:

1. Whether PG has violated section 44(e) of the Shipping Act, 1916 and section 510.24(e) of the Commission's General Order 4 by accepting compensation on ocean freight forwarding shipments for which it did not perform ocean freight forwarding duties from January 31, 1977 through May 31, 1979.
2. Whether PG has violated section 510.23(a) of General Order 4 by permitting its license to be used by a person not in its employ to perform ocean freight forwarding services from January 31, 1977 through May 31, 1979, in the Kansas City area.
3. Whether PG has violated section 510.23(a) of General Order 4 by permitting its license to be used by a person not in its employ to perform ocean freight forwarding services in the Houston area from July 16, 1978 through August 28, 1978.
4. Whether PG has violated section 510.23(a) of General Order 4 by permitting its license to be used by a person not in its employ to perform ocean freight forwarding activities in the Los Angeles area from June 22, 1976 through July 2, 1976.
5. Whether PG has violated section 510.23(a) of General Order 4 by permitting its license to be used by a person not in its employ to perform ocean freight forwarding work in the Los Angeles area during late 1979 and early 1980.
6. Whether PG has violated section 510.5(c) of General Order 4 by failing to inform the Commission of changes in its operations at branch offices.
7. Whether PG violated sections 510.23(a) and 510.24(e) by failing to act in accordance with its duties and obligations as set forth in those sections of General Order 4 in regard to any of its offices during the past five years and the effect of any such violations on the fitness of PG.
8. Whether civil penalties should be assessed against PG pursuant to section 32(e), Shipping Act, 1916 for violations of section 44(e) of the Shipping Act, 1916 and/or sections 510.23(a), 510.24(e) and 510.5(c) of the Commission's rules and regulations and, if so, the amount of any such penalty which should be assessed, taking into consideration factors of possible mitigation of such a penalty.
9. Whether PG's independent ocean freight forwarder license should be suspended or revoked pursuant to section 44(d) of the Shipping Act, 1916, for:
 - (a) willful violations of section 44(e) the Shipping Act, 1916, or sections 510.23(a), 510.24(e), and 510.5(c) of the Commission's regulations or both, or, if such are not shown to have occurred,

(b) such conduct as the Commission finds nevertheless renders PG unfit to carry on the business of forwarding in accordance with section 510.9(e) of General Order 4.

IT IS FURTHER ORDERED, That pursuant to the above cited sections of the Shipping Act, 1916, a proceeding also be instituted to determine:

1. Whether PGM has violated section 44(a) of the Shipping Act, 1916, by performing ocean freight forwarding work without having a license issued it by the Commission on at least 922 occasions from January 31, 1977 through May 31, 1979.
2. Whether civil penalties should be assessed against PGM pursuant to section 32(e), Shipping Act, 1916, for violation of section 44(a) of the Shipping Act, 1916, and/or the Commission's rules and regulations and, if so, the amount of any such penalty which should be assessed, taking into consideration factors of possible mitigation of such a penalty.
3. Whether, in light of the evidence adduced pursuant to the above issues, together with any other evidence adduced, PGM and its corporate officers possess the requisite fitness within the meaning of section 44(b), Shipping Act, 1916, to be licensed as an independent ocean freight forwarder.
4. Whether PGM's independent ocean freight forwarder license application should be denied for:
 - (a) willful violation of section 44(a) of the Shipping Act, 1916 pursuant to section 44(d) of that Act, or, if such violation is not shown to have occurred,
 - (b) such conduct as the Commission finds nevertheless renders PGM unqualified to carry on the business of forwarding in accordance with section 510.8(a) of General Order 4.

BACKGROUND

A prehearing conference was held in this proceeding on Monday, December 15, 1980, at which the parties agreed to file a joint or each a separate status report on or before February 13, 1981 (Tr. 32).

On December 16, 1980, the Commission's Office of Energy and Environmental Impact in a memorandum to the Secretary of the Commission advised "The OEEI has examined Docket No. 80-80 and has determined that section 547.4(a)(1) of the Commission's Procedures for Environmental Policy Analysis applies. No environmental analysis needs to be undertaken nor environmental documents prepared in connection with this docket."

On February 13, 1981, the Commission's Bureau of Investigation and Enforcement (BIE) served and filed a letter status report. As a follow-up, the parties by notice served February 17, 1981, were directed to file a prehearing statement within 15 days and by March 13, 1981, to advise whether settlement can be reached in this proceeding.

In a joint prehearing statement served March 4, 1981, the parties stated, *inter alia*, that since they have agreed in principle upon a settlement and there are no facts in dispute, an oral hearing for receipt of evidence will not be necessary. The parties will provide a stipulated record along with the proposed settlement for review by the Administrative Law Judge. The Judge by Order served March 11, 1981, directed the parties to file the stipulated record and proposed settlement by April 9, 1981.

On April 9, 1981, BIE served and filed (1) a six (6) page joint stipulation to which was appended a six (6) page affidavit of Siegfried Paulssen sworn to January 28, 1981, and (2) proposed Settlement of Civil Penalties. These are set forth in full as follows:

STIPULATION

Pursuant to Rule 162 of the Commission's Rules of Practice and Procedure (46 CFR 502.162) the Bureau of Investigation and Enforcement and Counsel for the Respondents hereby submit this joint stipulation.

1. Paulssen & Guice, Ltd. (PG) is a New York corporation operating as an Independent Ocean Freight Forwarder, License No. 1166, and as a Custom House Broker. The home office of PG is located at 15 Park Row, New York, New York 10038.
2. Siegfried Paulssen (Paulssen) is President of PG and owns 54% of the stock. Ketra Uebersee Transport GMBH & Co. KG Hamburg (Ketra) owns 25%, Philip D. Jones owns 6% and Eduardo Gonzales owns 3%. The remaining 12% is Treasury Stock.
3. On December 27, 1976, PG established a branch office, approved by the Commission, in Kansas City, Missouri under the name Paulssen & Guice, Ltd. The branch manager was Leo A. Moore (Moore).
4. On January 31, 1977, Paulssen & Guice Midwest (PGM) was formed as a Missouri corporation with its office located at 2124 Atlantic Area, North Kansas City, Missouri. Moore became President of PGM and owns 55% of the stock, PG owns 35% and Richard Held owns 10% of the stock. Paulsen, President of PG, is also Vice President of PGM. PGM performed the services previously done by PG's Kansas City branch office.
5. PGM was formed because it was felt that it would be better to have a separate profit center and that the incorporation would simplify the record keeping.
6. After PGM was incorporated, it continued to use PG's IOFF license mistakenly, believing that since the Commission had approved the Kansas City branch office, it could continue using PG's license.

7. Subsequent to January 31, 1977, when PGM was incorporated, ocean freight commissions were retained by PGM. During the balance of 1977 approximately 210 ocean freight shipments were handled by PGM, on which commissions were earned. During 1978, approximately 461 shipments were handled on which ocean freight commissions were earned.

8. Since PGM was operating under PG's license number, PGM began experiencing problems because the steamship companies were sending the commission checks to PG in New York instead of PGM. This occurred because of the ocean carrier's computer system. In order to solve this problem and to become competely [sic] autonomous, PGM applied for an IOFF license on May 23, 1978.

9. In a letter dated December 7, 1978, the Office of Freight Forwarders (OFF) requested additional information from PGM regarding an item in its financial statement attributing \$2,225.18 to ocean freight commissions. PGM responded by admitting that these commissions were collected using PG's license but stated that they did not realize that this was a violation of the Commissions' Rules and Regulations.

10. OFF, in a letter dated March 2, 1979 with a copy to Paulssen, pointed out that until PGM received its own license, PGM would have to operate as a branch office of PG. Since that time, PGM has sent all ocean freight commission checks to PG in New York and beginning with the pay period ending January 18, 1980, PGM's personnel were put back on PG's payroll. From January 1, 1979 through May 3, 1979, PGM has logged 251 ocean export shipments. This brings the total number of ocean export shipments performed by PGM during the period between January 31, 1977 to May 31, 1979 to 922.

11. PG operates a branch office in Houston, Texas located at 1314 Texas Avenue, approved by the Commission on April 19, 1976. The Branch Manager at that time was Linda Roberson. Ms. Roberson resigned as Branch Manager on July 18, 1978 without prior notice to PG.

12. Barbara Middleton was employed by PG to manage the Houston Branch Office on August 28, 1978. She resigned on June 29, 1979. She was replaced by Carolyn Chambers who managed the branch from June 29, 1979 to September 10, 1979. On September 10, 1979, PG hired Karen Kowalke to manage its Houston branch.

13. OFF was not notified that Ms. Roberson was no longer the branch manager until a letter dated July 5, 1979. In that letter OFF was advised of the employment of Ms. Middleton and Ms. Chambers. By a letter dated October 9, 1979, OFF was advised of the employment of Ms. Kowalke. Neither Ms. Middleton or Ms. Chambers were ever approved by the Commission. Ms. Kowalke's qualifications were submitted but, there's no record of OFF approving her as a branch manager.

In a letter received by the Commission on April 8, 1981, dated November 21, 1980, which inadvertently was not mailed until April 7, 1981, PG advised OFF that Ms. Kowalke was no longer the Houston Branch manager. She was replaced by Rudy Barraza whose qualifications were submitted on April 7, 1981.

14. During the period of July 18, 1978 to August 28, 1978, the time period between the resignation of Ms. Roberson and the hiring of Ms. Middleton, PG's Houston branch office was managed by Harold Hess, General Manager of Ketra and his wife Katherine. Neither Harold or Katherine Hess were employees of PG. Hess performed this function to help PG whose branch manager had left suddenly.

15. PG operates an approved branch office in Cleveland, Ohio. Raymond Gillie was the qualifying officer and branch manager since the branch opening in 1973. Mr. Gillie left this position in 1976. He was replaced by Peggy Rhinebold who managed the branch from approximately March, 1976 to August, 1976 when she was replaced by Janet Acklin. OFF was not notified that Mr. Gillie had left or of the appointment of Ms. Rhinebold. In a letter received by the Commission on April 8, 1981, dated January 16, 1981, which inadvertently was not mailed until April 7, 1981, PG advised OFF of the appointment of Ms. Acklin as branch manager. By another letter received on April 8, 1981, dated February 9, 1981, which also inadvertently was not mailed until April 7, 1981, OFF was informed that as of January 19, 1981, John White would be managing this office. His qualifications were also submitted at that time.

16. PG operates an approved branch office in Miami, Florida. Francisco Gonzales was the qualifying officer and managed the branch from its opening in 1973 until approximately April, 1977 when he left this position. He was replaced by Hans Bunte who is the current manager of this branch. In a letter received by the Commission on April 8, 1981, dated January 19, 1981, which inadvertently was not mailed until April 7, 1981, OFF was advised that Mr. Bunte was managing this branch. His qualifications were also submitted.

17. PG operated an approved branch office in Baltimore, Maryland from January 24, 1972 until May 25, 1977 when it was closed due to the death of its branch manager Hugh Curry. The Commission was not notified of this branch closing. PG was not aware that it was required to inform the Commission of this branch closing.

18. On June 22, 1976, OFF approved a branch office for PG in Los Angeles based upon the qualifications of Alfred Kuehlewind. By letter dated July 21, 1976, however, PG was advised to cease operations at this location because it appeared that Mr. Kuehlewind was not an employee of PG. In a tele-

phone conversation with the attorney who at that time represented PG, OFF was advised that the arrangement with Mr. Kuehlewind had stopped.

19. PG reopened this branch in September 1979. By letter dated March 24, 1980, PG requested that Alfred Vetter be allowed to replace Mr. Kuehlewind as branch manager of the Los Angeles branch. By a letter dated July 10, 1980, PG was advised that they did not have a currently approved Los Angeles branch and that they would have to apply again for a Los Angeles branch office. On August 7, 1980, PG made this application. Subsequently, however, in January, 1981, the Commission denied the request by PG to operate a Los Angeles branch.

20. The Commission was not apprised of these various changes in PG's branch operations because at that time PG was experiencing a number of internal problems. In early 1976, it was discovered that PG was in poor financial condition. Subsequently, PG changed banks, accounting firms, a portion of a major stockholder's stock was purchased by Ketra, and PG reduced its staff by 40%. In addition PG was assisted by Ketra who arranged for long term loans. For these reasons, most of PG's focus was on rebuilding the company and this was the period during which most of the branch office problems arose. (See Paulssen affidavit attached hereto).

(S) JOHN ROBERT EWERS
Director
Bureau of Investigation
and Enforcement

Gerald H. Ullman
Counsel for Respondent

STUART JAMES
Attorney

AFFIDAVIT

Siegfried Paulssen, being duly sworn, deposes and says:

I am the President of Paulssen & Guice, Ltd., respondent in the above-enumerated proceeding and am making this affidavit in order to explain the problems that led to the commencement of this proceeding.

Since the formation of our corporation Charles Guice and I were equal shareholders. It was Guice's function as Treasurer to handle the financial affairs, keep a close liaison with our accountant and banks, watch our cash flow closely and ob-

serve regulatory requirements. My function as President was to develop new business requiring me to spend a great part of my time on the road and develop and maintain close working relationships with the customers. I was quite successful in this regard, obtaining many major accounts, and building up a strong agency network in Europe, the Middle East, South America and the Far East.

In reviewing the financial condition of our company in early 1976 I learned to my great shock that the company was in poor financial shape. The accountant for the firm, one Harold Greenberg, had apparently developed with Guice an incorrect method of accounting for payables and in addition our records were kept so poorly that our financial situation became serious indeed. It was necessary for me to dismiss Greenberg, obtain a new firm, Biller & Snyder, to conduct a thorough audit of our books. Because our financial and accounting activities had been so mismanaged, after lengthy and difficult negotiations at the end of December, 1976 I worked out an agreement with Guice whereby he terminated his employment, he resigned as an officer and director and he sold all of his stock interest. At that time I assumed the position of Treasurer as well as President and devoted a great deal of time and effort to restoring the corporation to a sound financial position. In this area I was able to do the following:

1. Four of our key employees were made shareholders by the sale to them of part of the stock owned by Guice and myself, creating additional capital of \$190,000.
2. Stock was sold to Ketra Uebersee Transport, a highly reputable German forwarder, which brought into the company another \$160,000 in September, 1976.
3. In February, 1977 Ketra agreed that it would make long term loans to our firm in German marks and repayable in like currency.
4. From mid-1976 to mid-1977 I reduced our staff from 100 employees to 60.
5. In late 1977 we changed banks, using Barclays Bank with whom we currently enjoy an excellent relationship. In addition, Ketra arranged a line of credit for us with a Hamburg bank which substantially relieved the financial pressure upon us.

During this period we found a competent comptroller, Harold Riggs, and improved our accounting system. After unsuccessfully using two computer service bureaus we have installed a house computer, IBM System 34, with a proven freight program which went on line on January 1, 1981. We have also bought a software program from Cyber Data Systems which provides us with the type of control and information we badly needed.

It was during the period described above that most of the problems with our branch offices arose. For the most part, we sought to comply with General Order 4 in applying for branch office approval and keeping the Commission apprised of changes. I have gone through our files exhaustively, but am not certain that our firm has all of the correspondence. What we do have indicates that we were aware of the necessity of branch office approval, sought same, and attempted to inform the Commission of changes. However, the Commission records are probably more complete than ours and may show some deficiencies, inadvertent though they were.

In some cases involving our branch offices we were simply unable to comply with Commission requirements through no fault of our own. For example, in our Houston branch office two of our branch managers, Lynda Robertson and Barbara Middleton, terminated their employment without giving us any notice. Since this action took place at a time when I was concentrating my efforts to ward off a collapse of our firm, I was simply unable to drop everything and fill promptly the vacancy in the branch office manager. It could also be that in other areas appropriate action was not taken expeditiously, but again, my focus was necessarily on saving the company. I can state unequivocally, and as earnestly as I can, that any non-compliance with the branch office approval or reporting requirements of General Order 4 was totally unintentional.

Our counsel, Gerald H. Ullman, advises that we bear responsibility for any "willful failure" to comply with a Commission rule. As may be seen from the foregoing, I do not feel that any violation that may have occurred was willful. Nevertheless, our firm is willing to make amends by the payment of civil penalties provided that counsel for both sides agree that fitness should no longer be an issue to be submitted to the Administrative Law Judge for a decision.

In addition, our firm can assure the Commission that we shall diligently seek to avoid any future problems. As noted above, we have a new computer system and an able controller in Riggs who will be in charge of regulatory matters. Mr. Ullman has recently become our retainer counsel and by reason of his competence in our field we feel certain that we will obtain the proper advice and guidance on legal matters. In summary, our firm has had serious problems, but we are well on the road to recovery. Our revenue in 1980 has increased 50% over our 1979 gross income and we have acquired new major accounts and long term contracts with government entities overseas. With a new accountant, a proven computer system, an experienced controller, adequate credit lines and expert counsel, we are confident that the difficult period is behind us, but we continue to be handicapped by the pendency of this proceeding. While we are willing to make

amends by paying a reasonable civil penalty, we ask that the fitness issue be disposed of by agreement so that we can concentrate on building our business, preserving our stockholders' equity, and keeping our 80 employees gainfully employed.

(S) SIEGFRIED PAULSSEN

On April 9, 1981, BIE served a memorandum in support of proposed settlement and recommendation in regard to the fitness issue. The respondents served on April 17, 1981 (received April 20, 1981) a memorandum in support of the proposed settlement.

The Presiding Administrative Law Judge served on April 29, 1981, an order directing the parties to supply further information and documents in relation to the proposed settlement and recommendation as to the fitness issue. The BIE on May 14, 1981, served and filed a supplemental memorandum in support of recommendation as to the fitness issue with attached documentation. The respondent served on May 11, 1981 (received May 14, 1981) a supplemental memorandum.

REVIEW OF SETTLEMENT AGREEMENT

The above stipulation and proposed settlement of civil penalties are submitted to the Presiding Administrative Law Judge for approval pursuant to Rule 162 of the Commission's Rules of Practice and Procedure, 46 CFR 502.162. Rule 162 provides, *inter alia*, "the parties may, by stipulation, agree upon any facts involved in the proceeding and include them in the record with the *consent* of the presiding officer. . . ." (Emphasis supplied.)

As to the Stipulation, the Presiding Administrative Law Judge does not consent to Paragraphs 5, 6 and 8, page 2, as these are best shown from official records. Otherwise he consents to the remainder's inclusion in the record.

As to the Proposed Settlement of Civil Penalties, the Judge does not consent that PG's use of a controller and legal counsel (page 2) lessens PG's responsibilities to conform to Rules and Regulations. The amounts of the civil penalties as to PG in the amount of \$10,000 and PGM in the amount of \$5,000 are consented to.

On May 14, 1981, BIE served and filed a supplemental memorandum supporting its prior recommendation that the respondents, Paulssen & Guice, Ltd. (PG) and Paulssen & Guice Midwest, Inc. (PGM) be found "fit" to be licensed as independent ocean freight forwarders.

The respondents served their supplemental memorandum May 11, 1981 (received in the Office of the Secretary of the Commission May 14, 1981) and in it stated, *inter alia*, there is no question that the authority to adjudicate the issue of civil penalties and fitness rests in the first instance with the Presiding Judge.

Under date of June 4, 1981, the Presiding Administrative Law Judge served an Order for the Parties to Supply Additional Information for consideration on which the issue of fitness is to be judged. BIE on June 15, 1981, served and filed additional information regarding proposed settlement. On July 6, 1981, the additional information was received from the respondents, which is simply a nine (9) page affirmation under penalty of perjury by Siegfried Paulssen, to which was appended a copy of the following letter:

JUN 02 1981

Siegfried Paulssen, President
Paulssen & Guice, Ltd. (FMC-1166)
15 Park Row
New York, NY 10038

Dear Mr. Paulssen:

This is in response to your firm's attorney's letter of April 7, 1981, and the telephone conversation with staff of this office on May 29, 1981 requesting the Federal Maritime Commission's continued permission for branch offices at:

1314 Texas Avenue Houston, TX 77002	2124 Atlantic Avenue North Kansas City, MO 64116
Miami Int'l Airport Building 2141, Door- 12 Miami, FL 33148	5100 West 164th Street Cleveland, OH 44181

and describing the qualifying experience of the respective proposed managers:

Rudy Barrazo
Leo Moore

Hans Bunte
John Dennis White

From the information contained in the letter, it appears that the branch offices will be staffed by qualified persons knowledgeable in the field of ocean freight forwarding.

In accordance with section 510.23(a) of the Commission's General Order 4 (copy enclosed), you are hereby authorized to continue to operate the Houston, North Kansas City, Miami and Cleveland branch offices.

Approval is based upon the experience of the individuals as set forth in that letter. Should any leave his position, you must notify us immediately and submit:

- 1) the name of the proposed replacement,
- 2) that person's resume,
- 3) a statement on the person's connection with any other firm, and particularly with any shipper, consignee, seller or purchaser of shipments to foreign countries from the United States, as well as a statement whether that person has read and understands the Commission's General Order 4 and section 1 & 44 of the Shipping Act, 1916.

Our continuing permission is based upon this premise.

VERY TRULY YOURS,

(S) JEREMIAH D. HOSPITAL

Chief

Office of Freight Forwarders

DISCUSSION, REASONS, FINDINGS AND CONCLUSIONS

The introducing of evidence on the question of fitness of a holder or applicant for an independent ocean freight forwarder license is the burden of BIE. See *Independent Ocean Freight Forwarder Application, Lesco Packing Co., Inc.*, Docket No. 74-31, 19 FMC 132, 136 (1976). An applicant for such a license also has a burden of showing fitness. Despite the burdens, BIE continues to recommend the respondents be found fit, and of course, the respondents agree with BIE.

BIE states its opinion is that the record in this proceeding justifies the imposition of a civil penalty but does not warrant the revocation of PG's license nor the denial of PGM's application (p. 2—May 14, 1981 Supplemental Memo); that while it has made a recommendation in regard to the respondents' fitness after considering the facts as they have evolved in this proceeding, BIE says it is well established that the ultimate determination can be made only by the Presiding Administrative Law Judge and the Commission, citing *Independent Ocean Freight Forwarder License—E. L. Mobley, Inc.*, Docket No. 77-26, 21 F.M.C. 845 (1978), and *Trimodal, Inc.*, Docket No. 78-26, 18 SRR 1172 (1978).

Recognizing that fitness is to be determined by the Presiding Judge and the Commission, and presumably aware of its burden to introduce evidence in question of fitness, that presented herein by the BIE asserting that while PGM did perform 922 ocean shipments using PG's license number, the shipments were performed under the mistaken belief that PGM was authorized by the Commission to perform these services; that after PG and PGM were informed by the Office of

Freight Forwarders that the arrangement was violative of the Shipping Act, 1916, corrective action was taken to return PGM to the status of a branch of PG; that it was during a time when PG's focus was on regaining their financial stability that these violations occurred.

BIE contends the respondents have cooperated with the Commission and have evidenced a willingness to conform to the conduct required by the Commission's Rules and Regulations in the future, thus BIE continues to recommend that the Presiding Administrative Law Judge find that the respondents are fit to be licensed independent ocean freight forwarders.

The instant proceeding has two civil penalty settlement agreements proposed, one as to the Respondent Paulssen & Guice, Ltd. (PG) in the amount of \$10,000, and the other as to Paulssen & Guice Mid-west, Inc. (PGM) in the amount of \$5,000. The two total \$15,000. PG is the holder of Independent Ocean Freight Forwarder License No. 1166, issued August 1, 1967. PGM is an applicant for an independent ocean freight forwarder license. PGM applied May 23, 1978, and was assigned Application No. B-207.

PGM was formed January 31, 1977. Leo A. Moore, who was manager of PG's North Kansas City, Mo. branch office, which branch office was established December 27, 1976, became President of PGM; he owns 55% of the stock. PGM, even though it has never been licensed as an independent ocean freight forwarder, performed the services previously done by PG's North Kansas City, Mo. office using PG's license No. 1166. Ocean freight commissions were retained by PGM for 210 ocean freight shipments in 1977, 461 ocean freight shipments in 1978, and 251 ocean freight shipments in 1979, for a total of 922 occasions from January 31, 1977, through May 31, 1979.

The Commission, by letter of April 23, 1980, notified PGM of its intent to deny the application unless the applicant requested a hearing on the grounds that such a denial is unwarranted. In a letter dated May 7, 1980, legal counsel for the applicant requested that PGM be given an opportunity to show at a hearing that such a denial is unwarranted.

As indicated hereinabove, under date of June 4, 1981, the Presiding Administrative Law Judge served an Order for the parties to supply additional information for consideration on which the issue of fitness is to be judged; that BIE on June 15, 1981, in response thereto filed additional information regarding proposed settlement. BIE said, page 4, *inter alia*:

Finally, the ALJ has requested that certain references to the stipulated record, made by BIE in the proposed settlement of civil penalties agreement and in its supporting memorandum, be specifically identified. The Order of Investigation and Hearing alleged that Respondents engaged in unlicensed forwarding activities and PG was alleged to have had a number

of defects in its branch office operations. In its supplemental memorandum filed May 14, 1981, as well as in its original supporting memorandum, BIE stated that "PG and PGM have admitted to the conduct in question". Namely that PGM did perform 922 ocean freight shipments using PG's license while they were not in the employ of PG and that a number of PG's branch offices contained defects. The Respondents have admitted, in paragraph 7 of the stipulation that in 1977, 210 ocean freight shipments were handled by PGM and that 461 shipments were handled in 1978 using PG's license number. In paragraph 10 of the stipulation, the Respondents admit that in 1979, PGM handled 251 ocean freight shipments using PG's license number bringing the total number of shipments performed by PGM to 922.

Counsel for PG in its April 17, 1981, Memorandum in support of proposed settlement, stated, page 9, ". . . PG joins with BIE in its recommendation that the proceeding against PG be terminated with the imposition of a civil penalty of \$10,000 and a finding by the Presiding Judge that PG's license be retained." And counsel argues that the sole issue for determination herein with respect to PGM is whether its unauthorized forwarding justifies a denial of its application for a license. In all other respects, PGM has the necessary requisites for licensing. BIE in its April 9, 1981, Memorandum in support of proposed settlement and recommendation, in regard to fitness issues (p. 12), urged the Presiding Judge to approve the proposed settlement submitted by the parties, to find PG fit to continue to be licensed as an independent ocean freight forwarder, to approve PGM's IOFF application, and to discontinue the present proceeding. So, here there is a request for termination of the proceeding as to PG and a request to discontinue the proceeding.

The President of PG, Siegfried Paulssen, in his January 28, 1981, affidavit, stated among other things that he learned in 1976 that PG was in poor financial shape. He dismissed the company's accountant and got another one; Guice & Paulssen worked out an agreement whereby Guice terminated his employment, resigned as an officer and director, and sold all of his stock interest. President Paulssen assumed the position of Treasurer, as well as President. Mr. Paulssen stated that in other areas appropriate action was not taken expeditiously because his focus was on saving the company; that any more compliance with the branch office's approval or reporting requirements was totally unintentional.

In his July 1, 1981, affirmation, Mr. Paulssen says (pp. 8, 9), PGM's qualifications for a license are not questioned except for the unauthorized forwarding.

The Presiding Administrative Law Judge, based upon the above, and under the terms of the settlement, the record as a whole and the

implication therefore finds that there was unauthorized forwarding; that PGM did perform 922 ocean shipments using PG's license number. The Kansas City office was under the management of Leo A. Moore during the period of the 922 shipments. Now the same Leo A. Moore is the President of Paulssen & Guice Midwest, Inc., to whom the Leo Moore Company leases space for the Kansas City office. Leo A. Moore, according to the application of PGM, owns or holds fifty-five percent (55%) of the stock in PGM. Thirty-five percent (35%) of the stock in PGM is owned or held by PG. Mr. Paulssen, as noted above, stated his effort was focused on saving the PG company. Mr. Moore, as manager of the PG North Kansas City, Mo. branch was present all the time the 922 shipments were made. The respondents contend that any violations, if they occurred, were not willful. However, as the Commission said in *Independent Ocean Freight Forwarder License No. 1778, Crescent Navigation, Inc.*, Docket No. 80-21, Order Adopting Initial Decision, served August 13, 1981 (24 F.M.C. at 77 (1981)): "The Commission's regulations impose duties and obligations . . . and . . . passive failure to conform with the requirements of law is as serious a matter as affirmative actions in violation of the law."

PG is still doing business at its branch office at 2124 Atlantic Avenue, North Kansas City, Mo., and as indicated above, under date of June 2, 1981, was authorized by the Chief, Office of Freight Forwarders of the Commission, to continue to operate the North Kansas City and other branch offices named. PG is now promising to obey the Commission's Rules and Regulations and thus serve the public.

PGM is applicant for an independent ocean freight forwarder license at the same spot PG's branch office is doing business at, 2124 Atlantic Avenue, North Kansas City, Mo. Mr. Leo A. Moore is manager of the PG branch office at North Kansas City, Mo., and is President of the applicant PGM, holding or owning 55% of PGM stock. Mr. Paulssen, President of PG, is Vice President of the applicant PGM and holding or owning 35% of the PGM stock. Save for the addition of Midwest, Inc., the name of the applicant PGM is the same as that of the licensee PG.

Granting an independent ocean freight forwarder license to the applicant PGM would be akin to granting a second license to the same parties at the same stand where 922 shipments concerning them and PG in violation of rules and regulations were made and civil penalty settlements therefor received. A grant of a new, or second license under such conditions might be construed as condonation by the Commission of the actions involved, rather than enforcement of the law with compassion, which it is sought to be.

The respondents have been given every consideration in regards to the settlement of civil penalty. Enforcement of the law with compassion shall be followed in regard to the license of PG and the application

for a license by PGM. Under the circumstances of this case and the record herein, the Presiding Administrative Law Judge *finds* and *concludes* that PG shall be permitted to retain its independent ocean freight forwarder license, and the civil penalty settlement in the agreed amount of \$10,000 payable in 30 days is approved. PGM, under the circumstances herein, at this point, shall not be granted an independent ocean freight forwarder license, as its application shall be denied because it is not clear that PGM is independent, or that PGM has met its burden of proving to be fit and under such circumstances and record, to find PGM fit would be to make a travesty of justice. PG needs to direct all of its attention to the proper operation of PG without any dilution of the attention by efforts to operate a new corporation in the same branch office, trying to do the same business in almost the same name, which the record shows previously was confusing to the customers, and to operate with the same persons responsible and in charge the time PG found itself in financial difficulty.

Shippers who conceivably believe they are dealing with a new corporation, operating under a new independent ocean freight forwarder license as sought herein, would in reality be conducting business with those found to have engaged in activities amounting to 922 violations of the Shipping Act. The record is simply void as to the reasons necessitating the approval of a new license for PGM and the purposes are not apparent nor have the parties submitted a scintilla of evidence which mandates a second license.

For these reasons, the application of PGM is denied. However, PGM's settlement of civil penalty is accepted and approved.

For the reasons given, the results of the investigation and the record herein, PG is permitted to retain its freight forwarder license.

Wherefore, it is ordered:

(A) Paulssen and Guice Ltd.'s proposed settlement of civil penalty in the amount of \$10,000 payable within 30 days is approved.

(B) Paulssen and Guice Ltd.'s independent ocean freight forwarder license is not suspended or revoked; they are allowed to retain the license.

(C) Paulssen and Guice Midwest, Inc.'s proposed settlement of civil penalty in the amount of \$5,000 payable within 30 days is approved.

(D) Paulssen and Guice Midwest, Inc.'s application for a license as an independent ocean freight forwarder is denied.

(S) WILLIAM BEASLEY HARRIS
Administrative Law Judge

FEDERAL MARITIME COMMISSION

DOCKET NO. 80-61

CHUMET SHIPPING CO., INC. - INDEPENDENT OCEAN
FREIGHT FORWARDER LICENSE NO. 619

NOTICE

February 4, 1982

Notice is given that no exceptions have been filed to the December 31, 1981 initial decision in this proceeding and the time within the Commission could determine to review that decision has expired. No such determination has been made and, accordingly, that decision has become administratively final.

(S) FRANCIS C. HURNEY
Secretary

FEDERAL MARITIME COMMISSION

DOCKET NO. 80-61

CHUMET SHIPPING CO., INC. - INDEPENDENT OCEAN
FREIGHT FORWARDER
LICENSE NO. 619

Held:

- (1) Where the Respondent ocean freight forwarder improperly invoiced clients for insurance premiums by inflating the amount of the premiums it paid to insurance companies and where it failed to timely notify the Federal Maritime Commission of changes in its ownership and management and in its "qualifying officer," a settlement providing a penalty of \$20,000, with safeguards as to the company's future operation, is just and proper. Such a penalty gives due consideration to mitigating circumstances and is within that reasonable area of settlement and compromise which lends itself to the deterrence of future similar conduct by the Respondent and others so inclined, and will secure compliance with the law and the Commission's rules and policies.
- (2) Where the Respondent improperly invoiced customers for insurance premiums and engaged in certain other questionable practices, all of which activity was initiated and carried out by persons no longer associated with the Respondent, and where the Respondent is now owned and operated by other persons who were unaware of the improper conduct and who have corrected the prior wrongdoing and have agreed to future independent audits designed to prevent its recurrence and compliance with the law and regulations, it is held that the Respondent is "fit," willing and able to carry on business as an ocean freight forwarder and its license need not be suspended or revoked.

Gerald H. Ullman for Respondent.

Charles C. Hunter and *Stuart James* for Office of Hearing Counsel, Bureau of Hearings and Field Operations.

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

Finalized February 4, 1982

PRELIMINARY MATTERS

This case began when the Federal Maritime Commission (Commission) served an Order of Investigation and Hearing on the Respondent on September 12, 1980. In the Order the Commission directed that the following issues be addressed and resolved during the course of the investigation:

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

- 1) Whether Chumet violated section 510.5(a)(4) of General Order 4 by failing to notify the Commission of a change of the firm's qualifying officer within 30 days after the occurrence of the change.
- 2) Whether Chumet violated section 510.5(c) of General Order 4 by failing to notify the Commission of a change of the firm's officers and owners within 30 days after the occurrence of the change.
- 3) Whether Chumet violated section 510.23(c) of General Order 4 by participating in an export transaction whereby the licensee prepared a commercial invoice dated May 23, 1978, misrepresenting, by lowering, the selling price of the merchandise to the purchaser on a shipment which moved under ocean bill of lading dated May 26, 1978.
- 4) Whether Chumet violated section 510.23(d) of General Order 4 by not exercising due diligence in imparting information to its principal and/or by knowingly imparting false information to its principal in regard to a manufacturer's discount received on merchandise purchased by check dated June 5, 1978, relative to an ocean freight forwarding transaction handled under bill of lading dated May 26, 1978.
- 5) Whether Chumet violated sections 510.23(e) and 510.23(f) of General Order 4 by: (1) withholding information from its principal in regard to a manufacturer's discount received on merchandise purchased by check dated June 5, 1978, and (2) not promptly accounting to its principal for an over payment of charges relative to an ocean freight forwarding transaction handled under bill of lading dated May 26, 1978.
- 6) Whether Chumet violated section 510.23(f) by failing to account to its shipper principal, Cardinal Export Corp., the insurance money paid to Chumet relative to an insurance claim filed on behalf of the shipper principal which was in excess of the amount sought by the shipper principal.
- 7) Whether Chumet violated section 510.23(j) of General Order 4 by failing to state separately on its invoices or other forms of billing to its shipper principals the actual amount of the insurance value, insurance rate, and premium cost of insurance arranged for shipments handled during the billing period June 1, 1977 through February 28, 1979.
- 8) Whether Chumet violated section 510.23(j) by failing to state separately on its invoices or other forms of billing to its shipper principals the actual amount of the insurance value, insurance rate, and premium cost of insurance arranged in regard to ocean shipments forwarded by the licensee during the past five years.
- 9) Whether civil penalties should be assessed against Chumet pursuant to section 32(e), Shipping Act, 1916, for violations of

the Shipping Act, 1916, and/or the Commission's rules and regulations, and, if so, the amount of any such penalty which should be imposed taking into consideration factors in possible mitigation of such a penalty.

- 10) Whether Chumet's independent ocean freight forwarder license should be suspended or revoked for:
 - (a) willful violations of the Shipping Act, 1916, and the Commission's rules and regulations pursuant to section 44(d) of the Shipping Act, 1916.
 - (b) failure to comply with the requirements of section 510.5(a)(4) of General Order 4 pursuant to section 510.5(a)(5) of General Order 4.
 - (c) failure to respond to a lawful inquiry or to comply with the rules and regulations of the Commission in accordance with section 510.9(b) of General Order 4.
 - (d) such conduct as the Commission finds renders Chumet unfit to carry on the business of forwarding in accordance with section 510.9(e) of General Order 4.

Subsequent to the issuance of the Order of Investigation and Hearing, the Bureau of Hearings and Field Operations² (Hearing Counsel) and Chumet exchanged discovery requests in the form of written interrogatories and requests for admissions and production of documents. Pursuant to these requests, the parties exchanged a quantity of information and material relating to the allegations set forth in the Commission's Order of Investigation and Hearing. However, Chumet also raised objections to a number of Hearing Counsel's inquiries. In response, Hearing Counsel, on December 2, 1980, filed a motion for an order compelling responses to its outstanding discovery requests. Although Chumet furnished Hearing Counsel with additional information on December 17, 1980, the parties were unable to resolve all of the discovery issues in dispute.

By letter dated February 20, 1981, Hearing Counsel requested that its motion to compel be held in abeyance pending the outcome of further discussions by the parties. Hearing Counsel advised the presiding Administrative Law Judge that Chumet would furnish additional documentary material to Hearing Counsel and that Hearing Counsel would be deposing Chumet's Vice President and Secretary, Michael Metrick, in mid-March, 1981. Hearing Counsel further advised that the parties thereafter would jointly explore the possibility of resolving the instant proceeding without resorting to protracted litigation.

By letter dated March 24, 1981, Hearing Counsel notified the presiding Judge that a negotiated settlement appeared to be a realistic possi-

² At the time the present investigation was instituted, the Bureau of Hearings and Field Operations was designated the Bureau of Investigation and Enforcement.

bility and that negotiations between the parties were continuing. During the subsequent months, Chumet made available additional material requested by Hearing Counsel. The parties eventually informed the presiding Judge of specific dates on which an evidentiary record, a settlement agreement and memoranda of law would be submitted.

However, negotiations broke down in midsummer and Hearing Counsel, by letter dated August 7, 1981, notified the presiding Judge that although the parties had made significant progress in narrowing the gap between their respective positions, their efforts to reach a settlement had ultimately been unsuccessful. The presiding Judge then scheduled a hearing for October 19, 1981.

At that hearing, the parties advised the presiding Judge that a settlement had been reached. Pursuant to the Order of the presiding Judge served October 22, 1981, the parties have submitted on November 27, 1981, a settlement agreement reflecting the settlement so negotiated. In conjunction with that submission, the parties have also filed an evidentiary record upon which the propriety of the settlement can be determined.³

Also in accordance with the Order of October 22, 1981, the parties have each submitted memoranda in support of the proposed settlement of civil penalties. The memoranda also discuss the issue relating to "fitness," which cannot be settled. The parties both take the position that the Respondent should be allowed to continue to be licensed as an ocean freight forwarder. They assert that the evidentiary record submitted by the parties supports both the proposed settlement and a holding that the Respondent's license should not be revoked.

FINDINGS OF FACT

The parties to this proceeding executed a stipulation of facts which was submitted on November 27, 1981, together with certain Appendices and Exhibits which are hereby made a part of the evidentiary record of this proceeding. The facts contained in the stipulation are hereby adopted and so found, with one minor addition, as set forth below. We would have used a different sequence, but we have closely followed the stipulation submitted by the parties to avoid confusion when referring to the attached documents.

1. Chumet, located at 401 Broadway, New York, New York, 10013, is an independent ocean freight forwarder operating under FMC License No. 619, issued on February 12, 1964.

2. Effective August 25, 1971, License No. 619, Revised, was issued to Chumet following its incorporation. At that time, Chumet was owned

³ The evidentiary record consists of a stipulation between the parties with ten appendices and nine additional exhibits.

solely by Philip Chudnoff and Philip Metrick who were the only officers of Chumet and its sole qualifying officers.

3. By letter dated May 3, 1978, the Commission was advised of the death of Philip Chudnoff. (Appendix A.)

4. By letter dated May 8, 1978, the Commission's Office of Freight Forwarders (OFF) provided Chumet with a copy of form FMC-18 requesting that it update this form to reflect, *inter alia*, changes in the owners and officers of the firm. By letters dated April 2, 1979 and October 16, 1979, OFF advised Chumet that it had not received a response to its initial request. (Appendix B.) As of September 12, 1980, the date on which the present investigation was instituted, OFF had not received a revised form FMC-18 from Chumet.

5. On January 1, 1979, Philip Metrick died.

6. Chumet failed to notify the Commission in writing on Form FMC-18 of the changes in ownership or the changes in officers which occurred at Chumet as a result of either the death of Philip Chudnoff or the death of Philip Metrick until after the commencement of the present investigation.

7. Chumet failed to notify the Commission in writing of either the identity or the detailed ocean freight forwarding experience of the officer of Chumet who qualified Chumet as an independent ocean freight forwarder until after the commencement of the present investigation.

8. With a cover letter dated October 7, 1980, Chumet submitted an amended form FMC-18 that reflected the current ownership and officers of Chumet and detailed the work experience of Michael Metrick (Philip Metrick's son), the current qualifying officer of Chumet. (Appendix C.)

9. The current officers of Chumet are Roslyn Metrick, President, Michael Metrick, Vice President, and Sharon Metrick, Treasurer. Chumet's ownership is shared equally between Michael Metrick, Sharon Metrick and Debrah Metrick.

10. Michael Metrick has been employed by Chumet since July 1976. From July 1976 until December 1977, Mr. Metrick was employed by Chumet as a typing clerk. From December 1977 until March 1979, Mr. Metrick was employed as the Secretary and Assistant Manager of Chumet. From March 1979 to the present, Mr. Metrick has been employed as the Vice President and General Manager of Chumet.

11. Following the death of Philip Metrick in January 1979, Michael Metrick assumed the position of Chumet's qualifying officer.

12. Prior to January 1979, Michael Metrick had not been exposed to Chumet's methods of billing its clients for services performed.

13. Subsequent to January 1979, Michael Metrick investigated Chumet's existing procedures for billing its clients for the services it performed.

14. Michael Metrick initially worked with the Chumet employee who had been involved in the billing of Chumet's clients prior to January 1979. Mr. Metrick gradually assumed the responsibility for supervising the task of billing Chumet's clients for services performed.

15. Today, if a shipper requests insurance *from Chumet's own open policy*, Chumet issues an insurance certificate under that policy, forwards the original to the shipper and sends copies to the insurance company.

16. The insurance certificate that the shipper receives does not specify the premium that is paid by Chumet for the insurance so arranged.

17. Prior to January 1979, Chumet showed on its invoices to its clients the insured value of the cargo, an amount that allegedly represented the insurance premium and the amount of the placement service charge. The placement charge was for the service involved in arranging for the insurance. Appendix D contains a sampling of Chumet invoices reflecting insurance charges.

18. The premiums shown on Chumet's invoices, however, were not the actual insurance premiums paid by Chumet to its insurance broker. Prior to January 1979, it was a general practice for Chumet to show a larger figure on its invoices to its clients than the actual premium that had been paid by Chumet. The percentage of the "mark-up" of the premium costs varied from shipment to shipment.

19. Chumet inflated the actual insurance premium on its invoices to its clients by amounts ranging from 10 percent to in excess of 100 percent. Appendix E contains examples of insurance statements issued by Chumet's insurance broker that reflect the actual insurance premiums on the shipments represented by the invoices contained in Appendix D. The handwritten figures in the "Remarks" column on these statements represent the alleged premium and the placement fee billed to the client. The premium actually paid by Chumet is reflected in the "Premium" column. Also included in Appendix E are compilations of the differences between the actual and inflated premiums on a sampling of shipments handled by Chumet.

20. Chumet's clients were not aware that prior to January 1979, they were paying more in insurance premiums than Chumet was actually paying to its insurance broker.

21. Chumet forwarded approximately 2,000 to 2,500 ocean freight shipments annually during the years 1975 through 1980. Insurance was arranged by Chumet on a varying percentage of these export shipments.

22. Chumet's annual statements of income and earnings contain a category entitled "Profit on Insurance" (POI) which reflects the gross profit generated from insurance billings to clients minus the premiums paid by Chumet to its insurance broker. Included in the POI category are the placement fees assessed by Chumet and the difference between

the premiums actually paid by Chumet to its insurance broker and the premiums Chumet billed its clients (the differential).

23. For the years ending April 30, 1976, through April 30, 1979, the POI category amounted to \$25,219, \$44,560, \$154,494 and \$152,836 respectively. For these same years, Chumet's income from ocean freight forwarding fees was \$61,095, \$60,661, \$100,828 and \$126,972 respectively. Its net profit for these years was \$2,082, \$4,180, \$12,104 and \$21,778 respectively. (Appendix F.)

24. The POI category for the years ending April 30, 1978, and April 30, 1979, were disproportionately large as compared to the same category for the years ending April 30, 1976, and April 30, 1977, because of the increased volume and value of the shipments forwarded by Chumet during the later years.

25. The average percentages (taken from a random sample of Chumet's shipping files) of the POI category that were attributable to the differential during the calendar years 1976 through 1979 were respectively 44.87 percent, 38.63 percent, 44.09 percent and 95.51 percent. (Appendix G.)

26. Chumet generated approximately \$150,000 during the period September 1975 through June 1979 by inflating insurance premiums in billing its clients.

27. Prior to January 1979, Chumet identified on its invoices to its clients both the alleged premium cost of the insurance applied to the shipment and a placement fee. After January 1979, Chumet no longer specified a separate placement fee. Chumet thereafter assessed a lump sum for insurance coverage.

28. Chumet began billing its clients in this manner because Michael Metrick, having analyzed Chumet's previous system for billing insurance charges and having been unable to determine why Chumet had so billed its clients, decided to discontinue the previous method. Chumet operated in this latter manner until June 1979.

29. In June 1979, Chumet began billing its clients separately for the exact premium rate that Chumet paid to the insurance broker and a placement service charge.

30. Chumet altered its billings procedures because Michael Metrick was advised by Peter Breslaw, an investigator with the Commission's Atlantic District Office, of the Commission's regulations requiring that Chumet's insurance charges be reflected in such a manner.

31. Chumet, on its invoices to its clients, has used the letter P to designate the insurance premium and the letters P & S to designate the insurance placement fee. (Appendix H.)

32. Chumet's clients were not originally advised as to the meaning of the symbols so utilized and a number of shippers were confused as to the charges that the symbols represented.

33. For the year ending April 30, 1981, Chumet possessed working capital in the amount of \$87,010 and a net worth of \$56,557. During that year, Chumet had a net loss of \$1,237. (Appendix I.)

34. For the six-month period May 1, 1981, through October 30, 1981, Chumet possessed working capital in the amount of \$78,216 and a net worth of \$50,115. During that period, Chumet had a net loss of \$6,442. (Appendix J.)

ULTIMATE FINDINGS OF FACT

35. The record in this proceeding justifies a settlement whereby the Respondent pays \$20,000 to the Federal Maritime Commission. Such a settlement takes into consideration relevant mitigating circumstances and is within the boundaries of that reasonable area of settlement and compromise which lends itself to the deterrence of future similar conduct by the Respondent and others so inclined, and which will secure compliance with the law and the Commission's rules and practices.

36. The Respondent is fit to continue as a licensed ocean freight forwarder.

DISCUSSION AND CONCLUSIONS

1. *Settlement of Civil Penalties*

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

The agency shall give all interested parties opportunity for—

(1) The submission and consideration of facts, arguments, offers of settlement, or proposals of adjustments when time, the nature of the proceedings, and the public interest permit.

In *Pennsylvania Gas & Water Co. v. Federal Power Commission*, 463 F.2d 1242, 1247 (D.C. Cir. 1972), the Court, noting its legislative history,⁴

⁴ Senate Judiciary Comm., Administrative Procedure Act—Legislative History, S. Doc. No. 248, 79th Cong., 2d Sess. 203 (1945). In considering the settlement provision in S. 7, 79th Cong., 1st Sess. (1945), which ultimately became Section 554(c) of the Administrative Procedure Act (see note 5, *supra*), the Senate Judiciary Committee stated:

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

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

referred to the above provision "as being of the 'greatest importance' to the functioning of the administrative process" and stated:

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

Further, the Commission has by rule encouraged settlement⁵ and has often favorably looked upon them as a matter of policy.⁶

While settlement of cases is encouraged generally, they must be predicated on the specific facts and circumstances present in each case. Here, the facts are quite clear. For the fiscal years ending April 30, 1976, through April 30, 1979, Chumet invoiced its clients by including in the invoice information allegedly showing the insured value of the cargo, the amount of the insurance premium and the amount of a "placement service charge." In doing so, at least up until January of 1979, it "marked-up" the premium payments from 10 percent to over 100 percent, without informing its clients of the true premium costs. During the period April 30, 1976, through April 30, 1979, Chumet's profit on insurance income from ocean forwarding fees and net profit was as follows:

⁵ Rule 91 of the Commission's Rules of Practice and Procedure, 46 C.F.R. 502.91, provides in pertinent part: "Where time, the nature of the proceeding, and the public interest permit, all interested parties shall have the opportunity for the submission and consideration of facts, argument, offers of settlement, or proposal of adjustment"

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

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

⁶ See *Perry Crane Service v. Port of Houston Authority, of Port of Houston, Texas* (Approval of Settlement), FMC Docket No. 75-51, served June 21, 1979 (22 F.M.C. 30 (1979)), Administratively Finalized July 27, 1979; *Del Monte Corp. v. Matson Navigation Co.* (Approval of Settlement), FMC Docket No. 79-11, served November 20, 1979 (22 F.M.C. 364 (1979)), Administratively Finalized, December 27, 1979; *Merck, Sharp & Dohme v. Atlantic Lines*, 17 FMC 244 (1973). See also the long list of cases cited in section IIA of the Memorandum filed by the Bureau of Hearings and Field Operations.

Year	Insurance Profit	Fees	Net Profit
1976	25,219	61,095	2,082
1977	44,560	60,661	4,180
1978	154,494	100,828	12,140
1979	152,836	126,972	21,778

During the four-year period, officer's salaries rose from \$86,000 to \$138,100, and in 1978 a pension plan was apparently adopted to which \$69,611 was contributed in 1978 and \$72,275 was contributed in 1979.⁷

Prior to January of 1979, Chumet was owned by Philip Chudnoff and Philip Metrick, who were its only officers and its sole "qualifying"⁸ officers. When Mr. Chudnoff died, Michael and Roslyn Metrick also became officers.⁹ On January 1, 1979, Philip Metrick died, and ultimately Roslyn Metrick became President, Michael Metrick became Vice-President and Secretary, and Sharon Metrick became Treasurer. It was not until October 7, 1980, after the present investigation began, that Chumet filed a form FMC-18 which detailed the work experience of Michael Metrick, Chumet's present qualifying officer.

Michael Metrick, who is Philip Metrick's son, began working for Chumet in July of 1976 as an office boy. On Mr. Chudnoff's death, he took on additional duties as a typing clerk and from December 1977 to March 1979 Michael was Secretary and Assistant General Manager of Chumet. After his father's death in January 1979, Michael became Chumet's qualifying officer and since March 1979 has been employed as the Vice-President and General Manager of Chumet.

Prior to January 1979, Michael Metrick was neither part of nor familiar with Chumet's methods of billing clients for services performed. After January 1979, he investigated Chumet's existing procedures for billing its clients for the services it performed and gradually assumed responsibility for those billings. Initially, he discarded the separate description of premium payment and placement fee, assessing a lump sum for insurance coverage. In June 1979, Chumet began billing its clients for the exact premium rate Chumet paid to the insurance broker and the placement service charge. This was done because the Commission advised Mr. Metrick that its regulations required such a breakdown of the insurance costs.

In addition to failing to properly account for the insurance premiums on the invoices, which goes to whether or not Chumet violated section

⁷ While the record is devoid of any indication of who benefited from the pension program, Chumet only had two principal officers until 1978. In 1979 there were three officers, all members of the Metrick family.

⁸ "Qualifying" under the Commission's rules as licensed ocean freight forwarders.

⁹ They so notified the Commission by letter dated May 3, 1978.

510.23(j) of General Order 4, and its failure to timely notify the Commission about a change in its qualifying officer and its owners and officers, which involves violations of sections 510.5(a)(4) and 510.5(c) of General Order 4, Chumet is also charged with certain other possible violations. They are set forth in subparagraphs 2 and 3 of the Order of Investigation and Hearing (at page 2). They involve a shipment which moved on an ocean bill of lading dated May 26, 1978, and allege that Chumet misrepresented the selling price of merchandise shipped to Authentic Agencies, Inc. (Authentic) by failing to disclose a 5 percent discount (\$210.44) received from a supplier on its invoice dated May 23, 1978. The evidence of record ¹⁰ indicates that Authentic requested certain services of Chumet, was aware of the 5 percent discount, and does not object to Chumet's retaining the discount "since valuable services have been rendered by Chumet to us."

Subparagraph 4 of the Order (page 2) charges Chumet with possible violation of General Order 4, by failing to account to its principal, Cardinal Export Corporation (Cardinal), for certain insurance money (\$426.92) paid to Chumet as a result of a claim filed on behalf of Cardinal. Chumet received \$1,387.40 and paid Cardinal \$960.48. The evidence of record ¹¹ indicates that Cardinal was aware of the amount received by Chumet, but allowed Chumet to retain the \$426.92 "as reasonable compensation for the services rendered in the preparation, filing and processing of the claim."

Given the above factual background, it is our task to approve or disapprove the proposed settlement submitted by the parties. In it Chumet admits that it has engaged in specified conduct that may be violative of pertinent regulatory authority, and states that it has terminated all such practices. It agrees to pay a civil penalty of \$20,000 over a period of four years. To safeguard against any recurrence of any possible conduct violative of the maritime laws or Commission rules and regulations, Chumet not only has agreed to advise its owners, directors, officers and employees of the provisions of the proposed settlement, but has agreed to take further steps, the most important of which is to allow an independent auditor to inspect its books to insure compliance with General Order 4. The audits are to be conducted annually with or without notice to Chumet, and copies of the auditor's report will be furnished to the Commission as well as Chumet.

In accepting or rejecting the proposed settlement, it is necessary to consider the Commission's rules and regulations regarding settlements generally, 46 C.F.R. 505.1 *et seq.* They provide in pertinent part that "the criteria for compromise, settlement, or assessment may include, but need not be limited to, those which are set forth in 4 C.F.R. Parts 101-

¹⁰ Stipulation, Exhibit 2.

¹¹ Stipulation, Exhibit 5.

105." The referenced criteria are the government-wide "Standards For The Compromise of Claims," developed by the Comptroller General and the Attorney General of the United States under the Federal Claims Collection Act of 1966, 31 U.S.C. 952, and the Commission has held that these criteria do provide an accepted perspective from which to review and analyze a proposed settlement.¹² The criteria include consideration of the Commission's enforcement policy, the cost of collecting the claim, litigative probabilities and inability to pay. With respect to enforcement policy, it is our belief that given the provisions of the settlement, that policy is adequately served by the approval of the settlement agreement. It is clear that Chumet violated General Order 4 when it failed to properly invoice customers for the insurance premiums and when it did not timely notify the Commission of changes in ownership and management. Further, its billing methods in particular instances were loose and inaccurate to say the least. Yet, there are several important factors in mitigation which must be weighed. The lack of culpability of the current owners and managers is clearly a consideration in Chumet's favor. The termination of the violative practices is important, and Chumet's acquiescence in having outside auditors monitor its activities is a clear expression of its determination and willingness to right whatever wrongs that may have occurred. Indeed, in terms of enforcement policy, the proposed settlement of \$20,000 coupled with the corrective measures contemplated in the agreement is precisely the kind of example one would like to see followed in the settlement of similar Shipping Act violations.

As to the cost of collecting any penalties which might be due and the litigative probabilities involved, it is true that if the maximum penalty for each possible violation were assessed, it would far exceed the \$20,000 figure set forth in the settlement agreement. However, the likelihood that every violation could be proven, or even if proven would give rise to the maximum penalty being imposed, is remote. The cost of investigation and trial in terms of actual costs as well as man-hours would be substantial, and given the mitigating circumstances already noted, one would be hard-pressed to predict a money judgment that would exceed \$20,000 after costs and trial hazards were taken into account.

Finally, as to inability to pay, it does appear that Chumet had a net loss of \$1,237 in the year ended April 30, 1981, and a net loss for the next five-month period of \$6,442. Its current working capital is only

¹² *Behring International, Inc., Independent Ocean Freight Forwarder License No. 910*, (Approval of Settlement and Initial Decision), Docket No. 80-43, served March 17, 1981, 23 F.M.C. 974; *Eastern Forwarding International, Inc.—Independent Ocean Freight Forwarder Application—Possible Violations, Section 44, Shipping Act, 1916* (Initial Decision), Docket No. 79-27, served July 31, 1980, 23 F.M.C. 207.

\$78,216, and its net worth is \$50,115. Chumet's current expenses, including officer's salaries, are reasonable. While one might readily argue in support the proposed settlement on the basis of the above facts and an inability to pay, we note that it is not necessary to do so here. Even without consideration of Chumet's inability to pay, we would approve the settlement because of the other facts and circumstances we have already discussed. Our hesitancy in citing inability to pay as a decisive settlement consideration in this case stems from the belief that if inability to pay is considered to be a decisive factor, the financial settlements submitted should be certified with a sworn statement given within the ambit of 18 U.S.C. 1001.¹³ Further, where a corporate ocean freight forwarder license is involved, settlements on the basis of inability to pay should be approached with caution. It is all too easy for the corporate entity, especially when it is closely-held, to place assets beyond the reach of the Commission or its customers, so that when violations do occur and are uncovered, it might conveniently be able to plead inability to pay for settlement purposes. In our view, given the nature of maritime law and regulations, settlements on the basis of inability to pay ought to be approached with caution and avoided where other factors warrant settlement. We have done so here.

In view of all of the above, we believe the proposed settlement is an acceptable resolution of the issues involved. Without belaboring the point, the settlement of the civil penalties proposed by the parties here is a fair and equitable one in the light of the facts and circumstances involved, is in the public interest, and is approved. A copy of the settlement agreement is attached.

2. *Fitness.*

After settlement of the penalty provisions, the only issue left for decision is whether or not the Respondent's ocean freight forwarder's license should be suspended or revoked pursuant to section 44(d) of the Shipping Act, 1916 (Issue No. 10, page 5, of the Order of Investigation and Hearing). In *Independent Freight Forwarder's License or—E.L. Mobley Inc.*, 21 F.M.C. 845 (1979), Initial Decision served November 6, 1978, where the Commission issued an Order of Investigation regarding both civil penalties and the question of fitness, the Commission held that:

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

¹³ Section 1001 provides a criminal sanction for willful false statements.

agency's Shipping Act responsibilities to permit the licensee to negotiate the issue of fitness

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

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

SEC. 44. (a) No person shall engage in carrying on the business of forwarding as defined in this Act unless such person holds a license issued by the Federal Maritime Commission to engage in such business

(b) A forwarder's license shall be issued to any qualified applicant therefor if it is found by the Commission that the applicant is, or will be, an independent ocean freight forwarder as defined in this Act and is fit, willing, and able properly to carry on the business of forwarding and to conform to the provisions of this Act and the requirements, rules and regulations of the Commission issued thereunder, and that the proposed forwarding business is, or will be, consistent with the national maritime policies declared in the Merchant Marine Act, 1936; otherwise such application shall be denied

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

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

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

. . . Thus, the courts as the Commission have recognized that evidence of mitigation should be considered when determining

whether a license applicant should be found to be fit although implicated in violations of the Act in the past (citations omitted). Furthermore, in previous cases the Commission has expressed its belief that the Freight Forwarder Law, P.L. 87-254, was enacted as remedial statute in order to correct abuses in the forwarding industry (citations omitted).

The principle that the Commission should not rush to extreme sanctions without considering all factors of mitigation in an effort to fashion a just and reasonable remedy is well supported by the courts. Although agencies are not required to impose sanctions in a perfectly even manner because of the wide latitude they are given by the courts as the expert bodies most skilled in devising means to carry out specific legislative purposes, the agencies are nevertheless expected to consider less drastic alternative remedies and to base whatever remedy they select on facts and reasonable interpretations of law (footnote omitted).

Applying the above law and principles to the facts involved in this case, we must determine whether or not the Respondent is fit to continue to be licensed as an ocean freight forwarder. The evidence establishes, and the Respondent admits, that it made mistakes in billing clients for insurance. It also agrees that it failed to timely notify the Commission of changes in its ownership and management. However, the evidence also establishes that Chumet's violations were not the result of any incompetence in carrying out its duties as a freight forwarder. Rather, they resulted from questionable practices apparently initiated and carried out by persons who are no longer employed by Chumet. The evidence is clear that the practices have stopped, the present ownership is operating the company properly and that it intends to so operate it in the future. Indeed, it must do so because the audit required by the settlement agreement leaves no other alternative. Finally, we are convinced that Michael Metrick, the present qualifying officer, is sincere when he testified that he intends to operate Chumet in accordance with the law and regulations. We are also convinced that he has the expertise to render ocean freight forwarder services to customers in the future. Certainly, he and Chumet deserve the opportunity to do so, especially since the business is a small one and his livelihood depends on future compliance with the law and regulations. To suspend Chumet's ocean freight forwarder license would be too harsh a remedy and one we believe is unnecessary. Therefore, it is held that the Respondent is fit to carry on the business of an independent ocean freight forwarder.

(S) JOSEPH N. INGOLIA
Administrative Law Judge

ATTACHMENT

DOCKET NO. 80-61

BEFORE THE FEDERAL MARITIME COMMISSION
CHUMET SHIPPING CO., INC. INDEPENDENT OCEAN
FREIGHT FORWARDER LICENSE NO. 619

PROPOSED SETTLEMENT OF CIVIL PENALTIES

This Proposed Settlement has been entered into between the Bureau of Hearings and Field Operations (Hearing Counsel) and Respondent Chumet Shipping Co., Inc. (Chumet). It is submitted to the presiding Administrative Law Judge for approval pursuant to Rule 162 of the Commission's Rules of Practice and Procedure (46 C.F.R. 502.162) and section 505.3 of the Commission's General Order 30 (46 C.F.R. 505.3) and is to be incorporated into the Final Order in the instant proceeding if so approved.

WHEREAS, by Order of Investigation and Hearing served September 12, 1980, the Commission instituted the present investigation to determine whether Chumet had violated sections 510.5(a)(4), 510.5(c), 510.23(c), 510.23(d), 510.23(e), 510.23(f) and 510.23(j) of the Commission's General Order 4 (46 C.F.R. 510.5(a), 510.5(c), 510.23(c), 510.23(d), 510.23(e), 510.23(f) & 510.23(j)), and whereas, that Order includes the issue of whether civil penalties should be assessed for any violations of the above sections of the Commission's General Order 4 so found;

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

WHEREAS, Chumet has admitted that it has engaged in specified conduct which may be violative of section 510.5(a)(4), 510.5(c) and 510.23(j) of the Commission's General Order 4;

WHEREAS, Chumet has terminated the conduct that may be violative of section 510.23(j) of the Commission's General Order 4 and has instituted and has indicated its willingness and commitment to maintain measures designed to eliminate, discourage, and prevent such conduct in the future;

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

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

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

1. Chumet hereby agrees, as a condition of this Agreement, to pay a monetary amount of Twenty Thousand Dollars (\$20,000) of which Two Thousand Dollars (\$2,000) shall be payable thirty (30) days following approval by the Commission of this Proposed Settlement and Eighteen Thousand Dollars (\$18,000) shall be payable according to the terms of the Promissory Note attached hereto as Appendix 1.

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

3. Chumet agrees to take all reasonable steps to preserve and maintain at a location agreeable to the Commission through January 1, 1986 all records and documents now in its possession or under its control that in any way or manner either indicate or verify the conduct set forth in the factual record submitted in the present proceeding and, upon reasonable notice, to allow Commission investigators or attorneys unimpeded access to such records and documents and to allow the removal of documents specifically requested by Commission investigators or attorneys for the purpose of duplication.

4. Chumet agrees to take all reasonable measures designed to discourage, prevent, and eliminate the conduct that may be violative of section 510.23(j) of the Commission's General Order 4. These measures shall include, but need not be limited to, the measures set forth in Appendices II and III attached hereto.

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

6. Chumet hereby agrees, as a condition of this Agreement, that, if it breaches this Agreement, it will not interpose the Statute of Limitations as a bar or a defense in any action or proceeding instituted prior to January 1, 1986, by or on behalf of the Commission, to recover civil penalties for violations of the Commission's General Order 4, arising

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

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

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

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

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

CHUMET SHIPPING CO., INC.

BY _____

JOHN ROBERT EWERS, DIRECTOR
Bureau of Hearings and Field Operations

TITLE _____

JOSEPH B. SLUNT, CHIEF
Office of Hearing Counsel

CHARLES C. HUNTER
Hearing Counsel

STUART JAMES
Hearing Counsel

APPENDIX I

PROMISSORY NOTE

APPENDIX 1 TO PROPOSED

SETTLEMENT IN DOCKET NO. 80-61

For value received, Chumet Shipping Co., Inc (Chumet) promises to pay to the Federal Maritime Commission (Commission) the principal sum of Twenty Thousand Dollars (\$20,000) to be paid at the offices of the Commission in Washington, D.C., by bank cashier's or certified check in the following installments:

Two Thousand Dollars (\$2,000) on or before thirty (30) days following the approval by the Commission of the Proposed Settlement in FMC Docket No. 80-61;

Two Thousand, Two Hundred and Fifty Dollars (\$2,250) on or before six (6) months following the approval by the Commission of the Proposed Settlement in FMC Docket No. 80-61;

Two Thousand, Two Hundred and Fifty Dollars (\$2,250) on or before twelve (12) months following the approval by the Commission of the Proposed Settlement in FMC Docket No. 80-61;

Two Thousand, Two Hundred and Fifty Dollars (\$2,250) on or before eighteen (18) months following the approval by the Commission of the Proposed Settlement in FMC Docket No. 80-61;

Two Thousand, Two Hundred and Fifty Dollars (\$2,250) on or before twenty-four (24) months following the approval by the Commission of the Proposed Settlement in FMC Docket No. 80-61;

Two Thousand, Two Hundred and Fifty Dollars (\$2,250) on or before thirty (30) months following the approval by the Commission of the Proposed Settlement in FMC Docket No. 80-61;

Two Thousand, Two Hundred and Fifty Dollars (\$2,250) on or before thirty-six (36) months following the approval by the Commission of the Proposed Settlement in FMC Docket No. 80-61;

Two Thousand, Two Hundred and Fifty Dollars (\$2,250) on or before forty-two (42) months following the approval by the Commission of the Proposed Settlement in FMC Docket No. 80-61;

Two Thousand, Two Hundred and Fifty Dollars (\$2,500) on or before forty-eight (48) months following the approval by the Commission of the Proposed Settlement in FMC Docket No. 80-61;

In addition to the principal amount payable hereunder, interest on the unpaid balance thereof shall be paid with each installment. Such interest shall accrue from the date upon which the Commission approves the Proposed Settlement in FMC Docket No. 80-61 and be computed at the rate of twelve percent (12%) per annum on the unpaid balance.

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

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

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

CHUMET SHIPPING CO., INC.

BY: _____

TITLE: _____

DATE: _____

APPENDIX II
APPENDIX II TO
PROPOSED SETTLEMENT
IN DOCKET NO. 80-61

For a period of three years following final Commission approval of the Proposed Settlement in Docket No. 80-61, Chumet Shipping Co., Inc. will permit an independent audit of its books and records, as described below.

(1) The audit will be conducted by Bernstein & Friedman, P.C., certified public accountants, or such other independent auditor as may be named, subject to Commission approval, who will have complete authority to examine pertinent books and records of Chumet (see Attachment A hereto); and upon the issuance of a written statement by the independent auditor that he/she has been denied access or reasonable cooperation in an audit of Chumet's books and records, he/she will so certify to the Commission, and said action by Chumet will be conclusively considered to be a breach of the Settlement Agreement.

(2) The independent auditor will review a five percent (5%) sample of Chumet's shipping files reflecting ocean export shipments as to which Chumet arranged for insurance coverage and such other documents, including, but not limited to, statements issued by Chumet's insurance broker, that may serve to verify that Chumet has invoiced its clients the amounts of the insurance premiums actually paid by Chumet on the shipments represented by those files.

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

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

CHUMET SHIPPING CO., INC.

BY: _____

TITLE: _____

DATE: _____

ATTACHMENT A TO
APPENDIX II TO
PROPOSED SETTLEMENT
AGREEMENT IN DOCKET
No. 80-61

[CHUMET SHIPPING CO., INC.
LETTERHEAD]

Bernstein & Friedman, P.C.

60 Cutter Mill Road

Great Neck, New York 11021

Re: Audit of Chumet Shipping Co., Inc.

Gentlemen:

This is to set forth the terms of our agreement that you provide the necessary services to audit the insurance billing practices of Chumet Shipping Co., Inc.

Pursuant to the Settlement Agreement in Federal Maritime Commission Docket No. 80-61, Chumet Shipping Co., Inc. has undertaken to adopt measures to eliminate and prevent practices by Chumet Shipping Co., Inc. which violate the Federal Maritime Commission's freight forwarder regulations.

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

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

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

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

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

CHUMET SHIPPING CO., INC.

BY: _____

TITLE: _____

DATE: _____

Attachment

BERNSTEIN & FRIEDMAN, P.C.

BY: _____

TITLE: _____

DATE: _____

FEDERAL MARITIME COMMISSION

DOCKET NO. 81-70

PUERTO RICO MARITIME SHIPPING AUTHORITY
PROPOSED 2.9% RATE INCREASE AFFECTING MAJOR
COMMODITIES IN THE U.S. ATLANTIC AND GULF/
PUERTO RICO AND VIRGIN ISLANDS TRADES

NOTICE

February 4, 1982

Notice is given that no appeal has been taken to the December 31, 1981 discontinuance of proceeding and that the time within which the Commission could determine to review has expired. No such determination has been made and, accordingly, the discontinuance has become administratively final.

(S) FRANCIS C. HURNEY
Secretary

FEDERAL MARITIME COMMISSION

DOCKET NO. 81-70

PUERTO RICO MARITIME SHIPPING AUTHORITY
PROPOSED 2.9% RATE INCREASE AFFECTING MAJOR
COMMODITIES IN THE U.S. ATLANTIC AND GULF/
PUERTO RICO AND VIRGIN ISLANDS TRADES

DISCONTINUANCE OF PROCEEDING

Finalized February 4, 1982

By motion dated December 2, 1981, the respondent Puerto Rico Maritime Shipping Authority moved to dismiss (discontinue) this proceeding. In reply, Hearing Counsel agreed that the subject proceeding be terminated upon cancellation of the proposed rate increases.

The Director, Bureau of Tariffs, has advised that on or before December 29, 1981, PRMSA had completed filing the cancellations of the rate increases.

Good cause appearing, the subject proceeding hereby is discontinued.

(S) CHARLES E. MORGAN
Administrative Law Judge

FEDERAL MARITIME COMMISSION

DOCKET NO. 81-11

“50 MILE CONTAINER RULES”

IMPLEMENTATION BY OCEAN COMMON CARRIERS SERVING
U.S. ATLANTIC AND GULF COAST PORTS - POSSIBLE
VIOLATIONS OF THE SHIPPING ACT, 1916

INTERIM REPORT AND ORDER

February 5, 1982

The Commission commenced this proceeding by Order of Investigation on February 3, 1981. 46 *Fed. Reg.* 11357 (1981). Its purpose is to ascertain whether 142 ocean carriers have violated sections 14 Fourth, 16 First, 17 and 18 of the Shipping Act, 1916 (46 U.S.C. 812 Fourth, 815 First, 816 and 817)¹ by engaging in the practices described in the “Management-ILA Rules on Containers” (hereafter “Container Rules”). These rules are embodied in labor contracts collectively bargained for and agreed upon between ocean carriers and direct employer members of management port associations and appropriate organizational units of the International Longshoremen’s Association, AFL-CIO (ILA) at U.S. Atlantic and Gulf Coast ports. No ocean shippers are parties to these collective bargaining units. In their simplest form, the Container Rules prohibit ocean carriers from providing shipping containers or trailers to persons located within 50 miles of the carrier’s pier, unless the containers or trailers are loaded: (1) by ILA labor; or (2) by the shipper’s own employees at the shipper’s own facilities.²

The Commission has previously held that carrier conduct derived from an application of an earlier version of the Container Rules (1974 Rules) in the Puerto Rico trade during 1973 and 1975 violated the

¹ The Order of Investigation alleged violations of Shipping Act sections 18(a) and 18(b) and both paragraphs of section 17. Violations of section 2 of the Intercoastal Shipping Act, 1933 (46 U.S.C. 844) were also alleged. Section 2 contains the same tariff filing requirements as section 18(b) of the Shipping Act, 1916, insofar as the present inquiry is concerned. Unless otherwise indicated, references to section 18(b) are intended to apply equally to section 2.

² The Container Rules as amended through May 27, 1980 are included in Exhibit B to the May 20, 1981 Affidavit of James J. Dickman and involve seven practices expressly identified in the Order of Investigation as possibly violative of the Shipping Act, 1916. These practices are: (1) refusing to load containers or trailers onto vessels; (2) refusing to deliver containers or trailers; (3) refusing to book cargo or to honor existing bookings; (4) refusing to supply or make available containers, trailers or other equipment owned, leased or used by the carriers at certain off-pier facilities; (5) requiring certain containerizable cargoes to be shipped to the port in a “loose” condition; (6) charging certain shippers for fines assessed against the carrier for violation of the Container Rules; (7) imposing additional charges for stuffing and restuffing containers or trailers at the pier. Future references to “containers” will include “trailers” unless otherwise indicated.

Shipping Act. *Sea-Land Service, Inc.—Proposed Rules on Containers*, 21 F.M.C. 1, 21 F.M.C. 7 (1978), *appeal pending Council of North Atlantic Shipping Associations v. Federal Maritime Commission*, D.C. Cir. Docket No. 78-1776 (hereafter "*Sea-Land*"). In addition, the National Labor Relations Board (NLRB) issued a decision in 1975 which condemned the Container Rules as an unfair labor practice. *Consolidated Express, Inc. v. ILA*, 221 N.L.R.B. 956.³ The NLRB's decision was later vacated, however, following the Supreme Court's remand of a companion order in *National Labor Relations Board v. International Longshoremen's Association*, 447 U.S. 490 (1980), thereby opening the door to renewed implementation of the Rules by the ILA and affected ocean carriers not bound by the Commission's *Sea-Land* order.

The ILA announced that it would begin enforcing the Container Rules commencing January 1, 1981 on both foreign and domestic commerce shipments. The Commission began this proceeding after receiving complaints from shippers and other information indicating that at least some ocean carriers were adhering to the Container Rules.⁴ These practices continued until halted on February 29, 1981 by an injunction issued to preserve the *status quo* pending the remanded NLRB investigation into the Container Rules. *Pascarell v. New York Shipping Ass'n.*, Docket No. 81-13 (D.N.J.), *aff'd*, 650 F.2d 19 (3d Cir.), *cert. denied*, 454 U.S. 832 (1981).⁵ Accordingly, the Container Rules were in effect for only two months—January and February, 1981.

³ The unfair labor practice involved was a secondary boycott against third or "neutral" party employers prohibited by sections 8(b)(4)(B) and 8(e) of the National Labor Relations Act (29 U.S.C. 158(b)(4)(B) and 158(e)). The present form of these statutes was enacted as part of the 1959 Landrum-Griffith Act (73 Stat. 542) and was intended to eliminate the type of collusive boycott known as "hot cargo clauses." See 105 *Cong. Rec.* 15532 (1959); *Woodwork Manufacturers Ass'n v. National Labor Relations Board*, 386 U.S. 612 (1967).

²⁹ U.S.C. 158(e) provides, in pertinent part, that:

[No] labor organization or any employer [shall] enter into any contract or agreement, express or implied, whereby such employer ceases or refrains or agrees to cease or refrain from handling, using, selling, transporting or otherwise dealing in any of the products of any other employer, or to cease doing business with any other person, and any contract or agreement entered into heretofore or hereafter containing such an agreement shall be to such extent unenforceable and void.

Despite this language, a secondary boycott may lawfully, as far as the labor laws are concerned, occur when the parties to a collective bargaining unit are implementing a *bona fide* work preservation practice. The presence or absence of a work preservation rule is a matter within the primary jurisdiction of the NLRB and not the FMC.

⁴ On January 22, 1981, the International Association of Nonvessel Operating Common Carriers and other persons filed a complaint against a number of ocean carriers based upon implementation of the Container Rules which is pending before an administrative law judge as FMC Docket No. 81-5. A nonvessel operating common carrier (NVO) issues an ocean bill of lading in its own name, but actually moves the goods by using the facilities of a vessel operating carrier in the same manner as any other shipper. NVO's typically load or consolidate container load shipments on behalf of their shipper clients in addition to undertaking the basic ocean transportation.

⁵ The *Pascarell* injunction was issued under section 10 of the Norris-LaGuardia Act (29 U.S.C. 160(e), (h) and (j)), which allows "appropriate temporary relief" pending NLRB investigations in

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PARTIES TO THE PROCEEDING

The New York Shipping Association, Inc., the Council of North Atlantic Shipping Associations and the International Longshoremen's Association, AFL-CIO (jointly), and the Pacific Maritime Association have intervened in support of the individual ocean carriers named as respondents.⁶ The International Association of Nonvessel Operating Carriers and the Custom Brokers and Forwarders Association of America intervened in opposition to the Container Rules. The Commission's Bureau of Hearings and Field Operations (Hearing Counsel) is also a party.⁷

Twenty-five ocean carrier respondents requested that they be dismissed from this proceeding on various grounds. On June 12, 1981, Karlander Kangaroo Line, Seapac Container Service and Hanjin Container Lines, Ltd., were dismissed when they presented affidavits demonstrating they did not serve U.S. Atlantic or Gulf ports. An additional 13 Respondents subsequently submitted affidavits indicating that they are either not common carriers by water,⁸ do not serve ILA ports,⁹ or carry no containers.¹⁰ These Respondents will also be dismissed. In addition, the Commission takes official notice that four other respondent carriers did not offer container service at Atlantic and Gulf ports during January or February, 1981.¹¹

Those carriers which sought dismissal without supporting affidavits or which merely alleged that they did not “implement” or “enforce” the Container Rules because they took no action against specific non-conforming containers or offered no rates for consolidated shipments will not be dismissed. The Container Rules seemingly apply to full container load shipments as well as FAK or “consolidated” shipments and the adoption of the container use policy reflected in the Container Rules, without appropriate tariff amendments, is alone sufficient to violate section 18(b). An announced policy of discrimination may also be sufficient to violate the other Shipping Act sections cited in the Order of Investigation.

There remain 122 ocean carrier Respondents, many of which were members of the New York Shipping Association (NYSA) during Janu-

order to preserve the Board's primary jurisdiction over labor disputes. On September 29, 1981, an initial decision was issued upholding the Container Rules. *International Longshoremen's Association et al.*, Case Nos. 2-CC-1364 *et al.*, JD-515-81.

⁶ The ocean carriers and all persons siding with them are hereafter referred to as “Respondents” unless otherwise indicated.

⁷ The nonvessel operating carrier and customs broker interests (NVO's) and Hearing Counsel are hereafter referred to as “Proponents” unless otherwise indicated.

⁸ Gulf Atlantic Transportation, MTO Liner Services and West India Shipping Company, Inc.

⁹ American President Lines; Showa Line Ltd.; Korea Maritime Transport Co., Ltd.; Uruguayan Line; Seaspeed Services; Tropical Shipping and Transportation Co., Ltd.

¹⁰ Jinyang Shipping Co., Ltd.; R.T. Djakarta Lloyd; American Industrial Carriers; and D.B. Turkish Cargo Lines.

¹¹ CAST Shipping, Ltd.; Black Star Line; Caribe Cargo Express; and Trans World Systems.

ary or February, 1981, but most of which have not directly participated in this proceeding.¹²

POSITION OF THE PARTIES

Five basic issues have emerged from the proceeding to date: (1) must practices determining the availability of carrier-controlled containers be published in FMC tariffs; (2) does the 1980 Maritime Labor Agreements Act (MLAA) alter the Commission's jurisdiction over tariff rates and practices;¹³ (3) is Commission regulation of the Container Rules precluded or limited by the policies of the National Labor Relations Act;¹⁴ (4) does the refusal to furnish containers to non-ILA consolidators located within 50 miles of the carrier's pier, or the other Container Rules practices described in note 2, *supra*, violate sections 14 Fourth, 16 First, 17, or 18(a) of the Shipping Act, 1916; and (5) which of the Respondents have implemented or would necessarily implement all or part of the Container Rules. The position of the parties on each of these issues is described below.

I. Must practices determining the availability of carrier-controlled containers be published in FMC tariffs?

A. *Proponents*

Proponents argue that the Shipping Act requires tariffs to describe the rates applicable to all transportation services provided by the publishing carrier and to state separately "any privileges or facilities granted or allowed which affect these rates in any manner whatsoever." 46 U.S.C. 817(b)(1) and 844. *See also* 46 C.F.R. 5(c)(5). Proponents claim that this language requires that any restrictions in a common carrier's basic undertaking to serve all shippers indiscriminately be fully disclosed in its tariff. *Japan Korea-Atlantic & Gulf Freight Conference—Chassis Availability Rules*, 22 F.M.C. 466 (1980); *South Atlantic and Caribbean Lines, Inc. (SACL)*, 12 F.M.C. 237 (1969), *aff'd* 424 F.2d 941 (D.C. Cir. 1970); *A. H. Bull S.S. Co.*, 7 F.M.C. 133 (1962); *Intercoastal Investigation*, 1 U.S.S.B.B., 400, 447-450 (1935); *See Puerto Rican Rates*, 2 U.S.M.C. 117, 129 (1930). Proponents further state that the Container Rules involve service restrictions which were specifically adjudged to be mandatory tariff material in *United States v. Sea-Land Service, Inc.*, 424 F. Supp. 1008, 1011-1012; (D.N.J. 1977), *appeal dismissed*, 577 F.2d

¹² Twelve respondent carriers either expressly joined in or endorsed the position taken by NYSA/CONASA/ILA: Atlantic Container Line, Ltd.; Dart Containerline, Ltd.; Puerto Rico Maritime Shipping Authority; Sea-Land Service, Inc.; Trans Freight Lines, Inc.; United States Lines, Inc.; Compagnie Maritime d'Affretement; Japan Line, Ltd.; Kawasaki Kisen Kaisha, Ltd.; Mitsui O.S.K. Lines, Ltd.; Nippon Yusen Kaisha; and Yamashita Shinnihon Steamship Co., Ltd. NYSA purports to speak for all of its ocean carrier members.

¹³ P.L. 96-325, 94 Stat. 1021 (August 8, 1980), amending sections 15 and 45 of the Shipping Act, 1916 (46 U.S.C. 814, 841c).

¹⁴ 29 U.S.C. 151 *et seq.*

730 (3d Cir. 1978), cert. den. 439 U.S. 1072 (1979); *SACL*, *supra*, 12 F.M.C. at 241-242 (1969). See also *Sea-Land*, *supra*, 21 F.M.C. at 29.

B. Respondents

Respondents note that their charges for packing and unpacking containers are already listed in their tariffs and the Commission has not stated exactly what additional material should be published as a result of the Container Rules. The Respondents then argue that section 18(b) is intended to require only the publication of a carrier’s “rates and charges”, and that the use of carrier-controlled containers is not a matter intended to “change, affect or determine” rates or charges.¹⁵ In fact, Respondents allege that the Commission has never taken any publicly reported action suggesting that rules relating to the use of carrier-owned or leased containers must be published in tariff and that such rules are customarily omitted from FMC tariffs in most trades. Respondents also argue that the *A.H. Bull*, *SACL*, and *United States v. Sea-Land* cases, *supra*, dealt with a carrier’s refusal to perform a service already stated in its tariff and did not actually hold that container use practices must be published.

II. Does the Maritime Labor Agreement Act alter the Commission’s jurisdiction over matters which must be filed in FMC tariffs?

A. Proponents

Proponents allege that the MLAA is directed exclusively at section 15’s prior filing and approval requirements and expressly retains Commission jurisdiction over tariff practices of all types.¹⁶ The statute’s plain language is, according to Proponents, further reinforced by the Senate Committee’s statement that the MLAA preserves Commission jurisdiction to “ensure equal treatment of shippers, cargo, localities, and to prevent abuses made possible by concerted activity of ocean carriers and others.” Sen. Report No. 96-854, 96th Cong., 2d Sess. at 2, 10, 13 (1980). Proponents claim it can make no difference whether the “tariff practices” in question are incorporated verbatim into a maritime labor agreement—as are some of the alleged practices in the instant case—or

¹⁵ Proponents note that tariff filing has been described as “a system of rates and charges.” See, e.g., *Pacific Steamship Co. v. Cackette*, 8 F.2d 259, 261 (9th Cir. 1925), cert. den. 269 U.S. 586 (1925). *Accord*, *Intercoastal Investigation*, 1 U.S.B.B. 400, 433 (1935); *Certain Tariff Practices of Sea-Land Service*, 7 F.M.C. 504, 507-508 (1963).

¹⁶ 46 U.S.C. 841(c) provides that:

The provisions of this Act and of the Intercoastal Shipping Act, 1933, shall not apply to maritime labor agreements and all provisions of such agreements except to the extent that such provisions provide for the funding of collectively bargained fringe benefit obligations on other than a uniform man-hour basis, regardless of the cargo handled or type of vessel or equipment utilized. Notwithstanding the preceding sentence, nothing in this section shall be construed as providing an exemption from the provisions of this Act or of the Intercoastal Shipping Act, 1933, for any rates, charges, regulations, or practices of a common carrier by water or other person subject to this Act which are required to be set forth in a tariff, whether or not such rates, charges, regulations, or practices arise out of, or are otherwise related to a maritime labor agreement.

whether they represent a carrier's unilateral interpretation of its obligations under such an agreement. To limit FMC jurisdiction to the latter situation would allegedly allow ocean carriers to avoid regulation of their tariff practices at will by incorporating appropriate language into collective bargaining agreements. Proponents find further support for FMC jurisdiction over tariff practices included in a collective bargaining agreement in the fact that the discriminatory effects of the Container Rules were specifically mentioned to Congress during its consideration of the MLAA, Senate Report, *supra*, at 8-9; Sen. Doc. 96-107, *Hearings before the Subcommittee on Merchant Marine and Tourism of the Committee of Commerce, Science and Technology, 96th Cong., 2d Sess. at 16 (June 4, 1980).*

B. Respondents

Respondents argue that the MLAA was remedial legislation designed to reduce the impact of the *PMA* decision upon labor activities and should be interpreted as totally exempting maritime labor agreements from Shipping Act jurisdiction even when they contain terms which would otherwise be published in a tariff.¹⁷ Respondents believe that only "unilateral" carrier practices—such as the rates charged for stuffing and stripping containers—are subject to continued FMC regulation under section 5 of the MLAA. It is alleged that all aspects of an actual collective bargaining agreement must be exempt; otherwise, MLAA would merely remove Shipping Act jurisdiction with one hand and replace it with the other. Respondents submit that the legislative history quoted by the Proponents concerning preservation of FMC jurisdiction to "ensure equal treatment of shippers, cargo and localities" relates only to complaints concerning nonuniform assessment agreements under section 4 of the MLAA.

III. Is Commission regulation of the Container Rules precluded or limited by the National Labor Relations Act?

A. Proponents

Proponents allege that section 5 of the MLAA preserves and clarifies the Commission's jurisdiction over tariff practices and that the so-called "nonstatutory" labor law exemption from Shipping Act regulation is inapplicable to the type of shipper discrimination involved in the Container Rules. This claim is based upon the Commission's decision in *Sea-Land, supra*, and the Supreme Court's opinions holding that the pres-

¹⁷ Respondents focus upon the broad language used in the first sentence of MLAA section 5 which states, in pertinent part, that the Shipping and Intercoastal Acts "shall not apply to maritime labor agreements and all provisions of such agreements . . ." Respondents claim that the second sentence of section 5 merely prevents common carriers from using labor agreements as an excuse to avoid regulation of their own unilateral practices. According to the Respondents, if Congress had intended for the *actual terms* of labor agreements to be regulated as tariff practices, it would have written section 5 to expressly say so. Instead, it wrote a statute which states that only tariff practices "arising out of or related to" labor agreements may be regulated.

ence of some conflict between the Shipping Act and the policy of freely negotiated settlements of labor/management disputes represented by the Labor Relations Act, does not necessarily remove the Commission's authority to regulate. See *Federal Maritime Commission v. Pacific Maritime Association (PMA)*, 425 U.S. 40, 53-60 (1978), and *Volkswagenwerk, A.G. v. Federal Maritime Commission (VW)*, 390 U.S. 261 (1968).

Proponents claim that the nonstatutory labor law exemption from Shipping Act regulation is limited to section 15 agreements.¹⁸ Conflict with the labor laws is allegedly a matter to be considered only in determining whether tariff practices are unfair, unjustly discriminatory or unreasonable under the Shipping Act; it does not create a total exemption from Shipping Act regulation. *Burlington Truck Lines v. United States*, 371 U.S. 156, 170 (1962); *Carpenter's Union v. Labor Board*, 357 U.S. 93, 110 (1958). Proponents conclude that general labor policies cannot override an express legislative prohibition against specific ocean carrier practices, and that nothing about the Container Rules or their relationship to a collective bargaining agreement requires exemption from Commission regulation.¹⁹

B. Respondents

Respondents concentrate on the proposition that FMC regulation of the Container Rules impermissibly conflicts with legitimate labor law objectives within the meaning of the Supreme Court's decision in *Burlington Truck Lines, Inc. v. United States*, *supra*. See also *PMA, supra*. Respondents claim that the nonstatutory labor agreement exemption from the Shipping Act is co-extensive with the nonstatutory labor agreement exemption from the antitrust laws. Senate Report, *supra*, at 7. See *United Stevedoring Corp. v. Boston Shipping Ass'n (BSA)*, 16 F.M.C. 7 (report on remand, 1972); *PMA, supra*, at 58. Consequently, if the Container Rules meet the test for antitrust law exemption described in *BSA, supra*, at 12-13, they would not be subject to Shipping Act regulation.²⁰ Respondents contend that the Container Rules meet the

¹⁸ If the Container Rules were subject to the criteria for labor law exemptions articulated by the Commission in *BSA, infra*, Proponents alternatively allege that the Container Rules fail to meet the third standard (see note 20, *infra*) because they impose discriminatory conditions on parties outside the collective bargaining unit.

¹⁹ Proponents contend that a breach of a common carrier's duty to treat shippers in a reasonably equal fashion cannot be nullified by entering into a collective bargaining agreement. *Carpenter's Union v. Labor Board*, 357 U.S. 93, 109-111 (1958); *Merchandise Warehouse Co. v. A.B.C. Freight Forwarder Corp.*, 165 F. Supp. 67, 75 (S.D. Ind. 1958); *Galveston Truck Line Corp.*, 73 M.C.C. 617, 625-630 (1957); See also *Montgomery Ward & Co. v. Northern Pacific Terminal Co.*, 128 F. Supp. 475, 518 (D.C. Ore. 1953); *Pickup & Delivery Restrictions, California Rail*, 303 I.C.C. 579, 594 (1958).

²⁰ The four *BSA* guidelines patterned after the "nonstatutory labor exemption" from the antitrust laws are:

- (1) the agreement was bargained for in good faith;
- (2) the matter is a mandatory subject of bargaining;
- (3) the agreement does not impose terms on entities outside the collective bargaining group;

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BSA test and, in so doing, argue that the third *BSA* guideline—the imposition of terms on entities outside the bargaining group—has been construed too broadly by the Proponents. According to Respondents, the Container Rules are a work preservation measure valid under section 8(e) of the National Labor Relations Act which necessarily have an adverse economic effect upon third parties. Respondents argue that an effect upon third parties does not constitute an impermissible “imposition of terms” upon third parties, *National Woodwork Manufacturers Association v. National Labor Relations Board*, 386 U.S. 612, 627, 635, 644 (1967), and that the Container Rules do not involve an agreement by bargaining unit employers to impose working conditions upon other employers with whom they compete. Respondents contrast *PMA*, *supra*, where ports outside the bargaining unit were to be bound by the terms agreed upon by *PMA* and the union.²¹

Respondents also allege that the NLRB is the exclusive forum for judging the lawfulness of secondary boycott schemes and that the Commission is powerless to halt the Container Rules because the Norris-LaGuardia Act prohibits injunctions in cases “involving or growing out of a labor dispute” (29 U.S.C. 101, 104, 114).²² Respondents cite a recent House of Representatives bill (H.R. 2042, 97th Cong., 1st Sess.) banning the Container Rules as further evidence that the Commission is not presently authorized to regulate in this area. Respondents believe it would be arbitrary and highly unfair if Shipping Act considerations prevented the ILA from exercising work preservation rights available to unions in other industries.

IV. Does the refusal to furnish containers to non-ILA consolidators located within 50 miles of the carrier’s pier, or the other Container Rules practices described in note 2, *supra*, violate sections 14 Fourth, 16 First, 17 or 18(a) of the Shipping Act, 1916?

(4) the union is acting purely in its own self-interest and not in conspiracy with management.

Failure to meet any one of these guidelines can defeat exemption.

²¹ Respondents cite *Intercontinental Container Transport Corp. v. New York Shipping Ass’n*, 426 F.2d 884 (2d Cir. 1970), as further support for their claim that the Container Rules are exempt from the antitrust laws. There, the court held that the Container Rules were not sufficiently likely to violate the antitrust laws to warrant the issuance of a preliminary injunction against them pending litigation under the Sherman Act.

²² Respondents allege that a federal court could not enforce an FMC cease and desist order against the Container Rules because this would constitute injunctive relief against a person “participating or interested in a labor dispute” in violation of the Norris-LaGuardia Act. See *Railroad Telegraphers v. Chicago & N.W. R. Co.*, 362 U.S. 330, 339 n. 15 (1960); *Utilities Services Engineering, Inc. v. Colorado Building and Construction Trades Council*, 549 F.2d 173, 177-178 (10th Cir. 1977); *Brotherhood of R. Trainmen v. Atlantic Coast Line R. Co.*, 362 F.2d 649, 655 (5th Cir. 1966); *East Texas Motor Freight Lines, Inc. v. Teamsters Local 568*, 163 F.2d 10 (5th Cir. 1947); *Lee Way Motor Freight, Inc. v. Keystone Freight Lines, Inc.*, 126 F.2d 931 (10th Cir.), *cert. den.* 317 U.S. 645 (1942).

A. Proponents

Both parties intermingled their arguments concerning the different practices involved in the Container Rules and the different Shipping Act provisions involved. Proponents concentrated their efforts on the claim that the Container Rules constitute unjust discrimination under sections 14 Fourth, 16 First, and 17 first paragraph.

Proponents argue that common carriers have a fundamental duty to serve all comers on a reasonable and indiscriminate basis. *Swayne & Hoyt, Ltd. v. United States*, 300 U.S. 297, 303 (1937); *Grace Line, Inc. v. Federal Maritime Board*, 280 F.2d 790, 792-793 (2d Cir. 1960), *cert. den.*, 364 U.S. 933 (1961). Proponents state that the Supreme Court expressly ruled that this duty applies to nonequipment operating carriers in *Interstate Commerce Commission v. Delaware, L. & W. R.R.*, 220 U.S. 235, 252 (1911).

According to Proponents, the record clearly supports a finding that the Container Rules require similarly situated shippers to receive unjustifiably different treatment, and the Commission invalidated virtually identical practices in its *Sea-Land* decision, *supra*, because they deprived NVO's and shippers using non-ILA consolidation services access to facilities and privileges routinely available to other shippers. Allocating the entire burden of ILA work reductions caused by containerization to shippers that are consolidators or use consolidators is allegedly unfair and unreasonable within the meaning of *VW*, because such shippers are not the only persons that enjoy the benefits of containerization. See 390 U.S. at 282.

Proponents contend that the Container Rules violate section 16 First as well as section 14 Fourth and section 17, first paragraph, because the provision of containers is a matter ancillary to basic ocean transportation which cannot reasonably be affected by the nature of the cargo being transported. In such circumstances, the carrier has been said to have an absolute duty to treat shippers equally, making it unnecessary to demonstrate the presence of a competitive relationship between affected shippers. *New York Foreign Freight Forwarders & Brokers Ass'n v. Federal Maritime Commission*, 337 F.2d 289 (2d Cir. 1964); *Free Time Practices—Port of San Diego*, 9 F.M.C. 525, 547 (1966); *Valley Evaporating Company v. Grace Line, Inc.*, 14 F.M.C. 16, 21 (1970). Proponents also argue that although an ocean carrier generally enjoys the right to control the use of its equipment, this right is at all times subject to the requirements of the Shipping Act and Respondents have failed to show that their discrimination against shippers who are consolidators or who use consolidators located within 50 miles of a port is reasonable from a transportation perspective.

Proponents also argue that the Container Rules require unreasonably different treatment with regard to the handling of substantially identical

classes of cargo in violation of sections 17, second paragraph, and 18(a) because the Commission so held in *Sea-Land, supra*.

B. Respondents

Respondents treat the various antidiscrimination provisions of the Shipping Act as though they impose the same statutory duties (Reply Memorandum, note 57). Respondents argue that the discriminatory aspects of the Container Rules are just and reasonable because they implement a valid work preservation scheme and deprive no person of any benefit to which such person is entitled. Respondents claim that the Commission's sole responsibility is to determine whether the burdens which the Container Rules place upon the affected parties are fairly allocated. *VW, supra*, 390 U.S. at 292-295 (Harlan, J., concurring).

According to Respondents, however, fair allocation does not mean *equal* allocation, and the approach to unjust discrimination taken by the Commission in *Sea-Land, supra*, is incorrect and inconsistent with *VW* because it merely examines the alleged harm to shippers in transportation terms and does not meaningfully consider the underlying labor concerns.²³

Finally, Respondents contend that (1) only carrier-controlled containers are subject to the Rules; and (2) there is no evidence showing that the Container Rules produce unjust results.²⁴ Respondents claim that the Proponents have not proven that consolidators located within 50 miles of ports are similarly situated to any other class of shippers, or even that all such persons are shippers; Proponents have simply declared any difference in treatment is unlawful *per se*. Respondents also claim that relevant transportation factors are present which justify discrimination between full containerload and less-than-containerload traffic, including: the efficient and uninterrupted movement of containers over the piers; facilitation of trained dockside labor for handling less-than-containerload cargo; the relative efficiency and cost of full containerload shipments as compared to less-than-containerload shipments;²⁵ the relatively small volume of freight generated by consolida-

²³ The *VW* decision featured a finding that the separate "Mech Fund" agreement raised problems logically and factually distinct from the basic labor problems resolved by the collective bargaining agreement. 390 U.S. at 287. In the instant case, the collective bargaining objectives are allegedly inseparable from the Shipping Act conduct, and the Respondents therefore allege that the Commission cannot measure the fairness of the Container Rules without also assessing their validity as a work preservation measure—a task reserved for the NLRB.

²⁴ Proponents encourage the Commission to take a broad view of the circumstances which may justify the discriminatory aspects of the Container Rules, and note that the Supreme Court has stated that discrimination may be judged in light of:

... all circumstances and conditions which reasonable men would regard as affecting the welfare of the carrying companies and of the producers, shippers and consumers . . . *Texas & Pacific R. Co. v. Interstate Commerce Commission*, 162 U.S. 947 (1896).

²⁵ By accepting consolidated containers, ocean carriers allegedly permit transportation efficiencies to occur which benefit less-than-containerload shippers more than full-containerload shippers which

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tors; the NVO's lack of a beneficial interest in the goods shipped; and the interests of the shipping public as a whole.

V. Which of the Respondents have implemented, or would necessarily implement, any or all of the practices covered by the Container Rules?

A. *Proponents*

Proponents submitted 20 affidavits describing some 19 ocean carriers which refused to carry loaded containers or cancelled containerized cargo bookings, refused to provide empty containers to prospective shippers, or required loaded containers to be repacked at the pier during January or February, 1981.²⁶

B. *Respondents*

NYSA provided evidence indicating that its members and the ILA intended for the Container Rules to be implemented effective January 1, 1981, but decline to admit that its members actually performed any of the specific practices described in the Order of Investigation. Delta Steamship Company, Compagnie Maritime d’Affretement, Venezuelan Line and Hafskip Ltd., state that they did not implement the Container Rules, but furnish no corroborating evidence despite the fact that one or more of these ocean carriers appear to be NYSA members.

Respondents’ evidence also indicates that the Container Rules are intended to apply only to containers owned or leased by the carrier; carriers possess the right to control the loading and unloading of their containers; consolidators provide only a small percentage of the total container traffic handled by Respondents; the Container Rules have a long, *bona fide* history as an ILA bargaining objective; and the ILA considers the Container Rules critical to its survival as an organized labor union.

DISCUSSION AND CONCLUSION

Four of the above-described issues can be decided on the present record. The fifth—whether individual Respondents have or would violate specific Shipping Act provisions—will be referred to an administrative law judge to develop additional evidence and more focused legal argument.

makes it fitting for LTL shippers to pay the cost of using ILA Labor or obtaining their own containers. The Container Rules are also said to allow ocean carriers to accept shipments consolidated by non-ILA labor if the containers are owned or leased by the shipper.

²⁶ The carriers identified as implementing all or part of the Container Rules during 1981 are: Atlantic Container Lines; Barber Blue Sea Line; Dart Containerline Co., Inc.; Farrell Lines; Hapag-Lloyd, A.G.; Korea Shipping Corporation; Maersk Line; Moore-McCormack Line, Ltd.; Naviera Central, C.A.; Nedlloyd Lines; Polish Ocean Line; Prudential Lines, Inc.; Puerto Rico Maritime Shipping Authority; Royal Netherlands Steamship Co.; Sea-Land Service, Inc.; Trans Freight Line; United Arab Lines; United States Lines; and Zim Lines Company.

In order to expedite this proceeding and to focus more clearly on the discriminatory aspects of the Container Rules, the Commission has decided against pursuing civil penalty claims against any ocean carriers which may ultimately be found to have violated the Shipping Act during January or February, 1981. For this reason, the question of whether the respondent carriers violated section 18(b) by implementing specific Container Rule practices not published in their FMC tariffs will also be abandoned.²⁷

The basic features of the Container Rules must be published in an ocean carrier's tariff. A tariff notifies the shipping public of the "privileges and facilities" offered by ocean carriers, the conditions applicable to the use of these privileges and facilities, and all rates and charges assessed.²⁸ A carrier-controlled container is a facility within the meaning of section 18(b), and the privilege of using such containers unquestionably "changes, affects or determines" the rates and charges paid by the shipper. Restrictions on the type of loaded containers which will be transported by the carrier or requirements that certain loaded containers be warehoused or repacked as a condition of transport represent a denial of privileges otherwise available and must also be fully disclosed in a tariff. To transport certain types of containers only on the condition that the shipper pay an additional amount (i.e., the penalty assessed by the ILA) is to impose a "rate or charge" for transportation which may be lawfully collected only when published in the carrier's tariff.

There has been no suggestion that labor law considerations prohibit publication of these aspects of the Container Rules in ocean carrier tariffs. Indeed, it seemingly advances the Respondents' collective bargaining objectives to publicize the treatment to be afforded loaded containers and requests to use empty containers by providing shippers with the legal notice attributed to tariff publication and filing.

Although the Commission's tariff filing regulations (46 C.F.R. Parts 531 and 536) do not contain provisions specifically prescribing the publication of tariff rules governing the availability of carrier-controlled containers,²⁹ the Commission has consistently held that section 18(b)

²⁷ A random check of the Commission's tariff files indicates that appropriate tariff provisions were not filed, however.

²⁸ Section 18(b)(1) provides, in pertinent part, that:

[E]very common carrier by water in foreign commerce and every conference of such carriers shall file with the Commission and keep open to public inspection tariffs showing all the rates and charges of such carrier or conference of carriers for transportation to and from United States ports and foreign ports between all points on its own route and on any through route which has been established. Such tariffs shall plainly show the places between which freight will be carried, and shall contain the classification of freight in force, and shall also state separately such terminal or other charge, privilege, or facility under the control of the carrier or conference of carriers which is granted or allowed, and any rules or regulations which in anywise change, affect, or determine any part or the aggregate of such aforesaid rates, or charges, and shall include specimens of any bill of lading, contract of affreightment, or other document evidencing the transportation agreement.

²⁹ *But see* 46 C.F.R. 531.3(a), 531.5(b)(8)(i), 536.5(b)(8)(xv), 536.9, 536.5(d)(2) and 536.5(c)(5).

imposes a duty to publish analogous information. *Japan/Korea Atlantic and Gulf Conference—Chassis Availability and Demurrage Charges*, 22 F.M.C. 466 (1980); *F. Powers Co., Inc. v. Orient Overseas Container Lines*, 19 F.M.C. 219 (1976); *A. H. Bull S.S. Co.*, 7 F.M.C. 133 (1962); *Intercoastal Investigation*, 1 U.S.S.B.B. 400, 447 (1935). See also *Borden World Trade, Inc.—Declaratory Order*, 23 F.M.C. 248 (1980) (wherein the Commission stressed the need for clear and complete tariff provisions applicable to shipper use of carrier-owned containers). Moreover, in previous Container Rules litigation, the Commission stated that Container Rules practices could not be performed “unless and until [the carrier’s] tariffs are amended in the manner prescribed by section [18(b)],” *SACL, supra*, at 242. *Accord United States v. Sea-Land, supra*, where civil penalties were collected from a carrier which continued to implement the Container Rules after the Commission had suspended the tariff provisions governing such practices.³⁰

Section 5 of the MLAA did not diminish the Commission’s authority to regulate practices which must be described in ocean carrier tariffs. Although various phrases associated with section 5 are susceptible to more than one interpretation, the language of the entire statute and its legislative history taken as a whole firmly support the conclusion that the MLAA preserves the *status quo* concerning Shipping Act regulation of labor-related activities under Shipping Act sections other than section 15. A tariff practice “arising out of or otherwise related to a maritime labor agreement” therefore includes practices described by language taken verbatim from a labor agreement and practices mandated by the terms of the agreement. Any other interpretation would render the second sentence of MLAA section 5 meaningless.

As originally passed by the House of Representatives, H.R. 6613 (which ultimately became the MLAA) simply exempted all “collective bargaining agreements and agreements preparatory thereto” from all Shipping Act regulation. Senate Hearings, *supra*, at 5. It was only during Senate deliberations that a narrower exemption was considered necessary, and the Senate explained that its intention in adding section 5 to H.R. 6613 was to:

. . . retain the existing protections of the Shipping Act for shippers, carriers and localities which may be adversely affected by shipping practices which may arise out of maritime labor agreements. (Emphasis supplied). Senate Report, *supra*, at 13.

The import of this language cannot be fully appreciated without reviewing the adverse reaction to the House version of the bill reflect-

³⁰ In *United States v. Sea-Land, supra*, the carrier’s tariff did not provide for the refusal of containers to consolidators and the court held that such a refusal, even though done in reliance on the carrier’s labor agreement, was an unlawful failure to observe the provisions of its FMC tariff.

ed in the Senate hearings. Shippers, port interests and the Commission opposed H.R. 6613's total exemption of actions taken pursuant to collective bargaining agreements. Senate Hearings, *supra*, at 11 (FMC Vice Chairman Moakley), at 59 (the Boston Shipping Association, Inc.), at 83 and 107 (the International Association of NVOCC's), and at 95-96 (Maryland Port Administration). The Senate Committee described its hearings as follows:

The witnesses who appeared . . . were nearly unanimous in support of exempting collective bargaining agreements from . . . section 15 of the Shipping Act. The majority of those opposing H.R. 6613 as it passed the House, however, felt the bill went beyond what was necessary to assure free and unfettered collective bargaining, and that it stripped the FMC of jurisdiction to assure equal treatment of shippers, cargo and localities, and to prevent abuses made possible by one [sic] concerted activity of carriers and others. Senate Report, *supra*, at 10.

Vice Chairman Moakley's testimony explained that tariff practices stand on their own and must be defended outside the context of section 15, even if they involve the subject of collective bargaining agreements. Senate Hearings, *supra*, at 12 and 16.³¹ The Committee was also advised that the Container Rules were the subject of *both* collective bargaining agreements and FMC tariffs when the Commission decided the *Sea-Land* case in 1978. Senate Hearings, *supra*, at 15 and 16. The bill finally enacted was basically the "second alternative" offered to the Senate Committee by Vice Chairman Moakley. This approach was designed to preserve Shipping Act regulation over conduct prescribed by collective bargaining agreements to the extent it was subject to the tariff filing requirements of section 18(b), thereby avoiding a situation where "two carriers [would be] treated differently under the law simply by virtue of their collective bargaining obligations." Senate Report, *supra*, at 17-18. It was also designed to preserve whatever authority the Commission previously possessed to regulate the Container Rules. Too many witnesses expressed concern over the possible loss of Shipping Act jurisdiction over these specific practices, *e.g.*, Senate Hearings, *supra*, at 42, 83-85 and 90-91, for the Senate Committee to

³¹ The Vice Chairman noted that the language of the House Bill was unclear as to whether the agreement alone was to be exempt or whether conduct arising out of the agreement was also to be exempt. He then stated:

The Commission did not exercise jurisdiction over the [collective bargaining] agreement between management and labor in [the *Sea-Land*] case, but jurisdiction over tariff rules of individual carriers. As the Administrative Law Judge said in his initial decision, "A tariff provision is not an agreement; rather it is a unilateral statement of the author of the tariff . . ." If the Committee does intend to exempt all activities in implementation of collective bargaining activities from Shipping Act scrutiny, that intent must be made clear in the bill. Senate Hearings, *supra*, at 16.

foreclose all Commission regulatory authority over them without plainly stating it had reached such a conclusion.

As discussed above, the MLAA creates no statutory limitation on the FMC's jurisdiction over the tariff practices of ocean carriers. The further argument remains, however, that the Container Rules fall within the “nonstatutory labor exemption” from the Shipping Act recognized in *VW* and *BSA*, both *supra*. This possibility was addressed and rejected in the Commission's 1978 *Sea-Land* decision, *supra*, and the instant record provides no basis for reaching a different result.

The Container Rules impose conditions on persons outside the bargaining unit, namely the shippers and consolidators which use the carriers' services, and therefore do not meet the third of the Commission's *BSA* guidelines for exemption from Shipping Act regulation. Although it can be argued that the Respondents' collective bargaining agreement standing alone does not impose terms on outside parties, the Respondents necessarily accomplish such a result when they insist upon adherence to practices which must be published in carrier tariffs. Tariffs establish the exclusive basis upon which the publishing carriers may deal with shippers and therefore provide the vehicle by which the collective bargaining agreement imposes the terms and conditions of the Container Rules upon persons not party to the agreement. The Supreme Court has held that the failure to meet the third *BSA* guideline is sufficient to defeat a claim to a “nonstatutory labor exemption.” *PMA*, *supra*, at 61-62.

Commission jurisdiction over the Container Rules is supported by more than their nonconformance with the third *BSA* guideline, however. The Shipping Act's purposes differ from those of the antitrust laws and the *BSA* criteria are not identical to the “nonstatutory” exemption from the antitrust laws articulated in *United Mine Workers v. Pennington*, 381 U.S. 657 (1965) and *Amalgamated Meat Cutters v. Jewel Tea Co.*, 381 U.S. 676 (1965). In *BSA*, the Commission announced that it would apply an analytic approach for evaluating practices arising out of collective bargaining agreements which reflects the weighing of shipping and labor interests prescribed by *VW*.³² Although one aspect of this broadly conceived analysis is the application of four specific guidelines derived from the antitrust law exemption, a transportation practice arising out of a collective bargaining can meet the four specific guide-

³² The Commission stated:

In the final analysis, the nature of the activity must be scrutinized to determine whether it is the type of activity which attempts to affect competition under the . . . Shipping Act. The impact upon business which this activity has must then be examined to determine the extent of its possible effect upon competition, and whether any such effect is a direct and probable result of the activity or only remote. Ultimately, the relief requested or the sanction imposed by law must then be weighed against its effect upon the collective bargaining agreement. 16 F.M.C. at 13.

lines and still be subject to Shipping Act regulation under the "final analysis" portion of the *BSA* test. 16 F.M.C. at 12-13.

The Container Rules have a direct and practical impact upon both labor and shipping interests.³³ Nonetheless, a Commission order prohibiting this particular method of resolving labor/management conflict as an unjust ocean carrier practice would not undermine the basic collective bargaining process created by the National Labor Relations Act, whereas the absence of Shipping Act regulation would eliminate the fundamental premise of the Shipping Act and other common carrier statutes—that similarly situated shippers be treated equally.³⁴ Moreover, the courts have recognized that common carrier obligations take precedence over carriers' implementation of analogous "hot cargo" practices created by collective bargaining agreements. See *Burlington Truck, supra*; ³⁵ *Carpenters' Union v. Labor Board*, 357 U.S. 93, 108-111

³³ The Container Rules seemingly concern a mandatory subject of collective bargaining and the Commission must treat them as lawful under the labor laws pending the NLRB's evaluation of their status under 28 U.S.C. 158(e). The Affidavit of James J. Dickman describes the history of the Container Rules and establishes that the ILA agreed to handle containers loaded by non-ILA labor in return for major income and other compensation concessions (e.g., the GAI or guaranteed annual income plan) and the right to stuff and strip certain consolidated containerload shipments. See *Sea-Land, supra*, 21 F.M.C. at 16-22, 34, for an exposition of these uncontested facts. Respondents further claim the Container Rules are critical to the ILA's survival. No evidence was presented to substantiate or disprove this relatively extreme assertion. Although the ILA has experienced a major membership reduction during the past twenty years, an inability to implement the Container Rules is unlikely to shift all ILA cargo handling functions to other labor organizations.

³⁴ It is the integrity of the collective bargaining process and not the value of each bargained for benefit which must be balanced against the Shipping Act's guarantees of fair, essentially equal treatment. The effect of regulating ocean carrier practices under Shipping Act sections 14, 16, 17 and 18 is significantly different from the effect of subjecting collective bargaining agreements to the advance filing and approval requirements of section 15. Even if remedying a discriminatory tariff practice presented a plain choice between the protection of a particular union and protection of a particular class of ocean shippers, the more specific legislative purpose of the Shipping Act requires that the Commission choose the latter—provided the final action taken is no broader than necessary to remedy the unjust discrimination in question.

³⁵ In *Burlington Truck* the Supreme Court held that the ICC abused its discretion in awarding new route certifications when the record did not show that additional carriers were necessary to provide adequate service in the market. The case was remanded to the ICC to take direct action against the boycotting carriers, thereby affirming the presence of Interstate Commerce Act jurisdiction over the bargained for conduct which created the controversy. The presently relevant portion of the opinion reads as follows:

The union was free to make [appeals directly to the trunk-line carriers to refuse to serve local carriers], absent inducement of employees, and, as far as the labor laws and the collective agreement were concerned, the employer was free to reject or accede to such requests. But it was precisely at this point that the *Sand Door* case [*Carpenters Union v. Labor Board, supra*,] recognized the power of the Commission to enter cease-and-desist orders against the carriers violating the transportation law and their tariffs. Thus, . . . there was no reason to have assumed that the ordinary processes of the law were incapable of remedying the situation. 371 U.S. at 170.

The *Sand Door* (or *Carpenter's Union*) case cited above noted the ICC's 1957 decision in *Galveston Truck Line Corp. v. Ada Motor Lines, Inc.*, *supra*, with approval and described it as a self-restrained action which did not invalidate hot cargo clauses *per se*, but only enforced Interstate Commerce Act requirements on certain carriers after concluding that a "hot cargo" provision was not a defense to the charge that the carriers had violated specific statutory duties. 357 U.S. at 109. Accordingly, the teaching

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(1958); *Merchandise Warehouse Co. v. A.B.C. Freight For. Corp.*, 165 F. Supp. 67, 75-76 (S.D. Ind. 1958); *Montgomery Ward & Co. v. Northern Pacific Term. Co.*, 128 F. Supp. 475, 516-519 (D. Ore. 1953). Cf. *Railway Employees v. Florida E. C. Ry. Co.*, 384 U.S. 238, 244-245 (1966) (interpreting the Railway Labor Act in a manner consistent with the defendant's common carrier responsibilities); *Quaker City Motor P. Co. v. Interstate Motor Fr. Sys.*, 148 F. Supp. 226 (E.D. Pa. 1957) (enjoining a motor carrier from refusing to deliver cargo when its employees unilaterally chose to honor the picket line of another union). Application of these cases does not depend on the legality of the collective bargaining contract under the labor laws and the Commission makes no assumptions regarding the Container Rules' status as a legitimate work preservation measure. Shipping Act jurisdiction exists because the Container Rules present distinct Shipping Act questions with important Shipping Act consequences.

The national policy favoring facilitation of privately negotiated settlements to labor/management disputes does not authorize otherwise unlawful conduct simply because it is incorporated into a collective bargaining agreement,³⁶ and the Norris-LaGuardia Act's limitations on

of *Burlington Truck* is this: transportation considerations may not “unduly trench upon” the labor laws, but the labor law interest in the implementation of a collective bargaining agreement is not sufficiently acute to preclude administration of the otherwise applicable antidiscrimination provisions of the Interstate Commerce Act.

Intervenor Pacific Maritime Association cites the *Burlington Truck* decision for the opposing proposition that “work preservation rules . . . are exempt from . . . regulation under transportation statutes,” (PMA Brief at 18) and attempts to demonstrate that the opinion's component parts somehow exceed the whole. PMA's meticulous disassembly of *Burlington Truck* fails to uncover support for the broad exemption the Respondents seek, however. Only the dissenting Justice (Black) believed the ICC lacked regulatory authority over conduct arising out of collective bargaining agreements. His position cannot be attributed to the four concurring Justices (Goldberg, Warren, Douglas and Brennan) simply because they stated that the ICC on remand should order the carriers:

. . . to provide service in a manner and to the extent compatible with their labor agreements and with both the carriers' and the union's rights and duties under the federal labor laws. 371 U.S. at 177.

When read together, the Opinion of the Court and the concurring opinions indicate that the ICC was expected to prevent further implementation of the “hot cargo” clause in the carriers' collective bargaining agreement in a manner which would not unduly conflict with the National Labor Relations Act. The four concurring Justices differ from the Opinion of the Court only in their use of the qualifying phrase “appropriately limited cease- and-desist order”—a reference to the specific facts of the case which apparently permitted mutual accommodation of both collective bargaining agreement and Interstate Commerce Act obligations. Moreover, the concurring Justices voiced no disagreement with footnote 20 of the Opinion of the Court which states that the grant of permanent operating authority to additional carriers might be a justifiable ICC remedy in a different factual situation. 371 U.S. at 171, note 20.

³⁶ Agreements lawful under the labor laws may be unlawful under other statutes, and are not exempt from these other statutes merely because of their validity under the labor laws. See *United Mine Workers v. Pennington*, 381 U.S. 657, 664-666 (1965); *Amalgamated Meat Cutters v. Jewel Tea Co.*, 381 U.S. 676, 684-687 (1965) (opinion of Justice White); *VW, supra*, at 312 (dissent of Justice Douglas). When the Supreme Court has considered the lawfulness of work preservation or work extension agreements under the labor laws, its holdings were confined to the validity of such agreements on labor grounds alone. *E.g.*, in *National Woodwork Mfrs. Ass'n v. NLRB*, 386 U.S. 612 (1967), a collective

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injunctive relief in cases "involving labor disputes" do not apply where the requested relief represents a *bona fide* effort to enforce another federal statute.³⁷ The Commission may therefore investigate the Container Rules despite the fact that an adverse Shipping Act decision could ultimately prevent implementation of collective bargaining provisions which may be lawful under the labor laws.

The present record indicates that some of the Respondents have implemented the Container Rules so as to create the type of discrimination prohibited in *Sea-Land, supra*. There are, however, several matters which should be further developed before the Commission finally decides which Shipping Act sections have been violated by which of the remaining Respondents. This proceeding will therefore be referred to

bargaining agreement between a carpenters' union and a general contractors' association providing that union members would not handle premachined doors was found to be an unfair labor practice and the Court further stated:

We likewise do not have before us in these cases, and express no view upon, the antitrust limitations, if any, upon union-employer work-preservation or work-extension agreements. 386 U.S. at 631, note 19.

In *Connell Construction Co. v. Plumbers and Steamfitter*, 421 U.S. 616 (1975) the Supreme Court held that a non collective bargaining agreement *unlawful* under the Labor Relations Act was *also* subject to federal antitrust liability and stated:

There is no legislative history . . . suggesting that labor-law remedies for section 8(e) violations were intended to be exclusive, or that Congress thought allowing antitrust remedies in cases like the present one would be inconsistent with the remedial scheme of the NLRA. 421 U.S. at 634

See also *United Construction Workers v. Laburnum Corp.*, 347 U.S. 656, 665 (1954); *Southern S.S. Co. v. Labor Board*, 316 U.S. 31, 47 (1942); *Montgomery Ward & Co., supra*, at 498-499.

³⁷ The *Norris-LaGuardia* cases cited by Respondents are distinguishable. *Railroad Telegraphers v. Chicago & N.W. R. Co.*, 362 U.S. 330 (1960), did not involve any unlawful union conduct, and the footnote quoted out of context by NYSA is basically irrelevant to the Court's decision not to invoke the *Norris-LaGuardia* Act. *Brotherhood of Railroad Trainmen v. Chicago River & I. R. Co.*, 353 U.S. 30 (1957), upheld an injunction issued against unlawful union activity, although the law violated was a labor statute. *Milk Wagon Drivers v. Lake Valley Farm Products, Inc.*, 311 U.S. 91 (1940), involving attempts to halt alleged Sherman Act violations, must be compared with *Allen Bradley Co. v. Electrical Workers*, 325 U.S. 797 (1945), wherein injunctive relief was invoked to halt fully adjudicated Sherman Act violations arising from a labor dispute.

In *Brotherhood of R. Trainmen v. Atlantic Coast Line R. Co.*, 362 F.2d 649 (5th Cir. 1966), the court stated:

. . . it should be emphasized we deal only with the enjoynability of appellants' activity and not with its legality for any other purpose.

Congress did not . . . make the conduct listed lawful for all purposes. The most logical inference from this fact is that . . . Congress intended only to remedy abuses of judicial equity power relating to injunctions, allowing the law relating to the "legality" of the described activity for other purposes to develop in the court. 362 F.2d at 653 and note 3.

The decisions dealing with refusals to enjoin motor carriers for alleged violations of their common carrier responsibilities, *East Texas Motor Freight Lines, Inc. v. Teamsters Local 568* and *Lee Way Motor Freight, Inc. v. Keystone Freight Lines, Inc.*, both *supra*, were private party complaints, alleging violations of the Interstate Commerce Act. They involved neither the ICC itself nor an attempt to enforce an order of that agency. *Texas and New Orleans R. Co. v. Brotherhood of R. Trainmen, supra*, denied an injunction to a railroad attempting to implement a permissive authorization granted by the ICC. These cases present no obstacle to the enforcement of an ICC cease and desist order. See *Burlington Truck, supra*.

an Administrative Law Judge for expeditious resolution of the following questions:

1. Whether, and, if so, exactly how, the present Container Rules differ from the 1974 Rules at issue in *Sea-Land, supra*. Copies of the 1974 and December 6, 1980 versions should be made part of the record and the December 6, 1980 amendments plainly identified. Specific attention should be given to:

(a) the phrase “containers owned, leased or used by the carriers . . .” which appears in Container Rule 1(a)(1). A finding should be made as to whether the word “used” includes shipper owned or leased containers, and, if it does not, what its intended meaning is;

(b) the phrase “containers . . . from a single shipper . . . into which the cargo has been loaded (consolidated) by other than its own employees . . .” which appears in Container Rule 1(a)(2). A finding should be made as to whether full containers loaded by the employees of a nonvessel operating common carrier, or other person dealing with the ocean carrier as the shipper of said containers, are included in the Container Rules; and;

(c) whether the Container Rules require that the \$1,000 per container liquidated damages provided by Rule 7(c) be passed on to the shipper and, if not, whether such a result is likely or possible under the Container Rules;³⁸

2. The membership of NYSA during January and February, 1981;

3. The ports at which outstanding injunctions or other circumstances unrelated to the free choice of the ILA precluded carriers from implementing the Container Rules during January and February, 1981;

4. A detailed description of the actions, if any, taken to implement the Container Rules during January and February, 1981, by a representative sample of the remaining respondents to be selected by Hearing Counsel. This sample shall consist of 36 different carriers, no more than 20 of which shall be NYSA members, and shall examine the activities of at least three such carriers at each of 12 representative U.S. Atlantic and Gulf ports where implementation of the Container Rules was not barred by court order or other circumstances. The relevant conduct to be described includes any notices or other information communicated to shippers, orally or in writing, indicating that the Container Rules would be applied, as well as actual refusals to supply containers, load cargo, or deliver cargo except upon compliance with conditions prescribed by the Container Rules. Each imposition of Container Rules conditions by each of the selected Respondents should be documented,

³⁸ See, e.g., the March 18, 1981 Affidavit of Joseph M. Henderson, which states that Boston Consolidation Services, Inc., was told by respondent Korea Shipping Corporation that Boston Consolidation would be responsible for any ILA penalties on shipments booked on KSC vessels at New York.

as well as any attempts to impose responsibility for ILA fines on shippers.

5. A finding as to whether any of the seven enumerated aspects of the Container Rules (*see* note 2, above)—as they were implemented or necessarily would be implemented in the absence of labor law restraints—are unfair, unduly prejudicial or unjustly discriminatory between shippers within the meaning of Shipping Act sections 14 Fourth, 16 First and 17, first paragraph;

6. A finding as to whether any of the seven enumerated aspects of the Container Rules—as they were implemented or necessarily would be implemented in the absence of labor law restraints—are unjust or unreasonable within the meaning of section 17, second paragraph (foreign commerce) and section 18(a) (domestic offshore commerce);

7. A conclusion as to whether unjust discrimination against shippers is prohibited in domestic offshore commerce by virtue of Shipping Act section 14 Fourth, section 16 First, section 18(a), or any combination of the above, or any other provisions of the Shipping Act, 1916;

8. A conclusion as to whether each of the remaining Respondents would violate any of the above-referenced Shipping Act sections if the Container Rules were implemented in their present form and a recommendation as to whether any such Respondent should be ordered to cease and desist from taking such action in the future.

In resolving these remaining issues, Proponents and *any* of the Respondents may introduce such additional evidence as the Presiding Officer deems relevant to whether the Container Rules, as presently formulated, create discriminations or commercial burdens so unreasonable as to violate the above-referenced Shipping Act sections. Because the Commission has today ruled that the Container Rules are not exempt from Shipping Act regulation, despite their inclusion in ILA collective bargaining agreements, no further evidence regarding labor conditions shall be accepted by the Presiding Officer. If the Respondents have a defense to the Shipping Act violations alleged in the Order of Investigation, it must be a defense relating to transportation conditions, not national labor relations policy.

THEREFORE, IT IS ORDERED, That Gulf Atlantic Transportation; MTO Liner Services; West India Shipping Company, Inc.; American President Lines; Showa Line Ltd.; Korea Maritime Transport Co., Ltd.; Uruguayan Line; Seaspeed Services; Tropical Shipping Transportation Co., Ltd.; Jinyang Shipping Co., Ltd.; R.T. Djakarta Lloyd; American Industrial Carriers; D.B. Turkish Cargo Lines; CAST Shipping, Ltd.; Black Star Line; Caribe Cargo Express; and Trans World Systems are dismissed from this proceeding; and

IT IS FURTHER ORDERED, That this proceeding is assigned for hearing and decision to the Commission's Office of Administrative Law Judges, with a public hearing to be held at a date and place hereafter

determined by the Presiding Administrative Law Judge. This hearing shall include oral testimony and cross-examination in the discretion of the Presiding Officer only upon a showing that there are genuine issues of material fact that cannot be resolved on the basis of sworn statements, affidavits, depositions or other documents or that the nature of the matters in issue is such that oral hearing and cross-examination are necessary to develop an adequate record; and

IT IS FURTHER ORDERED, That, pursuant to sections 21 and 27 of the Shipping Act, 1916 (46 U.S.C. 820 and 826), the Respondents shall file with the Presiding Officer within ten business days from the service date of this Order:

1. a verified list of all ocean carriers which were members of the New York Shipping Association during January and February, 1981;
2. a complete and verified copy of the 1974-1977 “Management-ILA Rules on Containers,” a complete and verified copy of the December 6, 1980 version of these Rules which identifies the December 6, 1980 changes, if any, and an analysis of each such change describing its intended effect;
3. a verified list of any ports at which injunctions or other factors beyond the ILA’s control prevented implementation of the Container Rules during January or February, 1981, and an explanation of what the factor was in each instance.

Copies of these submissions shall be simultaneously furnished to all other parties of record;³⁹ and

IT IS FURTHER ORDERED, That this order be published in the *Federal Register* and a copy served upon all parties of record; and

IT IS FURTHER ORDERED, That all future notices, orders, or decisions issued in this proceeding, including notice of the time and place of hearing or prehearing conference, be mailed directly to all parties of record.

By the Commission.*

(S) FRANCIS C. HURNEY
Secretary

³⁹ It is not required that each of the 122 Respondents file the same material. It would be sufficient for the New York Shipping Association members and the ILA to respond on behalf of all.

* Commissioner Thomas F. Moakley concurs in the result and will issue a separate opinion. Commissioner Richard J. Daschbach dissents and issues a separate opinion.

DOCKET NO. 81-11

"50 MILE CONTAINER RULES"

IMPLEMENTATION BY OCEAN COMMON CARRIERS SERVING
U.S. ATLANTIC AND GULF COAST PORTS - POSSIBLE
VIOLATIONS OF THE SHIPPING ACT, 1916

Commissioner Richard J. Daschbach, dissenting.

The Commission's instant Order is a sincere effort to make good law but, by ignoring the intent of the Maritime Labor Agreements Act of 1980 (MLAA), as well as the practical and economic consequences of the investigation it proposes, it continues a wasteful and unnecessarily burdensome proceeding.

The Commission has already spent nearly a year investigating the 50-mile container rules, and it has compiled a record sufficient to make two important findings.

First, the 50-mile rules are a practice subject to the tariff filing requirements of section 18(a) of the Shipping Act, 1916.

Second, a plain reading of the MLAA and its legislative history shows that it was not intended to alter the Commission's authority to enforce Shipping Act violations.

However, the instant Order buries these conclusions amidst 40 pages of legal justification for preserving Shipping Act jurisdiction where it has not been seriously challenged, and it continues an investigation which, after the two findings described above have been made, is no longer necessary or defensible.

Any further conclusions which the Commission can reach regarding alleged violations by specific parties and their disposition is inherently remedial and can be more efficiently adjudicated in the currently stayed complaint proceeding (Docket No. 81-5, *International Association of NVOCC's et al. v. Atlantic Container Line et al.*).

In view of the broad jurisdictional issues already resolved and the specific factual matters still requiring adjudication, the complaint proceeding is far more practical, economical, and consistent with the regulatory reform principles of the MLAA than a costly and protracted Commission investigation and hearing.

Docket No. 81-5 addresses the same legal issues as Docket No. 81-11 and is the only vehicle for the parties alleging harm from imposition of the 50-mile rules to seek financial redress of their alleged injuries. The complaint proceeding also reflects the purposes of the MLAA, which specifically removed the Commission from active regulation of maritime labor activities while preserving its authority to adjudicate the complaint of any party affected by specific violations of the Shipping Act.

Finally, the complaint proceeding places the financial as well as legal burden of going forward on the aggrieved parties, where it belongs. In

view of the Commission's limited budget and personnel resources, cost is a valid issue to be considered in weighing the propriety of initiating or extending any investigation. It is a particularly relevant concern with respect to the instant Order, in which the Commission is embarking on an investigation of sweeping magnitude despite the availability of a more economically feasible alternative.

In addition to its cost, the Commission investigation envisioned by the instant Order has as many drawbacks as the complaint proceeding has advantages.

The Order is skewed in two mutually exclusive directions. On the one hand, it is a scholarly legal treatise on the respective philosophies underlying Shipping Act regulation and national labor law. On the other hand, it tries to re-focus an extant investigation in order to obtain more specific factual information. It simply cannot do both. The more scholarly the treatise, the less suitable a vehicle it becomes for the factual investigation which is allegedly needed here. The treatment of legal issues may be exemplary, but it does not help the Commission determine what Carrier X did to Shipper Y.

The instant Order presents an elaborate defense of Commission jurisdiction where none is needed, thus inviting controversy which might not otherwise arise. The MLAA clearly delineated the Commission's authority regarding maritime labor issues, and a simple re-affirmation of the principles of that statute would be sufficient. In belaboring the issue through 40 pages, the Order may create needless doubts about the Commission's statutory jurisdiction and complicate the premise on which that authority is based. This is the same error which the Commission committed in its overly aggressive assertion of jurisdiction in *Federal Maritime Commission v. Pacific Maritime Association (PMA)*, 425 U.S. 40 (1978), creating regulatory overkill which required statutory modification. The Commission's Order here threatens to rekindle the controversy which the MLAA resolved.

Finally, the cumbersome investigation proposed by the instant Order shows that the Commission continues to swim against the tide of current thinking on the proper role of the Federal government in enforcing the law. An investigation of the scope and magnitude envisioned by the Order here is over-reaching and interventionist regulation at its worst. It thrusts the heavy hand of Federal bureaucracy into a matter which could be more expeditiously and economically resolved through a private complaint proceeding. In so doing, the Commission imposes a major burden upon U.S. industry and labor as well as an unnecessary drain on its own financial and manpower resources.

Vice Chairman Moakley, concurring.

I agree with the majority's conclusion that the Commission has jurisdiction over the Practices described in the order of investigation but only to the extent that those practices affect the relationship between respondent carriers and shippers who utilize their services. To the extent that those practices (e.g. refusal to supply containers to off-pier facilities) affect the relationship between a carrier and a contractor who is not a shipper and is merely performing consolidation services on behalf of the carrier, the practices may be beyond our jurisdiction.

The jurisdictional borders between shipping and labor laws may have been in dispute prior to enactment of the Maritime Labor Agreements Act of 1980 (P.L. 96-325). However, since enactment of that statute on August 8, 1980, it is clear that this Commission has no jurisdiction over collective bargaining agreements *per se* (except with respect to certain assessment agreements, which exception is irrelevant to this proceeding). Shipping Act jurisdiction was clearly preserved over all practices of common carriers which are required to be set forth in tariffs, whether or not those practices reflect a collective bargaining obligation.

Therefore, it is critical for the Commission to distinguish between those practices which must be set forth in carriers' tariffs and all other practices.

The starting point for such a distinction would seem to be the obligation of a carrier, codified in section 18 (b) of the Shipping Act, 1915, and in section 2 of the Intercoastal Shipping Act, 1933, to notify the shipping public of the terms under which its service is offered. If the practice pertains to the terms of its service to the shipping public, then the practice would seem to be one which is required to be set forth in a carrier's tariff.

Since NVO's are members of the shipping public,¹ the terms under which containers are made available to NVO's (and to other shippers) must be set forth in a carrier's tariff. However, consolidators that perform stuffing or stripping operations as subcontractors to the ocean carriers are not shippers and their arrangement with carriers would not, at first blush, seem to be required to be set forth in the carriers' tariffs.

To my considerable frustration, we have not yet developed a record which reflects exactly what practices we are investigating, although there is some evidence to the effect that certain NVO's are being denied containers and are being subjected to other practices described in the Order of Investigation. It would seem beneficial to solicit the parties help in refining this issue once the record adequately divulges the practices involved. While I believe that the majority intends to make this distinction that I believe is critical to our ultimate disposition

¹ *Sea-Land Service, Inc.—Proposed Rules on Containers*, 21 F.M.C. 1.

of this case, the order may not be sufficiently clear to alert the parties and the presiding Administrative Law Judge of this intent.

On a second, related issue, I would clearly take a different path from the majority in reaching our common conclusion. That issue relates to the treatment of the non-statutory exemption arising out of the BSA ² litigation. I simply do not believe that the existence of such an exemption is consistent with the intent of Congress in enacting the Maritime Labor Agreement Act of 1980, *supra*.

As described above, the central theme of the Maritime Labor Agreements Act was to draw a clear line between labor and shipping jurisdictions. Collective bargaining agreements were relegated solely to labor law. Tariffs were seen as purely Shipping Act matters.³

Thus, having concluded that this case deals with tariff matters, the jurisdictional inquiry must end.

The application of the BSA exemption test once again blurs this clear jurisdictional division. It not only suggests that the Commission may not, under some circumstances, exercise jurisdiction over tariff matters, despite the language of section 5 of the Maritime Labor Agreements Act, but also requires the Commission to analyze the collective bargaining agreement itself, a result which Congress was intently attempting to avoid.

I would agree with the majority that, if on the basis of the record ultimately developed in this case, certain practices of respondent carriers are found in violation of the Shipping Act, the remedy for those violations should take labor policy matters into consideration. This result is, in fact, required by virtue of the Supreme Court's decision in *Burlington Truck Lines v. United States*, 371 U.S. 156 (1962). However, to consider labor policy matters in determining whether to exercise jurisdiction over a tariff matter is a throw back to a very difficult era for this agency prior to enactment of the Maritime Labor Agreements Act.

² *United Stevedoring Corp. v. Boston Shipping Association*, 16 F.M.C. 7 (1972).

³ See e.g. *Hearing before the Subcommittee on Merchant Marine and Tourism of the Committee on Commerce, Science and Transportation on HR 6613*, U.S. Senate, 96th Congress, 2nd Sess. (June 4, 1980) at pp 12-37:

FEDERAL MARITIME COMMISSION

DOCKET NO. 80-45

AGREEMENT NOS. 10386, AS AMENDED, AND 10382, AS AMENDED—CARGO REVENUE POOLING/EQUAL ACCESS AGREEMENTS IN THE UNITED STATES/ARGENTINA TRADES

ORDER PARTIALLY ADOPTING INITIAL DECISION

February 16, 1982

This proceeding was initiated by Order of Investigation and Hearing served June 30, 1980 to determine whether certain cargo revenue pooling and sailing agreements in the northbound and southbound United States/Argentina trades should be approved, disapproved or modified pursuant to section 15, Shipping Act, 1916 (46 U.S.C. 814).¹

On July 31, 1981, Presiding Administrative Law Judge Paul J. Fitzpatrick served his Initial Decision approving the northbound agreements, *i.e.*, Agreement Nos. 10386 and 10382. The proceeding is now before the Commission upon Exceptions to that decision.

INITIAL DECISION

The Presiding Officer concluded that Agreement Nos. 10386 and 10382 (Agreements) are not inconsistent with any of the standards of section 15 and accordingly granted them approval. In so doing, the Presiding Officer found that the Agreements: (1) implement a government-to-government arrangement and therefore carry a presumption of being in the public interest and are presumptively approvable; (2) meet a serious transportation need and provide important public benefits and further valid regulatory purposes; (3) do not invade the prohibitions of the antitrust laws any more than is necessary to serve the purposes of the Shipping Act; and (4) are a result of commercial negotiations subject to the Commission's Jurisdiction under section 15 of the Act. The Presiding Officer specifically addressed the issues delineated by the Commission in its January 29, 1981 Order and found no evidence which would warrant the disapproval or modification of the Agreements or which would support a finding that they are not the result of commercial negotiations among the parties.

The Presiding Officer reviewed the history which led to the negotiation and execution of these Agreements. He discussed the evidence in

¹ The Agreements were granted approval *pendente lite*. On January 29, 1981, the Commission denied Moore-McCormack Lines' motion to terminate the proceeding but finally approved the southbound agreements, *i.e.*, Agreement Nos. 10388 and 10389.

this proceeding, as well as designated portions of the record in Docket Nos. 78-51 and 78-52,² and found the impetus for the Agreements to be the March 31, 1978 Argentine/ United States Memorandum of Agreement—the so-called Blackwell/Guevara Memorandum of Understanding. The Presiding Officer found that the fixed share provisions of these Agreements are “consistent” with that Memorandum.

Having found that the Blackwell/Guevara Memorandum represents a favorable United States policy towards pooling agreements in these trades, the Presiding Officer therefore concluded that the Agreements are presumptively in the public interest and therefore presumptively approvable.³ The Presiding Officer also found that the Proponents had met their *Svenska*⁴ burden and that the Agreements warranted approval under the standards of section 15.

The Presiding Officer concluded that Argentine law and policy require fixed shares in the United States/Argentine trades. In so doing, he relied on a number of Aide Memoires, which were transmitted through the United States State Department, and the testimony of Mr. Samuel B. Nemirow, then Assistant Secretary of Commerce for Maritime Affairs, that fixed shares were consistent with the Blackwell/Guevara Memorandum and that the Argentine government, through its State Secretary of Maritime Interest (SEIM), had indicated that open competition was inconsistent with that Memorandum and Argentine law and policy.

The Presiding Officer held that the approval of these agreements will fulfill serious transportation needs and provide important public benefits by preventing the disruption of both the north and the southbound trades through the imposition of restrictive Argentine laws, and by avoiding the international conflict which could result from United States' retaliatory use of section 19 of the Merchant Marine Act, 1920, and other statutes. He found that the Argentine government would, if the Agreements are not approved, reimpose its waiver procedures in the southbound trades, as well as impose similar restrictions in the northbound trades with devastating impact on the U.S.-flag carriers, Delta and Mooremac, to the detriment of the foreign commerce of the United States. The Presiding Officer concluded that Argentina would

² The Atlantic and Gulf Agreements are successor agreements to Agreement Nos. 10349 and 10346, respectively, which were the subject of Docket Nos. 78-51 and 78-52, *Agreement No. 10349—A Cargo Revenue Pooling and Sailing Agreement Argentina/United States Atlantic Trade*, and *Agreement No. 10346—A Cargo Revenue Pooling and Sailing Agreement Argentina/United States Gulf Coast Trade* (Report and Order issued June 22, 1979, 21 F.M.C. 1100).

³ In support of this finding, the Presiding Officer cited a letter from President Carter to the House Committee on Merchant Marine and Fisheries relating to certain pending legislation. The President stated in pertinent part that:

... agreements and implementing government-to-government negotiations should receive prompt presumptive approval by the FMC. (I.D. page 92).

⁴ *Federal Maritime Commission v. Svenska Amerika Linien*, 390 U.S. 238 (1968).

take this action because it views the north and southbound trades and the respective pooling agreements as being "interlinked."

The Presiding Officer found that the third-flag allocations were not unjustly discriminatory or unfair,⁵ and were the product of true commercial negotiations without influence from the Argentine government or its state-owned carrier, ELMA. He determined that although Ivarans' share—the largest third-flag share—resulted, at least in part, from its negotiating tactics,⁶ consideration was given to its past performance. While past carryings were found not to be the only factors applied in negotiating the shares, the Presiding Officer explained that it was impossible to conclude from the record what weight was given to zonality and reciprocity, and the intangibles that are always present in commercial negotiations. No one factor was found, however, to have been given undue weight.

As to the level of share ultimately allocated Ivarans, the Presiding Officer also pointed out that Ivarans' recent past carriage (13.3% in 1980) is not much greater than its initial pool share and noted that Ivarans had stipulated that economic injury was not in issue and that Agreement No. 10386 would not force it out of the trade.

The Presiding Officer also held that actual pool calculations in the last quarter of 1980 show that the pool provisions are not unfair to Ivarans.⁷ During this quarter, Ivarans was found to have had total pool earnings of \$629,194, excluding surcharges, and to have retained \$228,059 of this amount as its 45% carrying compensation, in addition to the surcharges. The Presiding Officer noted that although Ivarans

⁵ The Presiding Officer noted that the 20% share allocated to third-flag lines in the Gulf trade was in excess of their historical carryings.

⁶ With regard to the disputed Atlantic Agreement negotiations, the Presiding Officer explained that the third-flag allocations resulted in part from the negotiating positions of the principal antagonists, Lloyd and Ivarans. In the negotiations Lloyd argued that it is entitled to its share because: (1) it has the capacity and capability to perform its pool obligations; (2) it has demonstrated a commitment to the trade; (3) it views its minimum sailing requirements as commitments and will serve the trade even if there is no cargo; (4) its vessels do not exclusively serve their national trades but also rely on cargo from other ports of call, such as Argentina, as do Argentine-flag carriers which load cargo in Brazilian ports; (5) consideration should be given the economic community of interest between Brazil and Argentina.

Ivarans, on the other hand, believed that past carryings should be the *only* criterion used to determine the third-flag shares in these trades. It also argued that a new entrant or carrier without substantial past participation should only be initially assigned a 1% share until it has established its capability to serve the trade. Finally, Ivarans believed that the Commission would not approve an agreement where Ivarans' share was lower than the percentage set forth in the predecessor agreement, Agreement No. 10349. (12.5% down to 11.1% over a three-year period). Ivarans allegedly did not reduce its share demand because it believed that the Commission would dismiss any protest if its pool demands were only a few percentage points over what the other lines were prepared to give Ivarans. Ivarans position is that it signed Agreement No. 10386 because it believed that failure to do so would result in the imposition of sanctions against it pursuant to Argentine law in both the north and the southbound trades.

⁷ Agreement No. 10386, the Atlantic Agreement in issue, was not in effect for the first three quarters of 1980.

paid an overcarriage penalty of \$21,835, this penalty only costs Ivarans \$.03 on the dollar on its *gross* revenues.

The Presiding Officer further concluded from the report on this pool period that the evidence indicated that Ivarans was only interested in very high-rated cargoes since its average revenue ton earnings were \$138.47 compared to \$111.53 for all the other carriers. He found that even after Ivarans paid the overcarriage penalty, it still earned an average of \$133.66 per revenue ton. Accordingly, it was concluded that the third-flag allocations were not unfair to Ivarans and that Agreement No. 10386 could be approved without the modifications proposed by Ivarans and Hearing Counsel.⁸

With regard to the impact of these Agreements on shipper interests, the Presiding Officer noted that no shipper testified in opposition to these Agreements and that the 24 shippers who responded to Hearing Counsel's survey perceived no difference in service under open or fixed shares.

POSITION OF THE PARTIES

A. Hearing Counsel

While supporting the Agreements as approved by the Presiding Officer, Hearing Counsel requests that the Commission clarify certain of the Presiding Officer's conclusions.

Hearing Counsel believes that the record does not support the Presiding Officer's finding that Argentine law requires fixed shares for the third-flag carriers. It points out that, although there was testimony concerning Argentine law and policy, no specific Argentine law was ever entered into the record. Hearing Counsel submits that because there is no Argentine law which *requires* fixed shares, open competition within the third-flag share would be consistent with the Blackwell/Guevara Memorandum of Understanding. Hearing Counsel cites the testimony of Mr. Blackwell in support of this position.

Hearing Counsel also takes exception to the Presiding Officer's finding that the Agreements are *prima facie* in the public interest because they are consistent with the Memorandum of Understanding and are therefore presumptively approvable under section 15 of the Act. Hearing Counsel believes, however, that the Memorandum is entitled to "considerable weight" in determining the approvability of these Agreements under the "public interest" standard of section 15, but that the Agreements must nevertheless be examined under the existing standards of section 15.

⁸ Ivarans favored open competition or renegotiation of the third-flag share. Hearing Counsel urged that the third-flag shares be renegotiated in the Atlantic trades and that both Agreements be modified to provide for verbatim transcripts of the third-flag caucuses. On Exception, Hearing Counsel abandoned its request for renegotiated third-flag shares in the Atlantic trade.

B. Ivarans

Ivarans excepts to nearly every finding and conclusion of the Initial Decision. Ivarans lists 35 specific factual/legal matters with which it takes issue. In general, Ivarans argues that: (1) neither the Blackwell/Guevara Memorandum of Understanding nor Argentine law requires fixed third-flag shares in these trades; (2) the Shipping Act, 1916 does not permit the presumptive approval of section 15 agreements which allegedly implement intergovernment agreements; (3) Agreement No. 10386, the Atlantic Agreement, is unjustly discriminatory and unfair to Ivarans.

Ivarans contends that the Presiding Officer has in effect overruled the Commission's findings in Docket Nos. 78-51 and 78-52 that the Argentine government does not have an interest in the actual division of the third-flag shares. Ivarans argues that the Presiding Officer made this finding without moving before him any specific Argentine law or resolution requiring fixed third-flag shares. In fact, Ivarans points out that the Argentine laws which the Presiding Officer did consider were the ones which were before the Commission in Docket Nos. 78-51 and 78-52 and upon which the Commission there based its finding that the Argentine government has no interest in how the third-flag shares are allocated.

Ivarans also argues that the Blackwell-Guevara Memorandum does not require fixed third-flag shares. Ivarans points to the testimony of Mr. Blackwell, where he indicated that the issue of fixed or open shares for the third-flag carriers was not part of the negotiations which led to the Memorandum, and that he personally was not concerned with the third-flag issue beyond the *general* concern for the participation of third-flag lines in the trade.

Ivarans also maintains that the Presiding Officer erroneously relied on President Carter's endorsement of "presumptive approvability" in determining that the Agreements should be approved. Ivarans points out that President Carter's statement was not "law," nor was the legislative proposal to which it was addressed enacted into law. Ivarans excepts to the Presiding Officer's "presumptive" analysis and further argues that this allegedly erroneous analysis led him to find the Agreements approvable.⁹

Finally, Ivarans argues that the Presiding Officer erred in failing to find that "zonalism and reciprocity" were significant factors in deter-

⁹ Ivarans also objects to the Presiding Officer's findings that the Agreements meet the *Svenska* standards. Ivarans argues that the Presiding Officer's conclusions are based on speculative findings that: (1) the Argentine government will disrupt the north and southbound trades in the event of Commission disapproval of these Agreements; (2) that the American-flag carriers will suffer immediate and irreversible financial hardship; and (3) that Mooremac will request, and the United States will extend countervailing relief under section 19, Merchant Marine Act, 1920 (46 U.S.C. 876) or section 301 of the Trade Act. (19 U.S.C. 2411).

mining the third-flag shares, particularly the Atlantic Agreement's shares. The record in this proceeding allegedly indicates that the Argentine-flag lines, ELMA and Bottacchi, and the Brazilian-flag lines, particularly Lloyd, consider zonalism and reciprocity as the primary factors in allocating third-flag shares.

The record also is said to establish that both the Argentine government and the Argentine carriers improperly influenced the negotiation of the third-flag shares.¹⁰ In support of this argument, Ivarans explains that it was required to attend a meeting with SEIM prior to the March, 1980 principals' meeting and that at this meeting, SEIM discussed the Argentina/Brazil Agreements, as well as the implementation of Resolution 619 against Ivarans if it did not sign the Agreement. Ivarans contends that both SEIM and Bottacchi¹¹ commented favorably on the shares that are presently set forth in the Atlantic Agreement. Ivarans is of the opinion that it could have developed more evidence on this issue if its discovery requests had been complied with and if ELMA had not refused to testify concerning instructions it had received from SEIM.

With respect to the weight afforded the factors used in determining the level of the third-flag shares, Ivarans submits that Agreement No. 10386 itself is the best evidence that past performance and service capabilities were not given significant consideration. Ivarans notes that Lloyd received a substantial share in Agreement No. 10386, although Lloyd has provided very little service in the Atlantic trade.

Finally, Ivarans contends that the Presiding Officer misconstrued its stipulation regarding lack of economic injury.¹² As a result, Ivarans argues that the Presiding Officer improperly placed the burden of going forward and the burden of proof regarding financial injury on Ivarans. Ivarans argues that it does not have the burden to establish that it would be economically harmed by the Agreements. Ivarans submits that it entered into the stipulation only with respect to certain discovery requests that Mooremac made of it regarding its financial records. Ivarans maintains that the Presiding Officer has erroneously interpreted the shipper responses to a Hearing Counsel survey and argues that the shipper responses in fact indicate preference for open rather than fixed third-flag shares.

¹⁰ Ivarans urges the Commission to draw negative inferences against the Proponents because of the refusal of the Argentine government to comply with certain discovery requests and ELMA's refusal to testify concerning the instructions that ELMA received from SEIM.

¹¹ Bottacchi, unlike ELMA, is not a government-owned carrier, but rather is privately owned.

¹² Ivarans stipulated that it would not contend that it would be economically harmed by the Atlantic Agreement.

C. Proponents

Proponents support the Presiding Officer's findings and conclusions and urge the Commission to adopt the Initial Decision.

DISCUSSION

The Exceptions to the Initial Decision present essentially four issues for resolution:¹³

(A) Whether the Presiding Officer properly applied a "presumptive" standard in finding that these Agreements should be approved;

(B) Whether the Presiding Officer properly found that Argentine law and policy require fixed third-flag shares in these trades;

(C) Whether the Commission should draw adverse inferences from the failure of ELMA and the Argentine government to comply with certain discovery requests; and

(D) Whether the Atlantic Agreement is unjustly discriminatory or unfair to Ivarans.

A. *Presumptive Standard*

The Presiding Officer found that the Agreements "carry a presumption of approvability" under the public interest standard of section 15 because they result from the United States/Argentina Memorandum of Understanding. The Presiding Officer qualified his finding, however, by explaining that this presumption does not necessarily render the Agreements "conclusively approvable." Thereafter he independently analyzed the Agreements under the *Svenska* standard and found the Agreements to be approvable.

The Commission concurs with the Presiding Officer that commercial agreements which flow from certain government-to-government arrangements should be presumed to be in the public interest for the purpose of section 15 consideration. Such an arrangement would not, however, necessarily render the agreement presumptively approvable, but rather acts to offset the adverse public interest presumption created by *Svenska* and shift the burden of going forward with respect to this issue back to the opponents of the Agreement.¹⁴ It is imperative, however, that the section 15 agreement be a *direct* result of the executive arrangement, as it clearly is in this case.

¹³ In reaching its decision to adopt the Presiding Officer's Initial Decision in this proceeding, as modified herein, the Commission has considered the complete record and the briefs and arguments of the parties. Arguments and exceptions not specifically discussed in this Order were nevertheless considered and determined to be either without merit or properly disposed by the Presiding Officer.

¹⁴ As the Presiding Officer observed, there would not be any point in the United States negotiating a diplomatic agreement which indicates that pooling agreements are in the public interest, if the commercially negotiated pooling arrangement is presumed to be contrary to the public interest under the Commission's rationale in *Investigation of Passenger Steamship Conferences Regarding Travel Agents*, 10 F.M.C. 27 (1966), *affirmed sub nom. FMC v. Svenska Amerika Linien*, *supra*.

B. Argentine Law and Third-Flag Shares

Ivarans and Hearing Counsel urge the Commission to reverse the Presiding Officer's finding that Argentine law and policy *require* fixed third-flag shares in its trade. Although the Presiding Officer did not have a specific Argentine law in evidence, the Commission finds that it is unnecessary to reverse this finding. There is adequate uncontradicted evidence of record that Argentine law and policy *require* fixed third-flag shares in its trade. Exhibit SX-40 on page 9, an Aide Memoire from the Argentine government, indicates that "open competition is contrary to the maritime laws and policies of Argentina." Moreover, Mr. Nemirow, a former Maritime Administrator, testified that he had been advised by Argentine officials that fixed third-flag shares were required by Argentine law,¹⁵ and that the Argentine government assumed that the Blackwell/Guevara Memorandum would, consistent with its laws, result in a pool with fixed third-flag shares in the trade. Accordingly, Hearing Counsel's and Ivarans' Exception will be denied.

C. Adverse Inferences

Ivarans and Hearing Counsel urge the Commission to impose sanctions against the Proponents for the failure of ELMA and the Argentine government to comply with discovery and for the refusal of ELMA's witnesses to testify concerning SEIM instructions to ELMA. Ivarans states that the Presiding Officer failed to rule on the adverse inferences it requested as a result of these refusals. The Commission is now requested to infer that the Argentine government had an interest in and in fact influenced the specific individual third-flag shares in the Atlantic Agreement. The Commission finds upon review of the Initial Decision as well as the evidence in this proceeding that the Presiding Officer properly disposed of Ivarans' request.

Although the Presiding Officer did not specifically rule on Ivarans' request for adverse inferences, the Presiding Officer nevertheless addressed the matters raised by the requested inferences. Indeed, as Ivarans points out, and the Presiding Officer found, reciprocity and zonalism were factors in the negotiations of the third-flag shares in the Atlantic trade. Despite these findings, Ivarans argues that the Presiding Officer failed to infer that the Argentine government influenced the negotiations through its support of zonalism and reciprocity. Given Argentina's recognized support of these concepts, the Presiding Officer's finding is tantamount to granting Ivarans' requested inference—

¹⁵ The Federal Rules of Civil Procedure provide that foreign law may be determined by any relevant source including testimony. This determination may be made without the benefit of expert opinion. *Curtis v. Beatrice Food Co.*, 481 F. Supp. 1275, *aff'd* 633 F.2d 203 (1980) (*See* 46 U.S.C. 826; 46 C.F.R. 502.156).

i.e., the Argentine government had an interest in the third-flag negotiations.¹⁶

This conclusion, however, does not require a reversal of the Presiding Officer's ultimate disposition of the Agreements since he further found, and the record will so support, that these factors were not given undue weight in determining the Agreements' third-flag shares (see Discussion, *infra*). Because the Commission has recognized zonalism and reciprocity as appropriate negotiating factors in this trade, their consideration by the third-flag carriers does not render them inappropriate.¹⁷

D. Atlantic Agreement Approvability

As the Presiding Officer noted, a record of this magnitude usually provides, by the process of selective record references, a basis of support for many and varied arguments. In balance, it appears that the Initial Decision presents a proper and well-supported disposition of the varied issues presented in this proceeding. There is sufficient evidence of record to support this finding that the Agreements satisfy the standards for approval and that the Atlantic Agreement is not unduly discriminatory or unfair to Ivarans.

The Agreements do fulfill serious transportation needs and provide important public benefits in the United States/Argentine trades. They serve to obviate potential conflict between the laws and policies of the United States and Argentina. *Docket Nos. 78-51 and 78-52, supra*. In the absence of these Agreements, and the related southbound agreements, it appears likely that certain restrictive Argentine laws and policies would be invoked. Such an action would inevitably lead to international conflict and result in the disruption of the U.S. foreign commerce with injury to shipper and carrier interests alike. Agreement Nos. 10386 and 10382 reflect a commercial alternative which should avoid these consequences and thereby provide important public benefits warranting their approval.

Nor does the existence of fixed third-flag share provisions require, as Ivarans contends, disapproval of the Agreements. (fixed third-flag shares in the United States/Argentine trades are not inconsistent with the Blackwell/Guevara Memorandum nor in and of themselves con-

¹⁶ This should not be taken to mean that the Argentine government had an interest in the level of the specific individual third-flag shares. In fact, the evidence in this proceeding indicates the contrary.

¹⁷ Neither Ivarans nor any other party is arguing that the role of the Argentine government presents a question of Commission *Jurisdiction* under section 15.

trary to any United States law administered by this Commission.¹⁸ The record in this proceeding supports the Presiding Officer's finding that the negotiated shares are the result of commercial negotiations and that Ivarans' share is not unjustly discriminatory or unfair.¹⁹

The executed Atlantic Agreement, to which Ivarans is signatory, provides that its signatories voluntarily accepted the Agreements' terms and conditions. Thus, the Agreement itself is the best evidence that the shares allocated in Agreement No. 10386 are not unjustly discriminatory or unfair to Ivarans. Moreover, Ivarans does not contend nor is there any evidence that Ivarans will economically be harmed by Agreement No. 10386.²⁰

Finally, the record does not establish that undue weight was given to zonalism and reciprocity. Nor is there any indication that zonalism will result in the "abrupt curtailment of services" provided by carriers who have historically served the trade, as was the case in Docket Nos. 78-51 and 78-52.

THEREFORE, IT IS ORDERED, That the Presiding Officer's July 31, 1981 Initial Decision is adopted by the Commission as modified by the discussion above; and

IT IS FURTHER ORDERED, That Hearing Counsel's and Ivarans' Exceptions are granted to the extent indicated above and denied in all other respects; and

FINALLY, IT IS ORDERED, That these proceedings are discontinued.

By the Commission.

(S) FRANCIS C. HURNEY
Secretary

¹⁸ The Commission's decision in Docket Nos. 78-51 and 78-52 to require open competition in the third-flag share was solely in response to the inadequacies of that record in an effort to avoid a lapse of Agreement Nos. 10346 and 10349 and the consequential disruption of the United States foreign commerce. It was not intended to establish a Commission policy of "open competition" in the Argentine trades. Fixed third-flag shares are neither required by nor contrary to any United States law administered by this Commission. Argentine law and policy on the other hand require fixed shares.

¹⁹ There does not appear to be widespread shipper opposition to fixed third-flag shares and the Proponents, with the exception of Ivarans, favor such provisions.

²⁰ Indeed, Ivarans stipulated that it would not raise these issues.

FEDERAL MARITIME COMMISSION

DOCKET NO. 80-45
AGREEMENT NOS. 10386, AS AMENDED,
AND 10382, AS AMENDED
CARGO REVENUE POOLING/EQUAL
ACCESS AGREEMENTS IN THE UNITED
STATES/ARGENTINE TRADES

Cargo revenue pooling and equal access agreements in the Northbound Argentine/United States Trades to United States Gulf of Mexico ports and United States Atlantic Coast ports found not to be unjustly discriminatory or unfair as between carriers; detrimental to the commerce of the United States; or contrary to the public interest or otherwise in violation of the Shipping Act, 1916.

Proposed modification to Agreement No. 10386-2 requiring that the Agreement be approved only pending renegotiation of third-flag shares found to be impractical, unnecessary and not warranted on this record.

Proposed modification to Agreement No. 10386-2 providing for "open competition" within the third-flag sector rejected as unwarranted on this record.

Proposed modification to Agreement Nos. 10386 and 10382 requiring transcripts be made of the non-national flag lines' future negotiations also rejected.

Agreement Nos. 10386, as amended, and 10382, as amended, found: to carry a presumption of approvability, to meet serious transportation needs, provide significant public benefits, further valid regulatory purposes, not to invade the prohibition of the antitrust laws any more than necessary to serve the purposes of the Shipping Act, 1916, and subject to the jurisdiction of this Commission.

Agreement No. 10386, as amended, (No. 10386-2) (U.S. Atlantic) approved without modification.

Agreement No. 10382, as amended, (No. 10382-2) (U.S. Gulf) approved without modification.

Odell Kominers, William H. Fort, Jonathan Blank, John W. Angus, III, for Moore McCormack Lines, Incorporated.

Roy G. Bowman, Hopewell H. Darnelle, III, John B. Yellott, Jr., for Delta Steamship Lines, Inc.

Neal M. Mayer, Peter J. King, Paul D. Coleman, for Companhia de Navegacao Lloyd Brasileiro and Companhia Maritima Nacional.

Seymour H. Kligler, David A. Brauner, Asher H. Miller, Nathan J. Bayer, for Empresa Lineas Maritimas Argentinas, S.A. and A. Bottacchi S.A. de Navegacion C.F.I.I.

Elmer C. Maddy, George E. Dalton, John E. Bradley for A/S Ivarans Rederi.

Stanley O. Sher, John R. Attanasio, Anthony J. Ciccone for Transportacion Maritima Mexicana, S.A.

Edward M. Shea for Sea-Land Service, Inc.

Robert L. McGeorge for Holland Pan American Lines.

AGREEMENT NOS. 10386, AS AMENDED, AND 10382, AS 671
AMENDED

James P. O'Sullivan, John A. Gaughan, Office of General Counsel, Federal Maritime Commission, appearing on behalf of Dr. Robert A. Ellsworth of the Commission.

John Robert Ewers, C. D. Miller, Polly Haight Frawley, William D. Weiswasser for the Bureau of Investigation and Enforcement.

INITIAL DECISION ¹ OF PAUL J. FITZPATRICK,
ADMINISTRATIVE LAW JUDGE

Partially Adopted February 16, 1982

PROCEDURAL BACKGROUND

This proceeding was instituted by "Order of Investigation and Hearing and Conditional *Pendente Lite* Approval," served June 30, 1980 (20 S.R.R. 83), to determine the approvability under section 15, Shipping Act, 1916 (46 U.S.C. § 814), of four cargo revenue pooling/equal access agreements in the United States/Argentina trades: Agreement Nos. 10382, as amended (northbound), and 10389 (southbound) in the Argentina/U.S. Gulf trades; and Agreement Nos. 10386, as amended (northbound), and 10389 (southbound) in the Argentina/U.S. Atlantic trades.

The Order recognized that similar predecessor northbound agreements previously approved in Docket Nos. 78-51 and 78-52 (*Agreement No. 10349—A Cargo Revenue Pooling and Sailing Agreement—Argentina/U.S. Atlantic Trade*, No. 78-51 (F.M.C., June 22, 1979), and *Agreement No. 10346—A Cargo Revenue Pooling and Sailing Agreement—Argentina/U.S. Gulf Trade*, No. 78-52 (F.M.C., June 22, 1979, 21 F.M.C. 1100, (hereinafter "*Docket Nos. 78-51 and 78-52*") were found to serve an important public benefit by maintaining international harmony through the avoidance of disruptive retaliatory action and resultant international conflict. The Order also stated that the justification for approval and the protest submitted raise factual and legal issues requiring further examination. The Agreements were granted *pendente lite* approval in view of "a considered emergency situation existing in the trade."²

Transportacion Maritima Mexicana, S.A. (TMM), the sole protestant of any of the four Agreements, was designated a protestant and the

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

² The language of the Order is as follows:

Because the Argentine Government has declared that all pool agreements will be declared null and void absent Commission approval by June 30, 1980, the Commission considers an emergency situation to exist in this trade. The threatened disruption of ocean trade between the United States and Argentina is an emergency of sufficient magnitude to lead the Commission to believe that approval of these Agreements pending our investigation of them and their approvability under the Shipping Act standards is not only justified, but is the only responsible course of action available to the Commission. Such approval should avoid disruption of United States/Argentina trade, assure shipper service, while preserving carrier interests pending the conclusion of our investigation. (Footnote omitted.)

Bureau of Hearing Counsel (renamed Bureau of Investigation and Enforcement, now Bureau of Field Operations, Office of Hearing Counsel) (Bureau or BIE) was made a party to this proceeding, and the Commission, at that time, directed the issuance of an Initial Decision on or before March 31, 1981.

On July 11, 1980, TMM filed a Petition for Review of the Commission's June 30, 1980 Order in the United States Court of Appeals for the District of Columbia Circuit, *Transportacion Maritima Mexicana, S.A. v. F.M.C.*, D.C. Cir. No. 80-1781, relating to Agreement No. 10382, as amended. TMM also filed simultaneously with this Commission a Motion to Stay the Commission's Order pending a decision by the Court. The motion was referred to the Commission and denied in its Order served October 10, 1980. However, on September 23, 1980, TMM and the other parties to Agreement No. 10382 executed an Amendment No. 2 with TMM apparently being provided a satisfactory pooling share. TMM has indicated it would withdraw its protest in this proceeding as well as its Petition in Court and become a proponent of Agreement No. 10382 if the Amendment was approved. The Amendment was filed and approved *pendente lite* and placed under investigation by Commission Order served December 16, 1980. TMM's Court action subsequently was dismissed.

Pursuant to the Commission's Order of June 30, 1980, a prehearing conference was held in Washington, D.C., on August 26, 1980. Extensive discovery was undertaken by the parties, including the taking of the deposition of the Honorable Samuel B. Nemirow, the Assistant Secretary of Commerce for Maritime Affairs.

On October 20, 1980, Moore McCormack Lines, Incorporated (Moore McCormack), filed a "Motion to Terminate the Proceeding, Or in the Alternative Suspend Proceedings Pending Receipt of Certain Evidence." Moore McCormack's request to terminate the proceeding was based in large measure on the deposition of the Assistant Secretary which would, it was claimed, resolve important issues concerning the positions of the Argentine and U.S. Governments and obviate the need for further evidentiary proceedings. A second prehearing conference was held on October 28 and, among other things, the Moore McCormack motion was discussed and the positions of the parties were noted. Parties filed replies and the motion was referred to the Commission. On November 6, 1980, the Commission granted a stay of this proceeding pending resolution of the motion.

On January 29, 1981, the Commission served an "Order Denying Motion to Terminate, Vacating the Stay of Proceedings, and Approval of Agreement Nos. 10388 and 10389," 23 F.M.C. 611. The Commission's January 29th Order denied the request to terminate the proceeding, added four issues, and posed a number of factual questions by which the parties were to develop responsive information. In addition,

the Commission stated, "[b]ecause the principal focus of this proceeding relates primarily to third-flag issues," it determined to discontinue the investigation of southbound Agreement Nos. 10388 and 10389. The Commission decided that those Agreements meet the standards for approval under section 15 of the Shipping Act, 1916, as amended (46 U.S.C. § 814), and concluded that "the extent of the anticompetitive impact of these Agreements is not sufficient to outweigh the benefits found." The Order also set a new deadline of July 31, 1981, for the completion of hearing and issuance of an Initial Decision.

A further prehearing conference was held on February 19, 1981. Discovery requests were considered, a procedural schedule was set for the resolution of outstanding discovery matters, exchange of testimony, and dates were set for the commencement of hearing and the filing of briefs.

Hearing was held in Washington, D.C., on May 11-14, 1981. Witnesses appearing on behalf of proponents were Messrs. Fred A. Wendt of Delta Steamship Lines, Inc. (Delta); James T. Crowley of Moore McCormack; Marcelo N. Dandois of Empresa Lineas Maritimas Argentinas, S.A. (ELMA); Hernan Schliemann of Bottacchi S.A. de Navegacion C.F.I.I. (Bottacchi); and Geraldo Ornellas de Souza of Companhia de Navegacao Lloyd Brasileiro (Lloyd Brasileiro or Lloyd), testifying on behalf of the Brazilian-flag lines, Lloyd Brasileiro and Companhia Maritima Nacional (Nacional). Dr. Robert Ellsworth of the Commission staff also testified, pursuant to subpoena, with respect to portions of the Commission's South American Trade Study. The Bureau, A/S Ivarans Rederi (Ivaran), Sea-Land Service, Inc. (Sea-Land), TMM, Holland Pan American Lines (Hopal), Reefer Express Lines (REL or Reefer Express), and Montemar S.A. Comercial y Maritima (Montemar) did not submit written direct testimony or present any witnesses, although counsel for Sea-Land, TMM and Hopal made brief statements setting forth the positions of their respective clients in support of approval of the agreements. The evidentiary record consists of 609 pages of hearing transcript and 23 exhibits, which include the parties' direct written testimony, exhibits introduced in the hearing, several volumes of stipulated exhibits, and transcript and exhibit designations from *Docket Nos. 78-51 and 78-52*. Simultaneous opening and reply briefs were filed on June 8 and 19, respectively, by the participants.

FINDINGS OF FACT ³

A. AGREEMENTS AND PARTIES.

1. *Agreement No. 10386 (U.S. Atlantic)*. Agreement No. 10386 is a cargo revenue pooling agreement covering the northbound trade from

³ Briefs were filed on behalf of Moore McCormack, Delta, ELMA, Bottacchi, jointly by Lloyd and Nacional, Ivaran and the Bureau. Moore McCormack, Delta, ELMA, Bottacchi, Lloyd and Nacional also filed Joint Proposed Findings of Fact (88 in number) which provide a thorough and persuadable treatment of an extensive record developed in this proceeding. Two other parties also submitted proposed findings as well. The Bureau submitted a total of 197 findings and Ivaran 69.

Rule 221 of the Commission's Rules of Practice and Procedure (46 C.F.R. 502.221) provides, in part:

... opening or initial briefs shall contain the following matters *in separately captioned sections*: ... proposed findings of fact in serially numbered paragraphs *with reference to exhibit numbers and pages of the transcript, argument* based upon principles of law with appropriate citations of the authorities relied upon, and conclusions. (Emphasis supplied.)

A careful review of the proposed finding submitted by Ivaran reveals that (1) some of the findings have been treated in the proponents' joint proposed findings and, in many instances, in a more thorough manner, (2) many contain statements that are clearly argumentative in nature and not properly a part of proposed findings, (3) many simply lack any reference to exhibit numbers and pages of transcript, (4) some reveal that the citations provided do not support the finding proposed, (5) others are either a misstatement of the record or an inaccurate portrayal of the testimony or exhibits, (6) some represent a broad conclusion clearly taken out of context or which requires additional record support to establish the matter as fact, and (7) some are of questionable relevance. Indeed, the reply briefs of Delta, Moore McCormack, and the Bureau pointedly accentuate the innumerable frailties noted above. Admittedly some of Ivaran's proposed findings are without any objection and have record support. On the other hand, of Ivaran's findings, the majority would require extensive recasting to remove the many objectionable features. A task of that nature involving an admittedly "massive record" would require, at the least, an inordinate amount of time considering that the Commission has set the time for completion of this proceeding on an expedited basis.

The Bureau's proposed findings present a somewhat different picture. Although the proposed findings are impressive in number (197), the overall approach taken in the presentation of these findings provides a less comprehensive treatment of the record. A careful review of the proposed findings reveals numerous proposals that, taken as a whole, cast the record in a limited scope which, while marked by a degree of meticulousness, fails to offer the fullest treatment to the many and varied issues presented here. For example, many of the proposed findings are merely selected excerpts from the transcript or exhibits. While this type of finding would be supported and generally not objectionable, the problem presented is that, in many instances, the finding, in order to be substantive, requires more. Proposed findings of that nature require a recognition of additional testimony relating to the subject. Furthermore, a number of important areas contained in the joint proposals are not present in those submitted by the Bureau. But most important, the joint proposed findings fundamentally treat those same factual presentations offered by the Bureau in a form more comprehensive and appropriate to this record.

In view of these observations, it has been determined to adopt the findings of fact as submitted jointly on behalf of Moore McCormack, Delta, ELMA, Bottacchi, Lloyd and Nacional (hereinafter referred to in the subsequent text as FF). Certain limited modifications have been made in view of the objections raised by Ivaran and the Bureau. In that respect, it should be observed that the opposition registered by the Bureau to the joint proposed findings (twelve in number—one of which represents a request to modify its own proposed findings) reflects, in many instances, a request to include selected transcript references which buttress the Bureau's position in this proceeding. Ivaran has provided objections which are by and large argument. A fair reading of both the Bureau's and Ivaran's responses show minimal objection to the citation of sources supporting the factual presentations contained in the joint proposed findings.

This Judge is aware of the admonition that a trier of facts should not routinely adopt findings submitted by the prevailing party. In this proceeding, those findings have been carefully and fully reviewed and found to be satisfactory and fully supportable in the record. To make changes other than those reflected here would be to do so for the sake of change alone. This Judge deems it unnecessary

Continued

Argentine ports in the La Plata/Rosario port range to discharge ports in U.S. Atlantic Coast from Key West, Florida, to Portland, Maine, inclusive (*ASX-1(a)*, p. 2).⁴ The principal terms of the agreement are described in detail in Findings Nos. 61(a) and 61(b), 62, 65, *infra*. The parties to Agreement No. 10386 are Moore McCormack, Sea-Land, ELMA, Bottacchi, Ivaran, Lloyd Brasileiro, Hopal, Montemar, and Reefer Express Line (see Section B, *infra*).

2. *Agreement No. 10382 (U.S. Gulf)*. Agreement No. 10382 is a cargo revenue pooling agreement covering the northbound trade from Argentine ports within the La Plata/Rosario port range to discharge ports on the U.S. Gulf Coast from Brownsville, Texas, to Key West, Florida, inclusive (*GSX-1(A)*, p. 2). The principal terms of the agreement are described in Findings Nos. 61(a) and 61(c), 62, 65, *infra*. The parties to Agreement No. 10382 are Delta, ELMA, Bottacchi, Lloyd Brasileiro, Nacional, TMM, Montemar, and Reefer Express (see Section B, *infra*). Navimex was a party to the agreement as initially filed, but subsequently went bankrupt and withdrew from the agreement and the Argentine/U.S. Gulf trade (see Finding No. 16, *infra*).

3. *Southbound national-flag pooling agreements (Nos. 10388 and 10389)*. In addition to the two northbound agreements identified above, two southbound equal access and pooling agreements among the national-flag carriers were initially made subject of the investigation, but were subsequently approved and dismissed from the proceeding by Commission Order of January 29, 1981. Agreement No. 10388 covering the U.S. Atlantic/Argentina trade is among Moore McCormack, Sea-Land, ELMA, and Bottacchi. Agreement No. 10389 covering the U.S. Gulf/Argentina trade is among Delta, ELMA, and Bottacchi. These agreements are further described in Finding No. 75, *infra*.

B. PARTIES TO THE PROCEEDING.

4. *Moore McCormack Lines, Incorporated*. (a) Moore McCormack operates United States-flag vessels in the U.S. East Coast/Argentine, Brazil, and Uruguay⁵ trade under a long-term operating-differential subsidy agreement with the United States, Contract No. MA/MSB-338, made under authority of Title VI of the Merchant Marine Act, 1936.

to do so. Furthermore, issues raised by Ivaran and the Bureau, which are necessary for the ultimate determinations in this proceeding, will be afforded the consideration required in this decision.

⁴ The record references herein are as follows: *SX*—Stipulated Exhibits (in the two bound volumes); *ASX*—Atlantic Stipulated Exhibits (in the three bound volumes); *GSX*—Gulf Stipulated Exhibits (in the two bound volumes); *GS*—Gulf Stipulations (in Vol. 1 of *GSX*); *Stip.*—Stipulations (in Vol. 1 of *SX*); *Ex.*—Individual exhibits admitted into evidence during the hearing. Some of the exhibits also contain exhibits or attachments within them, and these are cited after the exhibit within which they are found, e.g. (*SX-3A*, Ex. 5) or (*Ex. 7*, *DGX-11*).

The original numbering of each factual submission has been retained for ease of identification. The explanatory footnotes have been renumbered to conform to the prior text.

⁵ It also serves South and East Africa (*Ex. 4*, *MM-2*, p. 2).

Its current contract runs until December 31, 1994. Moore McCormack's participation in Agreement No. 10386, as amended, and No. 10388 was approved by the Maritime Administration as required by Moore McCormack's subsidy contract on August 12, 1980 (*SX-24(A)*). Moore McCormack is at present the only company operating United States-flag vessels in liner service between the U.S. Atlantic Coast and Argentina, a trade it has served continually for over 40 years. It operates a fortnightly service to and from Argentina as part of its Trade Route No. 1 service, which covers the entire East Coast of South America,⁶ utilizing two C-6 vessels each equipped to carry 521 TEU's and four C-4 vessels, each of which can carry 197 TEU's, in addition to break-bulk cargo (*Ex. 4, MM-2 (Crowley)*, pp. 2-3). Moore McCormack is in the process of reconstructing four C-4's to increase container capacity to 628 TEU's each and modifying the C-6's to carry 610 TEU's. Moore McCormack's anticipated additional investment will be approximately \$42,000,000 (*Ex. 19 (Crowley)*, p. 1). Complete vessel particulars are listed in *Ex. 19, Attachment A*. These vessels provide shippers a full range of service by offering both containerized and break-bulk space, bulk liquid capacity, and reefer space.

(b) In Moore McCormack's Argentine service, vessels arriving in the United States usually call first at New York, Boston, or Jacksonville, where cargo from South America is discharged. They then proceed to call at the ports of Philadelphia, Baltimore, Norfolk, and Savannah to discharge and load cargo and return to New York for loading. Vessels then proceed southbound directly to one or two Brazilian discharge ports and to the port of Buenos Aires, Argentina (Moore McCormack's only port of call in Argentina) where cargo is discharged and loaded. After loading in Buenos Aires, vessels proceed northbound to Montevideo, Uruguay, to Brazilian loading ports, and thence to U.S. ports of discharge. Total transit time from Buenos Aires to the United States is approximately 22 days (*Ex. 4, MM-2*, pp. 2-3). Moore McCormack's service to Brazil is part of its South American service, however, not every voyage serving Brazil also serves Argentina (*Tr. 490*).⁷

(c) Pursuant to the terms of Agreement No. 10386, Moore McCormack is required to make 24 voyages annually in the northbound Argentine trade. Between 1977 and 1980, Moore McCormack served over 2,000 active shippers in the Argentina northbound trade. Ninety percent of its staff is employed in solicitation or customer services supporting solicitation. Moore McCormack has offices in Chicago, De-

⁶ See, *United States Oceanborne Foreign Trade Routes*, U.S. Department of Commerce, Maritime Administration, Oct., 1979 (p. 22).

⁷ Its contract with the United States requires a minimum of 40 voyages per year in the U.S./South American trade (*Ex. 4, MM-2*, p. 2). A number of these voyages turn at Brazil and do not serve Argentina, but could serve Argentina if the traffic justified additional service.

troit, Cleveland, Rochester, Boston, New York City, Philadelphia, Baltimore, and Washington, D.C. engaged in cargo solicitation, as well as agents employed in other parts of the country. It has its own office in Buenos Aires serving shippers in Argentina (*Ex. 4*, MM-2, pp. 4-5).

5. *Delta Steamship Lines, Inc.* (a) Delta is the U.S. national-flag line member to Agreement No. 10382 as amended (*GSX-1A*, p. 3) and also southbound Agreement No. 10389 (*GS-40*). Delta has been serving the Argentina-U.S. Gulf trade since shortly after the Company was founded in 1919, under the name Mississippi Shipping Company, Inc., and is presently the only U.S.-flag carrier serving the Gulf trade (*Ex. 7*, ¶12, p. 6). Delta's service in this trade is part of Delta's regular Line E service on essential Trade Route 20 (U.S. Gulf/East Coast of South America) (*id.*), and Delta's participation in the trade under Agreement No. 10382 as amended has been approved by the Maritime Administration under Delta's Operating Differential Subsidy Agreements, MA/MSB Nos. 353 and 425 (*SX-24B*). In large part due to the new stability in the trade and the assured equal access to Argentine and Brazilian government controlled cargoes resulting from cargo revenue pooling/equal access agreements entered into in the early 1970's, Delta made a substantial capital investment to improve its service in the trade and ordered three modern efficient LASH/Container vessels, each having a capacity of 1,450,400 cubic feet (based on 74 barges at 19,600 cu. ft. each) plus 288 TEU's, which Delta introduced into service in the trade in 1973 (*Ex. 7*, ¶13, p. 7; *Tr.* 246).

(b) Delta's present service in this trade consists of approximately biweekly sailings by these three LASH vessels (*Ex. 7*, ¶14, p. 7; *DGX-1B*), and includes regular service to the ports of Maracaibo, Puerto Cabello and Guanta in Venezuela, Salvador, Rio de Janeiro, Santos, and Paranagua in Brazil, Montevideo, Uruguay, Buenos Aires, Argentina, and New Orleans and Houston on the U.S. Gulf Coast (*Ex. 7*; *DGX-1B*). Other U.S. Gulf ports are served by LASH barge, and other foreign ports are served on inducement (*id.*). During the 2½ years ending December 31, 1978, Delta accounted for approximately 66% of total Gulf cargo tonnage and 61% of cargo revenues (*Ex. 7A*, *DGX-12*, p. 1). And during the 25 months through December 31, 1980, Delta accounted for approximately 50% of total Gulf pool revenue (*GSX-18H*, p. 2), and also was a substantial carrier of non-pool cargo (*Tr.* 266, 502-03).

(c) The Argentina/U.S. Gulf trade constitutes an important part of Delta's Gulf service, and in 1979 accounted for approximately 22% of Delta's total northbound annual revenue and 27% of its total southbound annual revenue (*Ex. 7*, ¶15, at p. 7). Were Delta to be foreclosed from competing freely for any of the cargoes moving in these trades, and particularly Argentine Government-controlled cargoes which comprise some 85-90% of the southbound Gulf traffic (*Ex. 7*, ¶17, p. 9; *Tr.*

75-76), which in turn is about four to five times the size of northbound traffic (*Tr.* 267-68), Delta's profitability and service on this essential trade route would be substantially impacted, with resulting detriment both to the shipping public and the commerce of the United States (*Ex.* 7, ¶15, at p. 7-8; *Ex.* 5A).

6. *Sea-Land Service, Inc.* (a) Sea-Land is a U.S.-flag signatory to Agreement No. 10386, but does not presently operate vessels in the U.S./Argentina trade. The agreement provides that Sea-Land will not commence its service or participate in the agreement until it reaches an agreement with Moore McCormack defining their respective shares, rights, and obligations within the overall U.S.-flag share and obligations (*ASX-1(a)*, p. 3).

(b) Sea-Land's position in support of Agreement No. 10386 was stated orally at the commencement of the hearing:

MR. SHEA: Thank you, Your Honor. As you know, Your Honor, Sea-Land is a party to one of the pools at issue here. However, it is not an active operator in the trade.

While we are not presenting any evidence, Sea-Land does support and adhere to this pool and we urge its acceptance. [*Tr.* 6-7].

7. *Empresa Lineas Maritimas Argentinas, S.A.* (a) ELMA is an incorporated society of the Republic of Argentina. Argentine Decree Law No. 20055 establishes that the Government of the Argentine Republic must own at least 75% of the stock of ELMA and the remaining 25% of the stock may be owned by provincial states, municipalities or municipal corporations. The Board of Directors is appointed by the State Secretary for Maritime Interests (SEIM) (*SX-36*, p. 1; *Tr.* 305); however, SEIM does not control ELMA's commercial operations (*Tr.* 306), and ELMA acts as a profit-making venture (*SX-36*, p. 1).

(b) As part of the Argentine-flag merchant marine, ELMA is an instrument of Argentine national economic policy (*SX-1*, Att. C, p. 1).

(c) ELMA has served the U.S. East Coast/Argentine trade for at least 30 years with calls also in Brazil (see *Tr.* 302). Between 1978 and 1980 thirty-two vessels have served the Argentine/Atlantic trade, 13 Argentine flag, 1 Portuguese, 8 Greek, 4 German, 2 Liberian, 2 Panamanian, 1 Mexican, 1 unspecified (*ASX-9*). In the Atlantic trade, ELMA's vessel calls include Buenos Aires, Montevideo, Brazilian ports, Jacksonville, Norfolk, Philadelphia, Baltimore, New York and St. John. It made 28 northbound and 28 southbound sailings during 1978, 32 northbound and 41 southbound sailings during 1979, and 19 northbound and 22 southbound sailings during the first half of 1980.

(d) ELMA has been active in the Argentine/Gulf trade for many years. Nineteen vessels served the Gulf trade between 1978 and 1980, 18 of which were Argentine flag and one German flag (*ASX-9*). In the Argentine/Gulf trade, ELMA serves Buenos Aires, Campana, Brazilian

ports, Tampa, Mobile, New Orleans, Houston, Veracruz, Tampico, La Guayra, Curacao, San Juan and Santo Domingo. It made 17 northbound and 25 southbound sailings during 1978, 17 northbound and 18 southbound sailings during 1979, and 9 northbound and 12 southbound sailings during the first half of 1980.

8. *A. Bottacchi S.A. de Navegacion C.F.I.I.* (a) Bottacchi is an Argentine Corporation whose stock is owned totally by private persons (*SX-36*, p. 1; *Tr.* 405). Bottacchi began to serve the Argentine/U.S. Gulf trade in 1978, and the Argentine/Atlantic trade in 1980 (*SX-37A*, p. 1; *ASX-11(c)*, MM-1, pp. 25, 52). Two multi-purpose Argentine-flag vessels serve the Argentine/Atlantic trade, and one multi-purpose Argentine-flag vessel serves the Argentine/U.S. Gulf trade. Other vessels are time chartered as required.

(b) In the Argentine/Atlantic trade Bottacchi calls at Buenos Aires, Montevideo, Brazilian ports, New York, Baltimore, Philadelphia, Norfolk, Charleston, Savannah, Jacksonville, and Miami. During the last six months of 1980, Bottacchi made nine southbound and six northbound sailings in the Atlantic trade.

(c) In the Gulf trade, Bottacchi calls at Buenos Aires, Montevideo, Brazilian ports, Veracruz, Tampico, New Orleans and Houston. During the last six months of 1980, Bottacchi made seven southbound sailings and six northbound sailings in the Gulf trade.

9. *Companhia de Navegacao Lloyd Brasileiro.* (a) Lloyd is a Brazilian-flag carrier (*Tr.* 171) whose stock is substantially owned by the Brazilian Government (*Tr.* 161, 163; *SX-36*, p. 3). Lloyd and its subsidiaries participate in numerous trades throughout the world (*Tr.* 217-218; *Ex. 11*, pp. 1, 7), and have a substantial history of service in the trade from Brazil to the United States (*Tr.* 232).

(b) Prior to 1979, Lloyd provided service in the Argentina/U.S. trade on a limited basis (*SX-37(A)*, p. 2; *Ex. 4*, *Tr.* pp. 708, 728-729, 770). Since 1979, Lloyd has provided service from ports in Argentina to the U.S. Atlantic in conjunction with its regular Brazil/U.S. East Coast service, operating three vessels (*ASX-9*, pp. 23-28) which call both at ports in Argentina and at ports in Brazil (*Ex. 11* (Ornellas), pp. 7-8; *Tr.* 215-216). In the period 1979-1980, Lloyd completed 12 sailings from Argentine ports to the U.S. East Coast (*ASX-9*, p. 41; *Ex. 11*, p. 6). According to its witness, Lloyd has demonstrated its commitment and its capability of providing service to shippers in the Argentina/U.S. trades (*Ex. 11* (Ornellas), p. 7; *Tr.* 181, 189, 192-193).

(c) Since 1979, Lloyd has provided service to the U.S. Gulf from ports in Argentina in conjunction with its regular Brazil/U.S. Gulf Coast service, operating two vessels (*G SX-18(E)*; *G SX-7(A)*, p. 2) which call both at ports in Argentina and at ports in Brazil (*Ex. 11*, p. 2; *G SX-7(A)*, p. 2).

(d) Lloyd and Nacional participated jointly in the negotiation of a Brazilian-flag share within the Gulf pool (*Tr.* 171-172, 188-189), and their cargo carryings are considered jointly for pool purposes (*Tr.* 188; *GSX-18(A)-(D)*). The Brazilian lines carried just under two-thirds of the third-flag cargo during the first half of 1980 (*Ex. 11*, p. 6) and over 13% of the pool cargo, by revenue tons, for the period December 1, 1978 through December 31, 1980 (*GSX-18(H)*, p. 2).

10. *Companhia Maritima Nacional*. Nacional is a privately-held carrier operating under the Brazilian-flag (*SX-36*, p. 3; *Tr.* 162). Nacional operates solely in the trade from ports in Argentina and Brazil to ports in the U.S. Gulf and Mexico (*Tr.* 170, 176). Since 1979, Nacional has provided service from ports in Argentina in conjunction with its regular Brazil/U.S. Gulf service, operating three vessels which call both at Argentina ports and at ports in Brazil (*GSX-1(A)*, p. 3).⁸

11. *Hopal*. Hopal (Holland Pan American Line) is the trade name for Van Nievelt Goudriann & Co. B.V. Its position in support of Agreement No. 10386 was stated orally at the commencement of the hearing:

MR. MCGEORGE: Your Honor, perhaps I can give a little bit of background information that may be helpful. First of all, I should point out that Holland Pan American Line serves primarily the Paraguayan US Atlantic trade.

It stops off in Argentina and Brazil. It is important to it that it remain a member of this pool. It supports the pool agreement, and would urge that it be approved by the Commission. [*Tr.* 7.]

12. *A/S Ivarans Rederi*. (a) Ivaran is owned by A/S Ivarans Rederi, a Norwegian company. Its Chief Executive Officer (Managing Owner) is Mr. Erik Holter-Sorensen (*ASX-11(c)*, p. 3). Ivaran has been engaged in the U.S./Argentina trade for 50 years operating vessels, *inter alia*, of Norwegian, Danish, German, Greek, Singapore, and Spanish registry (*Ex. 19*, Att. F). It has operated from five to seven vessels in its service. Ivaran does not call regularly at all ports between New York and Miami—it does not serve Jacksonville from Argentina which most of the other lines do serve. In the United States, Ivaran does not directly serve any ports north of New York, *e.g.*, Boston, Gloucester, or New Bedford, and has not served them regularly for several years (*Ex. 19* (Crowley), p. 15). Although Ivaran has recently reduced its direct service to certain ports, it has continued to carry cargo regularly to those ports by moving it overland⁹ (*Ex. 19* (Crowley), pp. 15-16). In

⁸ A third Brazilian-flag carrier, Netumar, has suspended its participation in the Argentina/U.S. East Coast trade. Should it resume operations in the trade, its participation in any pooling agreements then in force will be derived from the Brazilian-flag quota (*Stip-2*).

⁹ For example, in 1980 Ivaran made only 16 direct calls at Philadelphia. Argentine conference statistics show that it loaded Philadelphia cargo on 26 of its 1980 voyages (*Ex. 19* (Crowley), p. 16).

the view of Moore McCormack's witness, Ivaran has curtailed direct service to some ports as an essential part of its policy of carrying mostly high-rated cargo and speeding its turnaround time to increase its capacity in the trade (*id.*). For example, while not putting its ships into the Port of Boston, Ivaran has nevertheless served that port by trucking or railing the cargo from other discharge ports, particularly the port of New York (*ASX-11(c)*, MM-1, p. 50). In 1980, Ivaran made no direct calls at Boston, but carried over 10% by weight of the total cargo shipped from Argentina to Boston (*Ex. 19 (Crowley)*, pp. 15-16). However, there is also testimony that Ivaran's service has been curtailed by reason of the restrictions imposed by the pooling agreement (*ASX-11(b)* at 12-13).

(b) Ivaran has also recently bypassed some Brazilian ports, where the cargo consist is low-rated. For example, in the first two months of 1981, Ivaran made five northbound voyages from Brazil, but of the six leading Brazilian pool container cargo ports Ivaran made no calls at Salvador (the number three port) or at Ilheus where the average rate per weight ton is \$96.00 and \$107.00, respectively, whereas it made five calls at Santos and three calls at Rio Grande where the average rate per weight ton is \$203.00 and \$300.00, respectively (*Ex. 19 (Crowley)*, pp. 16-17).

(c) By comparing, the vessels used by Ivaran in the trade in 1977 with those used in 1981, it can be seen that Ivaran has significantly increased its capacity. In 1977 Ivaran utilized approximately 6 vessels, all of which were built before 1968. Ivaran offered insignificant container capacity (approximately 50 TEU's per ship), and 5 of its ships were under 7,200 dwts (*Ex. 19, Att. F*). In April of 1978, Ivaran began phasing in its semi-container ships, and by 1980 had revamped its fleet. At present Ivaran utilizes the *Holstensailor* and *Holstentrader*, each of approximately 12,400 dwts and each on short-term charter to Ivaran, and the *Santa Fe* and *Salvador*, each owned by Ivaran and each of 14,700 dwts. The *Santos* (and other vessels) are also occasionally used in the trade (*Ex. 19, Att. F*).

13. *Reefer Express Lines*. (a) REL is a specialized carrier which operates primarily chartered fully refrigerated vessels of various flags. REL solicits and carries only refrigerated cargo in the northbound trade. It neither solicits cargo nor offers a service in the southbound trade (*Ex. 4, Tr. 985-987*). Its ships can carry containers but it does not offer container service (*Ex. 4, Tr. 998*). REL does not advertise a regular sailing schedule (*Ex. 4, Tr. 989*). Its agent in Argentina solicits large parcels of cargo and if he finds a shipper he "reports them back to New York" (*Ex. 4, Tr. 985*), and if "the quantity is of interest to us" (*Ex. 4, Tr. 992*), and if REL has or can obtain a ship for the required position, REL charters or assigns a ship to meet that opportunity (*Ex. 4, Tr. 985, 992*). Once the vessel is placed its agent goes back into the

market to seek completion cargoes (*Ex. 4, Tr. 974, 985*). It offers a service only where sufficient cargoes may take it (*Ex. 4, Tr. 992*).

(b) Because of the specialized nature of its service, and the limited scope of the pool range which excludes the ports situated in the south of Argentina where the reefer carryings of fish are prevailing (*GSX-5B, p. 11*), the parties negotiated a mutually acceptable participation for REL of 1,000 freight tons, which would be treated as being outside the pool in the U.S. Gulf agreement, and a maximum two annual sailings (*GSX-5B, pp. 11, 14; GSX-1A, p. 3*). In the Atlantic agreement REL's 1,000 ton maximum is considered inside the pool (*ASX-1(a), p. 3*).

14. *Transportacion Maritima Mexicana, S.A.* (a) TMM is a Mexican-flag carrier (*Tr. 7*) with limited historical participation in the Argentina/U.S. Gulf trade. TMM is the exclusive Mexican-flag carrier serving the Mexico/Brazil trade (*Ex. 4, Tr. 1079-80*), which is governed by a bilateral agreement between Brazil and Mexico (*id., Tr. 1089*), and also serves the Mexico/Puerto Rico trade (*id., Tr. 1081*), among others. TMM attempted to enter the trade in 1976 and made nine northbound sailings between April 1976 and January 1977, only one of which carried a single cargo of 5,261 tons of bulk sugar, before suspending its service (*Ex. 4, Tr. 1094-95, 1181-82; Ex. 7, ¶18, p. 9; SX-37A*). TMM reinstated service in the trade during the period of "open competition" under predecessor Agreement No. 10346, as amended, and made six sailings (only five of which carried poolable cargo) during the period from July 23, 1979 - June 30, 1980 (*GSX-18H, p. 1*), carrying a total of 1,438 revenue tons for poolable revenue of \$97,747, which constituted 2.12% of the total poolable revenue of all lines during that period (*Ex. 7A, DGX-12, p. 3*).

(b) TMM was offered and refused a 4.3% share under Agreement No. 10382 (*GSX-1A, p. 4; GSX-5B, pp. 33, 35, 37, 39*). TMM thereafter protested approval of Agreement Nos. 10382 and 10382-1 (*GS-33*), and originally was a protestant in this proceeding. After commencement of the proceeding, however, TMM reached a mutually satisfactory commercial agreement with the other lines (*Ex. 7, ¶42, p. 19; GSX-15; Tr. 7-8*), whereby TMM became a member of Agreement No. 10382 as amended by Amendment No. 2, FMC No. 10382-2, with a 6.0% third-flag share and required three minimum annual sailings (*GSX-1D*). TMM thereafter urged approval, at least *pendente lite*, of Agreement No. 10382 as amended (*GSX-16*), and after *pendente lite* approval thereof became a proponent of the agreement as amended (See Procedural Background, *supra*). TMM presented no witnesses at the oral hearing, but stated its support for approval of Agreement No. 10382, as amended, as follows:

MR. ATTANASIO: Your Honor, TMM, which is a Mexican-flag carrier which has participated in this trade for several years was originally a protestant to Agreement Number 10382.

However, following further negotiations with the other parties to the agreement, TMM was able to negotiate and was satisfied with the share of six percent which resulted from those negotiations.

As a result, TMM now urges approval of this pool agreement, is no longer protesting the agreement, and has withdrawn the related litigation in the Court of Appeals. As a proponent, we urge approval of the agreement as filed.

The agreement is a commercial settlement of the matters previously raised by TMM. However, because our position in the pool will be adequately represented by the other proponents, the original proponents of the agreement, we do not anticipate the need for any active participation, and would respectfully request to be excused. (*Tr.* 7-8.)

15. *Montemar S.A. Commercial y Maritima.* Montemar is a Uruguay-an-flag line which has had some small, occasional participation in the Argentine/U.S. Gulf trade in the past (*GSX-5B*, p. 34; *SX-37A*, p. 1; *Ex. 7A*, *DGX-12*, p. 1), but has made no sailings or carryings under either Agreement Nos. 10345, 10382, 10349, or 10386 through the end of 1980 (*GSX-18H*, pp. 1-2). Under Agreement No. 10382 as amended Montemar has a 1.9% share with two minimum annual sailings (*GSX-1D*), which Montemar originally negotiated and accepted at the February 12-13, 1980 Gulf Principals' Meeting (*GSX-5B*, p. 38; *GSX-1A*, pp. 3, 8). Montemar has indicated it intends to reinstitute its service in the trade at some future date (*GSX-5B*, p. 28; *GSX-7D*, pp. 2-3).

16. *Navimex.* Navimex was a Mexican-flag carrier formed in 1971 with 51% Mexican ownership and 49% Japanese and American interest (*Ex. 4*, *Tr.* 1080). Navimex was admitted into the IAFC in August 1974 (*Tr.* 252-63), but excluded from the Brazil/Mexico trade by the Mexican Government because of a lack of 100% Mexican ownership (*Ex. 4*, *Tr.* 1080). Navimex provided some service in the Argentina/ U.S. Gulf trade during the two years concluding June 30, 1978, two days after the negotiation and execution of Agreement No. 10346 (*GS-8*), but carried only 1,400 freight tons, or 0.73% of the tonnage carried by all lines, for \$132,129 in freight revenues, or 1.09% of the total freight revenues of all lines for the period (*Ex. 13*). Navimex participated in Agreement No. 10346 with a 1% pool share (*GSX-2A*, p. 3), 1979 (*Ex. 7*, ¶30, p. 15; *GSX-18E*, p. 3 (Ref. No. 84) *et seq.*). Navimex's lack of participation in the trade during the period of "open competition" under Agreement No. 10346 apparently was due to difficulties within the company (*GSX-5B*, pp. 28-29). Navimex sold two of its four ships (*Tr.* 260; *GSX-17A*, p. 11), and at the time of the February 12-13, 1980, Gulf Principals' Meeting stated it had restructured the company, intended to reinstate its service from the Gulf to Brazil and Argentina, and was studying the possibility of buying or chartering vessels to be used in the trade (*GSX-5B*, pp. 9, 29). Navimex was offered a 1.9% share under Agreement

No. 10382 (*id.*, p. 33; *GSX-1A*, p. 4), which it initially rejected (*GSX-5B*, pp. 35-39) and then accepted on March 31, 1980 (*GS-32*; *GSX-6*, pp. 2, 4). Navimex executed Amendment No. 1 to Agreement No. 10382 on April 18, 1980 (*GS-36*; *GSX-1B*), and became a proponent of the Agreement as amended. However, it did not reinstitute its service in the trade, and on June 30, 1980, informed the IAFC that it was withdrawing from both the conference and the pool (*GS-51*; *GSX-10*, p. 2). Navimex filed a declaration of bankruptcy in Case No. 2821/80 before the Eleventh Civil Court in Mexico City (*GSX-12*, p. 1), and took no part in the present proceedings.

C. THE ARGENTINE/U.S. EAST COAST TRADE.

17. *Cargo carryings—Argentine to U.S. East Coast, 1977-1980.* The table below shows the cargo carryings of the parties, in revenue tons, during the years 1977, 1978, 1979 (including December 1978), and 1980 (derived from *SX-37A*, p. 2 (1977-1978) and *ASX-9*, pp. 20, 29, 35 and 37 (1979 and 1980)):

REVENUE TONS OF POOL CARGO CARRIED

U.S. ATLANTIC TRADE (1977 to 1980)

	1977 (%)	1978 (%)	1979 (%) ¹⁰	1980 (%)
Mormac	67,706(43.8)	81,815(41.2)	81,833(46.0)	60,363(48.7)
Arg- flag ¹¹	54,177(35.0)	69,976(35.2)	58,494(32.9)	45,833(37.0)
Ivaran	32,174(20.8)	44,394(22.4)	33,471(18.8)	16,433(13.3)
Lloyd	360(.2)	-- (--)	3,380(1.9)	654(.5)
Hopal	226(.2)	704(.4)	619(.3)	674(.5)
REL	-- (--)	1,691(.9)	26(--)	-- (--)
Montemar	-- (--)	-- (--)	-- (--)	-- (--)
TOTAL	154,643	198,611	177,823	123,957

18. *Sailings—Argentina to U.S. East Coast, 1979 and 1980.* The table below shows the number of voyages made from Argentina by the parties during the calendar years 1979 (including December 1978) and 1980 in the northbound trade to the U.S. East Coast (from *ASX-9*, p. 41):

¹⁰ Including December 1978.

¹¹ ELMA and Bottacchi combined. Bottacchi did not begin service until 1980 (FF No. 8(a)).

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 ATLANTIC TRADE

(1979 AND 1980)

	12/1/78- 12/31/79	1980
Mormac	29	28
Argentine- flag	36	45
Ivaran	27	30
Lloyd	6	6
Hopal	4	3
REL	1	0
Montemar	0	0

19. *Southbound trade.* The southbound trade from the United States Atlantic Coast to Argentina grew substantially in 1979 and 1980 and at the time of the hearing was larger than the northbound movement (*ASX-11(c)*, pp. 8-9). In 1979 and 1980 the percentage of the southbound traffic controlled by the Argentine cargo preference laws declined from about 80% (*Ex. 19* (Crowley), p. 8) to between 50% and 60% (*Tr.* p. 441). Mr. Holter-Sorensen testified in *Docket Nos. 78-51 and 78-52* that he would take less than his historical participation in the northbound Argentine pool if he had "compensation" by way of an increased participation in the southbound trade to Argentina or Brazil (*Ex. 4* (Vol. 1), ¶17, p. 174,¹² and *Tr.* 343). However, as to a more recent view, he testified as to the probability of a decrease in southbound carriage (*ASX-11(c)*, pp. 8-9). Ivaran's vessels are presently carrying substantially greater amounts of southbound Argentine cargo than they carried in 1977 and 1978 (*ASX-11(c)*, MM-1, pp. 26 and 80). Mr. Holter-Sorensen estimated that in 1979 Ivaran carried between 6% and 10% of the southbound Argentine trade and between 7% and 9% of the Brazil trade and 21% of the Uruguay trade (*ASX-11(c)*, MM-1, p. 52). In 1979 Ivaran's total northbound carryings were approximately 100,000 revenue tons while its total southbound carryings were approximately 127,000 revenue tons (*ASX-11(c)*, MM-1, p. 51).

20. *Relationship of the northbound Argentine trade to entire northbound traffic to the U.S. East Coast.* Vessels employed in the Argentina/U.S. trades also call at ports in Brazil. Concepts such as stability, overtonnage, energy savings, capacity, capability and sailings are interrelated with services to ports and places on the entire route (*Ex. 11* (Ornellas), p. 2; see also *Ex. 7* (Wendt) pp. 28-29). The northbound Argentine traffic is only about one-fifth of the northbound Brazil traffic (*id.*, p. 4). Other statistical evidence indicates that of the entire northbound liner

¹² The number 174 appears at the top of the page cited in *Ex. 4* (Vol. 1). It is page 7 of Mr. Holter-Sorensen's direct testimony in *Docket Nos. 78-51 and 78-52*.

cargo movement (in 1980) to the U.S. East Coast from Argentina, Uruguay, Paraguay, and Brazil, nearly 85% originated in Brazilian ports (*Ex. 19* (Crowley), p. 14).

D. ARGENTINA/UNITED STATES GULF TRADE.

21. *In General.* (a) The northbound Argentina/U.S. Gulf trade covered by Agreement No. 10382, as amended, is a relatively small trade, amounting during the last two years to only about one-half the tonnage and less than 40% the revenue of the northbound Atlantic agreement trade (compare *GSX-18A*, p. 3 and *GSX-18C, D and E* with *ASX-9*, pp. 20, 29, 35 and 37). Thus, in the 13 months ending December 31, 1979, the Gulf pool consisted of only 91,290 revenue tons (84,268 annualized) for \$7,040,047 in freight revenues (\$6,498,505 annualized). These figures dropped for the twelve months ending December 31, 1980, to only 64,808 revenue tons and \$5,216,568 (see *GSX-18H* p. 2 and *Ex. 7A*, p. 3). Moreover, the northbound Argentina/U.S. Gulf poolable trade is substantially smaller than the northbound Brazil/U.S. Gulf poolable trade which in the last nine months of 1980 (the only period for which statistics including third-flag carriage are in the record) alone amounted to 195,201 revenue tons and \$17,981,193 in pool revenue (*GSX-19C*, pp. 5, 7 and 8), more than four times as much on an annualized basis. Indeed, the non-poolable general cargo carried only by the pool members just from the pool ports in Brazil to the U.S. Gulf during this same nine months amounted to 182,133 revenue tons and \$7,305,237 in revenues (*GSX-19C*, p. 5), approximately four times the total tonnage in the Argentine pool on an annualized basis (*Tr. 267*).

(b) In addition to poolable cargo, there appears to be substantial non-poolable cargo moving from Argentina to the United States Gulf (*Tr. 266*). The pool range itself is quite limited, covering only those ports within the La Plata to Rosario range, both inclusive (*GSX-1A*, p. 2; *Ex. 7, DGX-1A*).

(c) The southbound U.S. Gulf/Argentina trade is much larger than the northbound trade (*Tr. 267-68*). Mr. Wendt testified that the southbound traffic was probably four to five times larger, and that in 1979 the southbound poolable cargo revenue alone had jumped to in excess of \$32 million (*Tr. 268*), in contrast to the annualized 1979 northbound pool revenue of approximately \$6.5 million discussed above.

(d) The northbound Argentina/U.S. Gulf trade thus is but a relatively small, although still significant, part of a considerably larger trade route pattern between the East Coast of South America and the U.S. Gulf, which also includes Uruguay, Paraguay, Brazil, Venezuela (at least in the case of Delta) and sometimes Caribbean ports. Vessels employed in the Argentina/U.S. Gulf trade call at some or all of these ports (see *GSX-7A*, pp. 2, 3; *GSX-7C*, p. 5; *GSX-7D*, p. 3; *Ex. 7, DGX-*

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AMENDED

1B), and concepts such as capacity, capability and sailings are interrelated with services to ports and places on the entire route (*Ex. 11*, p. 2).

22. *Cargo Carrying—Argentina to U.S. Gulf Coast, 1977-1980.* The table below shows the cargo carryings of the parties, in freight or revenue tons, during the years 1977, 1978, 1979 (including December 1978) and 1980 based upon the IAFC Conference Statistics for 1977 and 1978 (including non-poolable cargoes) (*SX-37A*, p. 1) and the pool accountant reports under Agreements Nos. 10346 and 10382 for 1979 and 1980 (*GSX-18H*, pp. 2-3):

FREIGHT/REVENUE TONS OF POOL CARGO CARRIED

ARGENTINA-U.S. GULF TRADE, 1977-1980

	1977 (%)	1978 (%)	1979 (%) ¹³	1980 (%)
Arg.				
Flag ¹⁴	7,972(24.0)	38,233(26.3)	31,678(34.7)	23,321(36.0)
Delta	49,674(66.4)	94,574(64.9)	48,815(53.5)	28,625(44.2)
Lloyd	-- (--)	-- (--)	351(0.4)	1,895(2.9)
Nacional	-- (--)	-- (--)	8,579(9.4)	9,552(14.7)
Navimex	308(0.4)	2,491(1.7)	783(0.9)	-- (--)
Nopal	1,702(2.3)	7,405(5.1)	1,061(1.2)	-- (--)
Monte-				
marse	-- (--)	2,836(1.9)	-- (--)	-- (--)
TMM	5,261(7.0)	-- (--)	-- (--)	1,415(2.2)
REL	-- (--)	33(0.02)	-- (--)	-- (--)
TOTALS	74,917	145,632	91,266	64,818

23. *Sailings—Argentina to U.S. Gulf Coast, 1979-1980.* The table below shows the number of sailings made from Argentine ports within the pool range to the U.S. Gulf coast by the pool parties for the pool years 1979 (including December 1978) and 1980 (*GSX-18H*, p. 1):

SAILINGS FROM ARGENTINA TO U.S. GULF,
1979-1980

	12/1/78- 12/31/79	1980
ELMA	19	20
Bottacchi	4	11
Delta	27	24
Lloyd	2	4
Nacional	2	3
Navimex	2	0

¹³ Includes December 1978.

¹⁴ ELMA and Bottacchi. Bottacchi only entered the trade in 1978, and carryings are not broken out by line for the two under the pools.

SAILINGS FROM ARGENTINA TO U.S. GULF,
1979-1980—Continued

	12/1/78- 12/31/79	1980
TMM	1	4
Montemar	0	0
REL	0	0
TOTALS	59	66

E. ARGENTINE CARGO PREFERENCE LAWS AND MARITIME POLICIES.

24. *Law No. 18.250, as amended.* (a) Argentina has instituted programs, through a series of laws, decrees and resolutions designed to develop, maintain and promote an Argentine-flag merchant marine that is capable of carrying a substantial portion of its commerce and to strictly regulate common carrier service to and from Argentina (*GS-1*). (The relevant Argentine Merchant Marine promotional and cargo preference laws are set forth in *SX-1* and are discussed in the Commission's decision in *Docket Nos. 78-51 and 78-52, supra*, 1103-1104.) The principal Argentine cargo reservation law is Law No. 18.250 of June 10, 1969, as amended in 1972 by Law No. 19.877 (*SX-1, Att. A*). This law and its implementing decrees reserved for Argentine-flag carriage all goods imported by or for the account of or destined to the national government, the provincial governments, or the local governments (and all departments of any of these entities), state-owned corporations, and corporations in which the state (or provinces or local governments) have a controlling interest. In addition, the reservation in favor of the Argentine-flag applies to any goods whose importation is financed or guaranteed by any credit company of the state-owned banking system, and any import enjoying exchange, tax, or custom duty franchises, or any other type of fiscal benefit (*Docket Nos. 78-51 and 78-52, supra*, 1103). This law has effectively controlled upwards of 80% of the southbound exports to Argentina from the U.S. (*Ex. 19, p. 8*), but at the time of the hearing was estimated to control 50 to 60% of the southbound U.S. East Coast trade (*Tr. 441*) and 85 to 90% of the southbound U.S. Gulf Coast trade (*Tr. 75-76*).

(b) Law No. 18.250 as amended by 19.877 allows for participation by vessels of the exporting nation, such as Moore McCormack and Delta in the case of the United States, but only where there are inter-governmental or private agreements approved by the Argentine Government which establish a participation in favor of the Argentine-flag of no less than 50% of the freight revenues earned (*SX-1(A)*, p. 10).

Several decrees implementing the provisions of Law 18.250 have been issued, including Decree 6942 of October 1972 and Decree 264 of January 1974 (*SX-1*, Att. B).

(c) With respect to exports from Argentina moving in the northbound trade to the United States, Law 18.250 provides that the Argentine Government shall take action to obtain the largest possible share by Argentine-flag vessels in those types of cargoes controlled in the southbound trade (*SX-1*, Att. B, Article 1, p. 1). In addition, a "drawback" system, instituted in 1971 gives the Argentine exporter a tax rebate for exporting his commodity, and when he utilizes Argentine-flag vessels the rebate is also extended to a percentage of the freight charges (*Docket Nos. 78-51 and 78-52, supra*, 1103, note 15).

25. *Law No. 20.447*. In 1973 the Argentine Government promulgated Law No. 20.447. That law specifically declares that the Argentine Merchant Marine is an instrument of national economic policy, and asserts Argentina's right to carry 50% of its foreign ocean borne trade in its national-flag vessels (*SX-1*, Att. C). The law further directs the Argentine maritime regulatory agency, the State Secretariat of Maritime Interests ("SEIM"), to negotiate bilateral and multi-lateral agreements with other countries in order to distribute the traffic, and in the absence of such agreements the law directs that the distribution of traffic shall be in accordance with conference agreements in which the Argentine-flag shall be established by the government (*Ex. 4, MM-2* (Crowley), p. 7).

26. *Resolution No. 507*. On December 22, 1976, SEIM promulgated Resolution No. 507 (*SX-1(D)*). This resolution, implemented on January 19, 1977, provides in essence that Argentine-flag vessels are to be given first right of refusal for all Argentine import cargoes controlled under Law 18.250 and such cargo may be shipped on other lines only after a waiver of Resolution No. 507 is obtained in Argentina 30 days in advance of the non-Argentine vessel's departure. Violation of the decree subjects the consignee to severe monetary penalties (*GS-3; Ex. 19* (Crowley), p. 3). Resolution 507 was administered by the Argentine authorities and banks and changed "the prior mechanisms for obtaining waiver and requiring almost all the cargo in the United States that was moving to Argentina to be first offered to the Argentine flag lines in the United States, basically the ELMA line, not only in New York but in the Gulf as well" (*SX-2*, p. 11).

F. IMPLEMENTATION OF RESOLUTION NO. 507 IN THE UNITED STATES TRADE.

27. *Disruption of U.S./Argentina trade*. Implementation of Resolution 507 resulted in chaotic conditions on the loading docks, cargo terminals and in the traffic departments of major United States shippers, as

former Assistant Secretary of Commerce for Maritime Affairs Blackwell testified (*SX-2*, pp. 10-13). Shippers could not book with Moore McCormack or Delta prior to obtaining required Argentine clearance. As a consequence shippers were forced to cancel bookings already made (and in some cases were forced to dray cargo to ELMA's pier at their expense), and other bookings were lost, causing substantial delay, confusion, and inconvenience to shippers and threatening serious financial injury to Moore McCormack and Delta (*Ex. 19* (Crowley), p. 3; *Ex. 7* (Wendt), pp. 9-10). Assistant Secretary Blackwell testified, as a result of Resolution No. 507:

The shipper didn't know what vessel his cargo was going on. He did not know when it was going to arrive. He did not know what condition it was going to arrive in. . . . [*SX-2*, p. 13.]

As the Commission found in *Docket Nos. 78-51 and 78-52*:

Generally, [the shippers and carriers] complained of the "stifling" effects of the Resolution on the movement of goods from the United States to Argentina and the chaotic conditions created by that Resolution at loading docks, cargo terminals, and in the traffic departments of major United States shippers. [*supra*, 1103.]

28. *Shipper and carrier protests over Resolution 507.* The implementation of Resolution 507 caused an "avalanche of concern" by shipper and carrier interests in the United States (*SX-2*, p. 70). "The basic complaint was almost a total discombobulation of the shipping services in the southbound trade" (*SX-2*, p. 13), as U.S. shippers were totally stifled in moving their exports to Argentina (*id.*, p. 70). This resulted in an outpouring of protest to the carriers (*Ex. 19* (Crowley), p. 3; *Ex. 7* (Wendt), p. 10) and to the Maritime Administration "urgently" asking that something be done to remedy the situation (*SX-2*, p. 12). The Maritime Administration received protests from, among others, the Commerce and Industry Association of New York, the National Industrial Traffic League (a major shipper association), International General Electric, Ford Motor Company, and DuPont Company (*SX-2*, pp. 12, 70). Meanwhile there was "chaos . . . on the loading docks and in the [cargo] terminals and in the traffic departments of some of our major shippers" (*SX-2*, p. 12; *GS-4*).

29. *Response of the United States Government.* In response to these protests, Assistant Secretary Blackwell and representatives of the State Department traveled to Argentina in February 1977 and met with Admiral Carlos N. A. Guevara, then Argentine Secretary of State for Maritime Interests. It was agreed that in furtherance of harmonious relations between the United States and Argentina, and in view of the existing revenue pooling agreements between Moore McCormack and Delta, on one hand, and ELMA, on the other hand, and Article 4 of

Resolution 507 which permits pre-waivers of the Argentine-flag loading requirement where such agreements are in effect, pre-waivers would be issued for all shipments of U.S. exports on United States-flag vessels (*GS-5; Ex. 7* (Wendt), p. 10; *Ex. 19* (Crowley), p. 3). This prompt action by the United States benefited shippers by lifting the harsh restrictions on their selection of vessels, avoided severe financial injury to Moore McCormack and Delta, and eliminated the possibility of a more serious intergovernmental confrontation (*SX-2*, pp. 16-19; *Ex. 19*, pp. 3-4; *GS-5; Ex. 7*, p. 10).

30. *Moore McCormack and Delta slow in recovering.* Despite the pre-waiver procedure, Moore McCormack's and Delta's southbound carryings were slow in recovering from the adverse impact of Resolution 507, notwithstanding the fact that it was implemented in full force for only about 2 months (*Ex. 19* (Crowley), p. 4; *Ex. 7* (Wendt), p. 10). Moore McCormack's participation in the southbound pool trade under Agreement No. 10038 was over 55% and ELMA's was below 45% for the full year 1976. Moore McCormack's participation dropped sharply during 1977 to about 43%, while ELMA's rose correspondingly. Moore McCormack's participation did not improve significantly until after the first eight months of 1978, despite the fact that its service was unchanged (*Ex. 19* (Crowley), p. 4). Delta's southbound cargo carriage under Agreement No. 10039 for the entire first six months of 1977 declined by more than 42% from the last half of 1976 (*Ex. 7* (Wendt), p. 10).

G. THE MEMORANDUM OF UNDERSTANDING BETWEEN THE UNITED STATES AND ARGENTINA.

31. *Meetings between Argentine and United States Government officials.* On March 31, 1978, Assistant Secretary of Commerce Blackwell (accompanied by a representative of the State Department) and Admiral Guevara signed a Memorandum of Understanding concerning the maritime trades between the United States and Argentina (*SX-2*, Ex. 4; and *SX-16*, Att. 3) (hereafter sometimes referred to as the "Memorandum of Understanding" or the "Intergovernmental Agreement"). A draft of the Memorandum of Understanding had been prepared by Marad, in conjunction with the United States Department of State, to be presented to and negotiated with the Argentine maritime authorities (*SX-2*, pp. 28-30; *GS-6*); the document had been "blessed by the State Department" (*SX-2*, p. 29). The Memorandum of Understanding was a product of the confrontation in February 1977 over issuance of Resolution 507, and established a set of principles to govern the trade to avoid future such international disputes (*SX-5; Ex. 19*, p. 4).

32. *Principal terms of The Memorandum.* The Memorandum was intended to establish a set of principles to govern the trade and to protect

both the U.S. and Argentine commercial and maritime interests. It was the intention of both governments that the vehicle for accomplishing the Intergovernmental Agreement would be commercially negotiated carrier pooling agreements (*SX-2*, pp. 35, 37, 82-83; *Ex. 4, ELMA-3, Att. D; SX-16; SX-22B*). The Intergovernmental Agreement provides in pertinent part:

1. Each party recognizes the intention of the other Party in carrying a substantial portion of its liner trade in vessels of its own flag in accord with appropriate legislation in each country. For purposes of this paragraph, vessels of Argentina shall include vessels under Argentine registry or charter.

This provision, established in the light of the reciprocal interests of the two countries, does not affect the rights of flag vessels of third parties to carry goods between the ports of the two Parties, as implemented in the terms of Paragraph 2 below, and in accord with the appropriate legislation in each country.

2. The establishment of mechanisms and procedures necessary to the implementation of the carriage of cargo envisioned in Paragraph 1 of this Memorandum of Understanding, such as revenue shares for the lines in the trade, number of sailings, over-carriage and under-carriage provisions, and similar matters, will be determined by commercial agreement between their respective national flag carriers, subject to approval by the appropriate governmental agencies of each of the Parties.

Regarding the participation of third-flag carriers, Assistant Secretary Nemirow testified that:

The memorandum says that third flags participate in accord with appropriate legislation in each country. If appropriate legislation in one of the countries party to this agreement provided for fixed shares for third flags, it would be consistent with this agreement that that be the requirement for third flag competition or participation. [*SX-3A*, p. 32.]

33. *The Memorandum of Understanding is a binding Executive Agreement of the United States.* When the Assistant Secretary of Commerce negotiates bilateral agreements on behalf of the United States, he acts as the "chief negotiator on behalf of the Executive" (*SX-3A*, p. 6). A draft of the Memorandum of Understanding was prepared by the Maritime Administration in the United States, and in conjunction with the United States Department of State (*SX-2*, pp. 28-30). Before Mr. Blackwell traveled to Argentina with the intention of entering into the Memorandum of Understanding, he was authorized by the Department of State specifically to sign on behalf of the United States Government (*SX-2*, pp. 28-29, 79-80, and *Ex. 3*, p. 1). When the Memorandum was executed it became a binding Executive Agreement of the United States (*SX-*

2; pp. 50, 93-94). The Assistant Secretary of Commerce has been designated the chief spokesman for U.S. maritime policy (*SX-3A*, p. 6 and Ex. 2, pp. 6-7).

H. PREVIOUS CARRIER AGREEMENTS AND F.M.C.
PROCEEDING—DOCKET NOS. 78-51 AND 78-52.

34. *Negotiation of Agreement Nos. 10346 and 10349.* (a) Subsequent to the execution of the Memorandum of Understanding, ELMA was directed by SEIM to draft pooling agreements with the other national-flag carriers then serving the United States/Argentina trades. The pools in the northbound trades were to be formed on the basis of no less than 80% for the national-flag lines and no more than 20% for the third-flag lines (*Ex. 4, ELMA-3, Barni Testimony*, p. 2 and Att. D). Thereafter, a principals' meeting of all lines serving the Argentine/U.S. Gulf Coast trade was held in Buenos Aires on June 27 and 28, 1978, and an agreement was executed on June 28, 1978, covering the northbound Gulf trade from Argentine ports within the La Plata-Rosario range. This agreement was filed with the Commission and assigned No. 10346 (*GS-8*).

(b) On June 29-30, 1978, a principals' meeting was held for the East Coast trade, but no agreement could be reached on the division of the third-flag 20% share. Following failure of the third-flag carriers to agree upon pool shares, SEIM issued Resolution No. 619 in July 1978 (*Ex. 4, ELMA-3*, p. 4). That Resolution provides that all Argentine export cargoes which are covered by a conference or pool shall be carried only by conference members, or, by members of the pool where pooling agreements approved by SEIM exist.¹⁵ A second Atlantic principals' meeting was held in late July 1978 at which the third-flag carriers reached an agreement. Ivaran was dissatisfied with its share, but signed the agreement and signified its intention to oppose it by pursuing its legal rights (*ASX-11(c)*, MM-1, p. 2). The Atlantic agreement was filed with the FMC and assigned No. 10349.¹⁶

35. *F.M.C. Proceedings on Agreement Nos. 10346 and 10349—Docket Nos. 78-51 and 78-52.* The Commission held an investigation and evidentiary hearing on Agreement Nos. 10346 and 10349. In its final report and Order served June 22, 1979, the Commission unanimously

¹⁵ Resolution 619 allows for a waiver of the carrier requirement when no conference or pool member, as the case may be, is in a position to lift the cargo. For perishable cargo such as refrigerated commodities, a waiver may be obtained if there is no pool member in position to lift the cargo within 48 hours of the desired date of shipment (*SX-1E*, p. 2).

¹⁶ Contemporaneously, Delta, ELMA and Bottacchi, and Moore McCormack, Sea-Land and ELMA also executed new southbound equal access, sailing and cargo and revenue pooling agreements, which provided for a 50-50 division of cargo pool revenue by the national-flag lines. The Agreements were filed with the FMC and approved effective November 28, 1978 (*GS-9; Ex. 4, MM-2* (Crowley), p. 11).

approved the Agreements subject to the condition that they be amended to provide for "open competition" within the maximum twenty percent third-flag shares, 21 F.M.C. 1100. Thereafter, the parties met in Buenos Aires in July 1979 and amended the Agreements in accordance with the Commission's Order (GS-16; see Order, 19 S.R.R. 700).

I. RESPONSE OF THE GOVERNMENT OF ARGENTINA TO F.M.C. IMPOSITION OF OPEN COMPETITION.

36. *Initial response.* Shortly after the Commission imposed "open competition" Assistant Secretary Samuel B. Nemirow, who had succeeded Mr. Blackwell, contacted the Argentine authorities to explain that the Commission's decision was not a disapproval of the pools and to request that Argentina not take any precipitous action cancelling or disapproving the pools (SX-3A, pp. 30-31, 56, 79-80). Mr. Nemirow took this action because he believed that it was important that the Agreements not be terminated by the Argentine authorities since continuance of the pools was important to the free flow of commerce between the United States and Argentina (*id.*, p. 56).¹⁷

37. *Position of the Argentine Government on fixed shares.* Despite the Commission's belief to the contrary as reflected in its decision in *Docket Nos. 78-51 and 78-52*, the record shows that the Government of Argentina has stated that its maritime laws and policy require fixed shares, although the Argentine law has not been offered in evidence here, (SX-40, p. 9), and had always assumed and understood that the Memorandum of Understanding would result in a pool with fixed shares for all the lines (*id.*, p. 8). However, SEIM has no interest in the specific division of the third-flag shares, and has always left it to those lines to agree (SX-3A, pp. 75-76 and Ex. 4; SX-40, p. 10; see 21 F.M.C. 1100). In the discussions with Mr. Blackwell preceding the signing of the Memorandum of Understanding, the Argentine maritime authorities reportedly were "fearful that that type of competition [*i.e.*, open competition within shares] . . . would in itself create conditions unstable to trade" (SX-2, p. 86). This position was also expressed in the Argentine Government Aide Memoire commenting on the predecessor agreements wherein Argentina stated that those agreements (which had fixed shares for all lines) ". . . constitute *precisely* the manner of implementation contemplated by our respective governments in entering into the above mentioned memorandum" (SX-6, p. 4; emphasis supplied). Mr. Ne-

¹⁷ Assistant Secretary Nemirow held various legal and policy positions in the Department of Transportation and the Federal Maritime Commission prior to joining the Department of Commerce (SX-3A, Ex. 1, p. 4). He was the chief negotiator on behalf of the United States during the negotiation of the U.S./China bilateral maritime agreement, has been personally involved in the negotiations which led to bilateral shipping agreements between the U.S. and the Soviet Union, Brazil, and Argentina (SX-3A, p. 6), and has headed delegations to negotiate with all of these countries.

mirow testified in this proceeding that from the very beginning, upon learning of the Commission's imposition of open competition, the Argentine authorities have opposed that concept:

Q. [BIE] What was their position with regard to the open competition?

A. Their position with regard to open competition is perfectly clear, I think, to everyone at this table and everyone who has participated in any of these discussions. They believe that in order to participate in their trade all carriers should have a fixed share.

And the fixed share for the third flags is, they believe, a requirement. They've indicated that to me. They've indicated that to the Commission. They've indicated that to various of the parties in this case. They're very clear on it. [SX-3A, p. 31.]

* * *

Mr. Kominers: My question is is that a requirement of some law of theirs or is it a requirement of some policy?

The Witness: It has been indicated to me and I have not researched their law—it has been indicated to me by certain people in Argentina that in order to comply with their law that fixed shares would have to be established for third flag participants. [SX-3A, p. 33.]

(See also *Ex. 15*, p. 2; *Tr.* 358.) The position of the Argentine Government was reaffirmed recently in a further Aide Memoire related to this proceeding:

The clear understanding of the Argentina side is that both countries expected the lines would negotiate 40/40/20 pools with fixed shares for each carrier as was the case in all of the pooling agreements entered into in other trades in which Argentine flag carriers participated. This understanding has been repeated in each succeeding meeting between the two governments with regard to this matter . . . [SX-40, p. 8] Because such "open competition" is contrary to the maritime laws and policies of Argentina, SEIM, after consultation with and the support of the U.S. Maritime Administration and State Department, instructed ELMA to call another meeting to arrive at fixed shares. [SX-40, pp. 9-10.]

38. *Purpose and policy in requiring fixed shares.* (a) In a letter to Mr. Nemirow dated December 7, 1979, Admiral Guevara took occasion to address specifically the Commission Order requiring open competition for the third-flag share:

This State Secretariat believes that the modifications imposed by the Federal Maritime Commission, determining a system of "free competition" in 20% of the Northbound trade, for the

intervention of the so-called third flags, infringe upon the contents of Paragraph 2 of the Memorandum of Understanding signed by the Maritime Administration and this State Secretariat for Maritime Affairs, and duly ratified by the corresponding governments. . . .

* * *

We share, in this respect, the views adopted by SUNAMAM¹⁸ in opposition also to the system of "free-competition" because, in our opinion, non-existence of fixed shares for each of the participating third-flag lines—nor, in consequence, a minimum number of sailings for each of them—would entail a lack of rationalization in the service and a probable uncontrolled competition in providing it, that could consequently be the cause for over-tonnaging and for all kinds of malpractices, together with an uneconomical utilization of fuel. [SX-3A, Exhibit 5A, p. 1.]

This position was again expressed to Assistant Secretary Nemirow in meetings held in March 1980 between U.S. and Argentine delegations (see FF 45, *infra*). Mr. Nemirow testified that during those meetings Admiral Guevara reiterated the importance to Argentina of fixed shares for all carriers.

Q. How do they characterize the problem? How did the Argentine authorities characterize the problem?

A. In their view, and it's set out here, they believe they must have fixed shares in the third flag participation. And they believe that carriage other than a fixed share basis will destabilize the trade and will generate over-tonnaging in the trade.

That it will generate the kinds of competition that will have a negative impact on their trade and that they intend to take whatever measures are available to them to see that that doesn't happen. [SX-3A, p. 40.]

¹⁸ SUNAMAM, the Brazilian maritime regulatory agency, voiced the following objections to open competition:

- 1 - the practice encourages individual Lines to constantly endeavor to increase their percentage participations;
- 2 - discourages rationalization of sailings and service and, consequently, adversely affects the interchange of trade between the particular countries involved;
- 3 - open competition could lead to an unmanageable free-for-all between the Lines involved, in which situation both the traffic flow and the Lines would suffer and control by the Maritime authorities of respective Lines' performances would be made the more difficult;
- 4 - open competition gives rise to rebating and other malpractices which flourish in an area of unrestrained competition and which damage the maritime industry;
- 5 - could result in cost increases to the Lines in addition to increased fuel consumption, any such increases being contrary to Brazilian Government policies;
- 6 - could encourage undesirable "under carrier" practice when active and rational participation is the proper conduct for all Lines engaged in the Trade. [SX-7, pp. 5-6.]

Q. You had indicated earlier, I believe, that members of SEIM felt that open competition would—well, to characterize—create havoc in their trade. Do they give you any specific examples of the sort of problems that they were experiencing?

A. I don't know about the word "experiencing." They contemplate—they believe in a regularized, rationalized, stabilized trade as an efficient way to conduct commerce. They have agreements of that nature with European countries, with developing countries, with developed countries.

They believe it's a waste of resource to have, for example, excess capacity out there trying to compete with someone else who has excess capacity in order to generate cargo. They think that will increase rate levels because you're competing with more tonnage than the trade requires.

They are also concerned about, and they've indicated this to us, that it will be in the nature of the competition that if the third flag share were open for competition, the third flags will have a tendency to always over carry. And they're afraid that the third flags will then, because of the level of tonnage that they would put in the trade and the kinds of competition within that share, that that will by nature generate a situation where the third flags are carrying more of the share than "they're entitled to." [SX-3A, pp. 42-43.]

(b) The purpose and policy underlying Argentina's requirement was confirmed and elaborated upon in the Aide Memoire (SX-40) submitted to the United States concerning this proceeding:

Argentina is opposed to open competition in the non-national portion of the pool because:

1. it encourages the various lines to seek ever-increasing percentages of participation;
2. it discourages rational employment of resources and impairs the ability of maritime authorities to regulate destructive competition;
3. it encourages malpractices and instability to the detriment of shippers and consignees, and
4. it leads to increased fuel consumption.

No country in the world that has pools has "open competition" pools—a pool without fixed shares is not a pool and cannot serve to stabilize the trade or contribute to the most efficient allocation of scarce capital and fuel, a matter of great importance to the Argentine Republic. [SX-40, pp. 10-11.]

39. *Considerations expressed as to open competition in one segment of the pool.* Fixed shares give the necessary predictability to enable each carrier to plan an efficient service, to make investment decisions (*Ex. 11* (Ornellas), p. 3) and, also allow the pool members to maximize their utilization in a manner which conserves energy. Open competition in only one segment of the pool will have a tendency to cause the third-

flag carriers to overcarry their maximum allotted share which in turn will lead to destabilization of the trade and contribute to the employment of unnecessary and unutilized tonnage in the trade (*Ex. 19 (Crowley)*, pp. 5-6). Mr. Blackwell testified that the Argentine authorities "... were fearful that that type of competition, even amongst the divided portions of the trade, would in itself create conditions unstable to trade and very likely lead to a dominant carrier within the pool shares which in turn would lead to more unfavorable conditions later on" (*SX-2*, p. 86). If the third-flags are left to open competition, the Argentine Government is obviously concerned that this will encourage the third-flags as a group to exceed 20% and the Argentine share possibly to fall below 40% (*Ex. 19 (Crowley)*, p. 6). Since Ivaran has been increasing its carrying capacity over the past two years to the point that it alone can now carry more than 25% of the Atlantic trade and is willing to be an overcarrier even with fixed shares demonstrates that Argentina's concern may be valid (*ASX-11(c)*, p. 94; *id.*, MM-1, pp. 2, 43).

On cross-examination, Mr. Crowley testified that the problems engendered by "open competition" within the third-flag share are not limited in their effect to the non-national lines:

... because of the relatively light penalties paid, the distinct potential is there for a line not subject to a specific share to just pump in tonnage and take anybody's share, including Moore McCormack's.

That of course, would disrupt the ... certainness, [sic] to the extent that you can be certain, as to how we should employ our assets in the trade. It puts another question in, in a business where there are enough questions anyway. [*Tr. 455.*]

Prior to the signing of the Memorandum of Understanding, Assistant Secretary Blackwell identified the concern of Argentina to be:

the Argentineans believed, that third flag lines had made very significant incursions into the non-pool traffic, and the pool [predecessor Agreement Nos. 10038 and 10039] which we thought was the stabilizing element in the northbound trade from the Argentine point of view was losing its effectiveness in terms of the amount of cargo moving pursuant to it. [*ASX-2*, p. 20.]

40. *The Agreements, including fixed shares for the third-flag lines, are consistent with the Memorandum of Understanding.* (a) The position of the Government of Argentina with respect to the carrier agreements contemplated by the Memorandum of Understanding is stated in its April 13, 1981, Aide Memoire:

That Memorandum called for pooling agreements among all carriers in the northbound trade. *The clear understanding of the Argentine side was that both countries expected the lines would*

negotiate 40/40/20 pools with fixed shares for each carrier as was the case in all of the pooling agreements entered into in other trades in which Argentine flag carriers participated. This understanding has been repeated in each succeeding meeting between the two governments with regard to this matter and has been the subject of written communications between them including an Aide Memoire dated April 17, 1979 which was submitted to the Federal Maritime Commission in the predecessor to these proceedings, Docket 78-51 and 78-52, and a letter to the Maritime Administration dated December 7, 1979. [Emphasis added.]¹⁹ [SX-40, pp. 8-9.]

(b) Former Assistant Secretary of Commerce Blackwell, who negotiated the Memorandum, understood from his discussions with the Argentine authorities at the time of signing that it was their desire that the commercial pooling agreements include more than just the national flag carriers (SX-2, p. 81), and while Mr. Blackwell did not recall that specific percentages were then discussed (*id.*, p. 60), he knew from his experience that Argentina was sensitive about receiving the same treatment in maritime matters as Brazil (*id.*, pp. 68-69) where there have been 40/40/20 pools in the northbound trades to the U.S. for many years (*Ex. 4, MM-2, p. 22*). He testified that a 40/40/20 division was "a reflection of the practicalities that exist in the shipping business today" (SX-2, p. 71) and seemed to be "a reasonable allocation of traffic to meet the needs of the direct traders as well as the cross traders" (*id.* at p. 72).

(c) In a letter to the Federal Maritime Commission on June 16, 1980, Reginald A. Bourdon, Director of Marad's Office of International Affairs, stated on behalf of Mr. Nemirow:

Read together, paragraphs 1 and 2 of the Memorandum also contemplate that there will be commercially agreed shares for such third flag carriers as participate in the trade. [SX-22(B).]

Likewise, Mr. Nemirow, who was involved in drafting the Memorandum of Understanding (SX-3A, p. 22), testified that the pooling agreements reached, including fixed shares for all carriers, were not inconsistent with the Memorandum of Understanding or any U.S. policy (SX3A, pp. 31, 32).

(d) Marad has approved these agreements after finding that they "do not create relationships which will eliminate or tend to eliminate the substantial foreign-flag competition encountered by" Moore McCormack and Delta and that they "do not contravene and may not reason-

¹⁹ In the Aide Memoire dated April 17, 1979, the Argentine Government advised that the prior agreements which then had fixed shares ". . . constitute precisely the manner of implementation contemplated by our respective Governments in entering into the above-mentioned Memorandum" (SX-6, p. 4).

ably be expected to contravene the purposes, policy or provisions of the Merchant Marine Act, 1936, as amended" (*SX-24A and B*, p. 1).

41. *The Argentine Government's request for negotiation of fixed third-flag shares.* On December 22, 1979, SEIM temporarily approved Agreement Nos. 10346 and 10349 as modified by the parties to include "open competition" in accordance with the Commission's June 22, 1980, Order, as well as the corresponding southbound Agreement Nos. 10345 and 10350, until March 31, 1980 (*GS-22; SX-9*). However, SEIM advised both the IAFC and the Commission that:

3. Before March 31, 1980 this State Secretariat will definitely decide on the manner in which third flag lines will participate in the trade from Argentina to the U.S. East and Gulf coast ports. [*SX-8*.]

Thereafter, SEIM instructed ELMA to call principals' meetings of the Atlantic and Gulf lines to attempt to reach new agreements in which the third-flag lines would participate with fixed shares (*SX-40*, pp. 9-10). ELMA was instructed by SEIM to inform the lines that the existing pools would terminate as of March 31, 1980, and that any new pools would have to be based upon fixed shares for third-flag participants (*Tr. 329-30; GSX-5B*, pp. 2-3; *ASX-4*, pp. 1-2). SEIM, however, did not specify what the third-flag shares should be (*SX-40*, p. 10), and ELMA did not receive any instructions as to any specific third-flag shares (*Tr. 331*). Admiral Guevara told Mr. Nemirow in March 1980 that SEIM preferred a "commercially arrived at arrangement" and agreed "to allow the commercial mechanisms to try to work out arrangements that would avoid government involvement and government, unilateral government action. . . ." (*SX-3A*, pp. 59, 76-76 and Ex. 4). This was consistent with the Commission's finding in *Docket Nos. 78-51 and 78-52* that the Argentine Government had no interest in how the third-flag shares were divided (*supra*, 512).

J. NEGOTIATION OF AGREEMENT NOS. 10386 AND 10382.

42. *Delta's request for a Gulf Principals' Meeting.* In response to SEIM's December 22, 1979, telex, which was circulated to the member lines by the IAFC (*GS-22; SX-9*), Delta also requested ELMA to call a meeting of the Gulf pool principals at the earliest possible date to discuss SEIM's announcement and possible alternative pool conditions to be adopted so as to avoid a lapse of the pools on March 31, 1980 (*GS-25; Ex. 7, ¶¶25, 27-28*, pp. 12, 13 and *DGX-4A*).

43. *ELMA's calls to Principals' meetings.* On February 1, 1980, Captain Dandois of ELMA contacted the Gulf lines' Buenos Aires representatives by telephone to see if February 12-13, 1980, would be acceptable for a meeting in Buenos Aires (*GS-25; GSX-5B*, p. 4). Upon receiving no objection (*id.*), ELMA sent a letter to the IAFC-B dated February 4, 1980, requesting the convocation of a Gulf Pool Principals' Meeting

in Buenos Aires on February 12-13, 1980, to discuss "third flag participation in Argentina/U.S. Gulf pool (NB)" (*GS-26; GSX-4*, p. 2). The IAFC-B immediately notified the member lines of the communication by telex on February 4, 1980, and by Gulf Pool Circular C080, dated February 5, 1980 (*GS-26; GSX-4*). Similarly, on February 19, 1980, ELMA wrote the IAFC to request a Principals' Meeting for March 18-19, 1980, in Buenos Aires to discuss "participation of the third-flags in the Argentina/U.S. East Coast pool -establishment of a new pool" (*ASX-3*).

44. *The Gulf Pool Principals' Meeting—February 12-13, 1980.* (a) Pursuant to ELMA's request, a meeting of the Gulf Pool Principals' was held in Buenos Aires on February 12-13, 1980. A tape recording was made of this meeting and the transcript thereof is *GSX-5A* (Spanish original) and *GSX-5B* (English translation). No recording was made of the separate third-flag caucus and no transcript exists of that meeting. However, the results of the caucus were reported in the Principals' Meeting and are reflected in the transcript thereof (see *GSX-5B*, pp. 10-12, 17). (*GS-27; Ex. 7, ¶30*, p. 14).

(b) The Gulf Pool Principals' Meeting commenced on February 12th. TMM and Navimex were represented only by their Buenos Aires agents, and not their principals. After a preliminary statement by ELMA regarding the calling of the meeting and SEIM's opposition to the concept of open competition (*GSX-5B*, pp. 2-6), the lines' pool cargo carriage and sailing statistics for the prior year were reviewed (*id.*, pp. 6-10). The third-flag lines then held a caucus to negotiate shares, the results of which were reported at the resumption of the Principals' Meeting (*id.*, pp. 1-12). REL had proposed that it be permitted two or three sailings with a minimum of 500 tons per vessel. The other third-flag lines agreed to this request, conditioned upon REL's participation being "limited to two annual sailings with a minimum of 500 tons per vessel" (*id.*, p. 11). REL agreed to accept a maximum of 1,000 tons of reefer cargo which would be considered out of the pool cargo (*id.*, pp. 12, 14). The Brazilian lines initially had requested a combined 14.3% share, which was based on their share under original Agreement No. 10346 adjusted for the withdrawal of Nopal (*id.*, p. 10; *Tr. 175*). However, they had receded first to 13.0% and then finally to 11.9% (*GSX-5B*, p. 11). Navimex, which as of October 1979 had sold two of its four ships (*GSX-17A*, p. 11) and had not made any sailings in the trade in almost eight months, was demanding 4% on the basis of an equal division of the 20% share among the five individual third-flag lines (*GSX-5B*, pp. 11, 19). TMM, with carryings of only 23 tons during the prior year and including the period of open competition (*id.*, pp. 29-30; *GSX-18E and F*), rejected the concept of basing shares on past performance (*GSX-5B*, pp. 12, 32) and proposed that the lines first determine the number of sailings for each line and then calculate the

shares proportionately according to those numbers (*id.*, pp. 11, 20, 30). This proposal was rejected by the other lines (*id.*, pp. 11, 15, 19; *Tr.* 92-94). TMM finally stated that its objective was 10%, and refused to negotiate its share further (*GSX-5B*, pp. 20, 22, 30). Montemar initially requested a 3.0% share (*id.*, p. 11), but evidenced a willingness to recede to 2.7% (*id.*, p. 18). No consensus was reached.

(c) Additional negotiations were conducted the next day, during which the future intentions of the various third-flag lines in the trade in terms of vessel commitments and capacities were reviewed, as well as the comparative carryings of the Brazilian lines and TMM during the preceding pool year (*id.*, pp. 27-30). None of the third-flag lines evidenced any willingness to change its previous position (*id.*, pp. 30-31). The national-flag lines felt that the 11.9% requested by the Brazilian lines was fair and reasonable in view of the capacity of their fleet and their past performance during the preceding year (*id.*, p. 33; *Ex.* 7, ¶31, p. 15; *Tr.* 101, 104). However, the national-flag lines felt that the positions of TMM, Navimex and Montemar were unreasonable in view of their general lack of service in the trade (*GSX-5B*, pp. 23, 31, 35 (Schliemann); *Ex.* 7A, ¶31, p. 15; *Tr.* 101). After discussions among the lines continuing into the afternoon of the second day, the Brazilian lines were again polled to determine if they would accept the reduced share of 11.9% proposed in the third-flag caucus (*GSX-5(B)*, pp. 32-33). In an effort to encourage a possible division of the 8.1% third-flag balance which would be mutually acceptable to the three remaining lines, and in view of the third-flag lines' inability to reach any agreement among themselves, the national-flag lines suggested 1.9% each for Navimex and Montemar, and 4.3% for TMM (*GSX-5B*, p. 33; *Tr.* 357). Captain Dandois of ELMA stated that this proposal was based upon Navimex's past performance and stated intention to put two vessels into the trade, Montemar's stated intent also to put two vessels into the trade, and TMM's showing of actual present vessels and sailings in the trade, notwithstanding TMM's past lack of carryings even where they were physically present and making sailings (*GSX-5B*, pp. 33, 37; *Tr.* 351). This suggestion was rejected, and the three lines failed to suggest any alternative division (*id.*, pp. 35-36). Montemar finally agreed to accept a 1.9% share, conditioned upon its having only two minimum sailings (*GSX-5B*, p. 38); however, Navimex and TMM refused to agree to any shares.

(d) A new agreement therefore was executed on February 13, 1980, with the Brazilian-flag lines and Montemar having 11.9% and 1.9% respectively, and REL being able to carry up to 1,000 tons of reefer cargo outside the pool (*GSX-1A*, Art. 2, p. 3). The 6.2% balance of the third-flag 20% share was retained for TMM and Navimex, on a "suggested" basis of 4.3% for TMM and 1.9% for Navimex, in the event they elected to join the agreement (*id.*, p. 4; *GSX-5B*, p. 40). The

executed agreement was based upon the original Agreement No. 10346 (*GSX-2A*), inasmuch as the lines already had agreed to the terms thereof and that agreement had been approved by the appropriate authorities except as to the particular third-flag shares (*GSX-5B*, pp. 6, 27; *Tr.* 286-87, 337). Provisions of the prior agreement were negotiable, however, and could have been changed had the lines so agreed (*Tr.* 338). The new agreement was promptly filed with the Commission for approval under section 15 and assigned Agreement No. 10382 (*GS-29*).

45. *March 12-14, 1980 meetings between the U.S. and Argentine Governments.* Meetings were held March 12 through 14, 1980, between delegations of the United States Maritime Administration and State Department, headed by Assistant Secretary Nemirow (*SX-3A*, pp. 37-38), and of Argentina, headed by Admiral Guevara. At these meetings the Argentine side stressed its view that the failure of the third-flag lines to reach fixed pool shares was inconsistent with both the Intergovernmental Agreement and Argentine maritime policy, and both governments indicated their intention "to urge participants in the northbound Argentina/U.S. pools to arrive at fixed shares through the commercial mechanisms contemplated by . . . the Memorandum of Understanding" (*SX-3A*, Ex. 4, p. 1; *SX-3A*, p. 71). Failure of all third-flag lines to agree upon fixed shares "would result in the implementation of regulatory measures by SEIM to insure non-interference with the efficient and stable operation of northbound pools" (*SX-3A*, Ex. 4, p. 1). The press release issued at the conclusion of the meetings indicated that ". . . whatever measures which might be available to maintain stability in the trade would be pursued by both sides" (*SX3A*, Ex. 4, p. 6). During his deposition, Mr. Nemirow was asked whether Admiral Guevara's reaction to the FMC's decision opening the third-flag share to competition was reasonable in light of Admiral Guevara's assumptions about what the Intergovernmental Agreement meant:

A. Well, I can't get into his mind, Mr. Kominers. It seems to me that in his view, that is what the agreement meant. Therefore, you can understand that also in the view of his government, fixed shares are an appropriate way to establish third-flag participation, and his response to that is clearly understandable under those circumstances. They have these agreements, as I indicated earlier, with many countries. I believe that almost every trade where a pool does exist, the pool provides for fixed shares. I don't know of a situation such as the one he is confronted with here. And I think his response is understandable.

Q. What I am really trying to ascertain is whether you think that he has a reasonable basis for feeling that Argentina, rather than anyone else is the aggrieved party in this entire flap.

A. In the discussions I have had with him, it is clear to me that he believes he has a reasonable basis for that. He believes

that he has an agreement with the United States government that the proviso will be implemented in a certain way; he believes that that agreement is based upon fixed shares for third flags; he can't understand why we have come to a point where the governments have agreed to something, the lines have agreed to something, and it isn't happening.

I can understand his concern, and I think his response is not unreasonable. [SX-3A, pp. 60-61.]

46. *East Coast Principals' Meetings—March 18-19, 1980.* (a) At the principals' meeting ELMA announced that it had called the meeting at SEIM's request for the purpose of forming a new pool in which the third-flag carriers would participate with fixed shares (ASX-4, pp. 1-2; Tr. 374). The third-flag carriers promptly met in a caucus to discuss division of the third-flag share (ASX-4, p. 5).²⁰ They thereafter advised the other lines that they were far apart. Lloyd Brasileiro asserted that it was entitled to 9.5% "taking into consideration our capability of transport in the area and of our overall participation in this trading area" (ASX-4, p. 5). Ivaran's representative, Mr. John Schmeltzer of U.S. Navigation (Ivaran's U.S. agent), stated that: ". . . we believe that performance and service should be the criteria" and considered itself entitled to a 19% share, effectively leaving 1% to be divided among Lloyd, Hopal, Montemar and REL. Apparently recognizing that such a claim was unrealistic, Ivaran proffered that "we are willing to go down to the 17%" (ASX-4, p. 6; see also, ASX-11(c), MM-1, p. 55). Hopal "consider[ed] . . . 1% [would] be an absolute and bare minimum" (ASX-4, p. 6), and Montemar's representative advised that: ". . . it is our intention for the next pool to normalize our service on this trade. For that reason, our aspiration now is to have a quota of about 1.4% in the next Pool" (*id.*, p. 7). In lieu of a percentage share, REL requested authorization for several sailings to carry a fixed volume of refrigerated cargo only, which would not be included in the pool (*id.*). This was similar to the arrangement reached in the Gulf negotiations. At the request of the national-flag lines a second caucus was held (*id.*, p. 10) with the result that Lloyd came down to 9%, Ivaran to 16.2%, and Hopal and Montemar held at 1% and 1.4% respectively (*id.*, p. 11). The third-flag carriers held a third caucus on March 19 in which Hopal proposed 9% for Ivaran, 9% for Lloyd, 1% for Hopal, and 1% for Montemar. This was acceptable to all third-flags but REL and Ivaran (*id.*, p. 15). Ivaran continued to adhere to a minimum requirement of 16.2% (*id.*, p. 16). Ivaran insisted that performance and service should be the sole criteria for pool shares (*id.*, pp. 15-18) and would not consider a suggestion that it reduce its tonnage to accommodate the

²⁰ No transcripts of the third-flag caucuses were made, though transcripts were made of the principals' meetings, and the results of the third flag caucus were reported therein (SX-Strip. No. 1).

other lines (*id.*). Thereafter ELMA proposed that "we are prepared to discuss the new wording of the new Pool with all those lines which are prepared to sign it with a quota as proposed by Hopal, or something like that" (*id.*, p. 26). Lloyd, Montemar, and Hopal indicated their assent (*id.*), and REL refused to sign (*id.*), saying that it was "going to Washington to protest" (*id.*, p. 29).²¹ Ivaran indicated that it would have to sign under protest (*ASX-4*, p. 27). The national-flag lines objected because they were "not ready to accept any signatory party which [did not] sign in full agreement with all terms and conditions" (*id.*, p. 28).

(b) As Captain Dandois explained, by seeking the commitment that all parties agree to their shares, he was attempting to avoid "having hearings like this" (*Tr.* 380), "because it is useless having an agreement, then protesting it, and then going on with all those things. But it is not so imperative, it is not a fact of taking it or leaving it" (*Tr.* 381; see generally, *Tr.* 379-381). Ivaran thereafter advised that it was prepared to sign the agreement and state that it would not protest (*id.*, p. 32), but made the statement only after conferring with its attorneys who advised that such a statement was "completely meaningless" (*ASX-11(c)*, MM-1, p. 56). After further discussion of a technical nature concerning the terms of the Agreement, it was decided that the final document would be signed the next day (*ASX-4*, p. 42).

47. *Ivaran refused to sign Agreement 10386 on March 20th.* (a) The following day Ivaran appeared at the conference's offices at the appointed time for signing the Agreement, but refused to sign. It told the other lines it was "unable [to] sign due instructions received from Norwegian government via Norwegian Shipowners Association" (*ASX-11(c)*, MM-1, p. 34; *Ex. 19*, p. 6; *ASX-11(b)*, p. 6; *ASX-11(c)*, MM1, p. 41). Mr. Holter-Sorensen subsequently advised the Norwegian Embassy in Washington that he was in fact prepared to sign and protest, but did not because of instructions from Norway:

THE AGREEMENT WAS TO BE SIGNED MARCH 20 AT 10.00 HOURS, BUT THE SAME MORNING I RECEIVED A TELEX FROM THE OSLO OFFICE QUOTING A LETTER FROM HANDELSDEPARTEMENTET [i.e., the Norwegian Shipping Department] REQUESTING ME NOT TO SIGN WHEREFORE I ADVISED THE OTHER SIGNING LINES THAT IVARAN WOULD NOT SIGN THE AGREEMENT. [*ASX-11(c)*, MM-1, p. 56.]

(b) As a result of Ivaran's refusal to sign the Agreement on March 20, the remaining parties amended the fixed share provisions to distrib-

²¹ The other third-flag lines including Ivaran had rejected Reefer's request for a tonnage ceiling within the third-flag share of 3,200 tons (*ASX-4*, p. 21), equivalent to about 9.3% share. The lines did in fact accommodate REL, but on a reduced basis (*ASX-4*, p. 36).

ute the share agreed upon by Ivaran among the other lines, with opportunity for Ivaran to sign the Agreement at any time in the future at its previously agreed upon share. In addition, provision was made for REL's participation by setting aside a specific number of sailings and a tonnage limit to be counted against the third-flag 20% share (*Ex. 19*, pp. 6-7; *ASX-1(b)*). Unlike the Gulf trade, Ivaran was given no fixed date by which it must sign the Agreement (*Tr. 345-46*).

(c) Subsequent to the principals' meeting, the parties to the Agreement advised Ivaran:

Finally, no Pool member has any intention of depriving Ivaran of its legal rights to protest the agreement or continue to prosecute its appeal. Ivaran may sign the March 20th, agreement reserving its legal rights as it has previously done with 10.349, so long as it agrees that if and when the agreement is approved, Ivaran will be bound by the agreement as signed [*ASX-11(c)*, BIE-Ex. 4; also *Ex. 19*, Att. C, p. 1.]²²

The Agreement and amendment were filed with the F.M.C. for approval on April 1, 1980, and assigned numbers 10386 and 10386-1 respectively. On March 31, 1980, SEIM informed the IAFC that SEIM was extending its approval of all the prior northbound and southbound pools to April 30, 1980 (*GS-31*; *SX-12A*).

48. *Ivaran's legal advice that Resolution 619 was unconstitutional.* During and after the March 18-19, 1980, principals' meeting Ivaran obtained the advice of several lawyers in Argentina with respect to legal action should the Argentine Government use Resolution 619 to ban Ivaran from the trade. The advice it received, quoted in detail below, was that Resolution 619 was unconstitutional under Argentine law and would be set aside by the Argentine courts:

While I was in Buenos Aires 4 weeks ago, I met with 3 different lawyers, who all stated that once used, Resolution 619 was a clear breach of the Argentine constitution. This constitution gives all Argentine citizens and foreigners trading in Argentina complete freedom to navigate and trade. None of the lawyers were afraid to take the matter to court, and if Resolution 619 is used, we will immediately and latest on May 1st, ask for a temporary injunction against Resolution 619. Our lawyers state that we have good hopes to have the resolution set aside, until the courts have made a final decision, which could take about 4-6 months. [*ASX-11(c)*, MM-1, p. 54.]

²² In response to a request by Ivaran for confirmation that this was the position of all parties (*Ex. 19*, Att. C, p. 3). Ivaran was advised by the Conference Administrator:

In response to your telex of April 28, my telex of April 25 reflects view of all of the lines. Lines do not consider quoted statement to imply any limitation on Ivarans prosecuting such full legal rights as it believes it has.

However, if and when agreement is approved, Ivarans will be bound by the agreement as signed. [*Ex. 19*, Att. C, p. 4.]

AMENDED

* * *

Both during and after the meeting I had contact with Argentinean lawyers, all of whom were of the opinion that if loading up were denied we would have a very good case against the Argentinean authorities. Altogether we discussed the case with three lawyers, one of whom gave us a short opinion but unfortunately did not have time to take our case. Both of the other two were of the opinion that Resolution 619 was constitutionally unwarrantable under the constitution at present in force. According to the Argentine constitution which to my amazement is evidently respected by the military Junta, we all have privileges in Argentina and if we are denied loading, both counselors believe we can take the matter up before a judge and get 619 set aside while the matter is investigated more deeply. I inquired also precisely whether counselors and judges would be afraid of pronouncing a verdict against the military Junta but this was rebuffed. As mentioned above, the military Junta has hitherto followed the Argentinean laws, but there are only a few cases where Argentinean citizens have endeavored to stand on their rights. Where they have done so, they have, however, won through.

* * *

When we take the case to the court, we can, according to Argentine law, select our own judge and our counselors had two whom they believed would set 619 aside. If this were set aside, we shall have a few months in front of us to get a final decision regarding Resolution 619. [*Id.*, p. 42.]

Ivaran has not pursued legal action in Argentina to have Resolution 619 set aside.

49. *Resolution 619 not implemented.* (a) On March 28, 1980, Ivaran's agent in Argentina met with officials of SEIM (*ASX-11(c)*, MM-1, p. 35). At that time Ivaran was concerned that Resolution 619 would be enforced against it if it did not sign the pool agreement and was prepared to take legal action. It telexed its agent in Argentina:

Also, of course, try find what SEIM will do if do not sign pool on 31-3.

Also start preparing immy all papers necessary to get cargo ban lifted as disc with Dabinovic and other Lawyer. [*ASX11(c)*, MM-1, p. 35.]

(b) On April 8, 1980, the IAFC received SEIM note No. 76 dated March 28, 1980, signed by Captain Babino, the National Director of Politics of Maritime Interests (DNPIM Note 76) (*SX-13*). This note

stated that as of May 1, 1980, Ivaran, TMM and Navimex²³ could not accept northbound cargo bookings from ports within the pool range to U.S./Atlantic and Gulf ports, and instructed the IAFC to circulate this information among shippers and other interested parties. Ivaran protested that Section B of the conference (U.S./Atlantic) had no authority to inform the trade and that Ivaran would sue if they did (*ASX-11(c)*, MM-1, pp. 48-49; *ASX-11(c)*, pp. 232-233). The other carriers in the U.S. Atlantic trade concluded that they should obey the instructions of SEIM (*Tr.* 496) and let the Conference Administrator decide what action to take. No notice was published (*Tr.* 496), and Ivaran was in fact never banned (*ASX-11(c)*, pp. 224-225; *Tr.* 507).

50. *Ivaran's communications with the Norwegian Government.* (a) Prior to and during the course of the East Coast principals' meeting of March 18-19, 1980, Ivaran kept the Norwegian Government well informed of Ivaran's views on the new agreement. On March 17, Mr. Holter-Sorensen communicated his impressions of a meeting that day with SEIM officials to Mr. Dahl at the Norwegian Embassy in Washington, D.C. (*ASX-11(c)*, MM-1, pp. 30-31). Mr. Holter-Sorensen was concerned that the U.S. Government might agree to fixed shares and therefore sought further information from the Norwegian Embassy on this issue (*id.*, p. 33). Based on his discussions with Mr. Dahl, Mr. Holter-Sorensen entered the meeting in the mistaken belief that "MarAd [didn't] want fixed shares at all" (*ASX-11(c)*, *Tr.* 56). Ivaran also believed that the F.M.C. would not approve an agreement containing a share for Ivaran below that negotiated in the prior agreement (*id.*, *Tr.* 27). Throughout the course of the Pool meetings Ivaran remained in constant communication with the Norwegian Shipowners Association and the Norwegian government (*ASX-11(b)*, p. 6; *ASX-11(c)*, *Tr.* 39, 86). By the time of signing on March 20, Ivaran knew that a Norwegian trade delegation would be traveling to Argentina to discuss Ivaran's problems (*ASX-11(c)*, Confidential #1, p. 3).

(b) On April 8, 1980, Mr. Holter-Sorensen prepared a memorandum for the Norwegian Shipowners Association, a private voluntary organization of shipowners, (*ASX-11(c)*, *Tr.* 16, 57), through which he communicated with the Norwegian Government (*id.*, pp. 16-17). With respect to the instructions of the Norwegian Government this memo discloses:

. . . After having discussed the matter with our American legal adviser by telephone to New York we found we could

²³ On March 31, 1980, Navimex, through its Buenos Aires agents, notified IAFC-B that Navimex accepted the 1.9% pool share made available to it under Agreement No. 10392 (*GSX-6*). In view of Navimex's acceptance of the 1.9% share the IAFC on April 10, 1980, requested SEIM to permit Navimex's inclusion in Agreement 10382. SEIM responded that Navimex could join the pool and would be excluded from the effect of DNPIM Note 76 (*GS-35*).

give such a declaration [not to protest] since it was meaningless because of the coercion introduced by Resolution 619. We gave the said declaration, but before we got to the point of signing we received a very serious telex from the (Norwegian) Royal Department of Trade and Shipping, which strongly admonished us not to sign, since the agreement was in direct conflict with Norwegian shipping policy and consequently a trade delegation would soon be sent to Argentina. We thought this would be useful in solving our problems. [ASX-11(c), MM-1, p. 41.]

At his deposition, Mr. Holter-Sorensen was unsure of the basis for the Norwegian Government's instructions. He did not know whether the Norwegian Government opposed fixed shares generally or just the level of the Ivaran share. He also indicated that had he been offered the 18 percent he sought he would have signed despite not knowing the Norwegian Government's position (ASX-11(c), Tr. 112-114).

(c) In the April 8 memorandum Ivaran considered its strategy for the future:

If we cannot therefore solve these baffling situations by some means or other, we shall be compelled to change our tactics gradually and then probably reach a position of accepting the percentage shares after a number of discussions but continue to load the cargoes. In Argentina it is gradually becoming more sensible to be overcarriers since this will cost only 22% of the gross freight. [ASX11(c), MM-1, p. 43.]

(d) In preparation for the upcoming meetings of the Norwegian delegation with authorities in the U.S. and in Argentina, Mr. Dahl requested information from Ivaran in order for the Norwegian Embassy in Washington, D.C., to brief Mr. Oelberg, head of the delegation, upon his arrival (ASX-11(c), Tr. 62). Further memos were provided to Mr. Dahl by telex on April 15, 1980, (ASX-11(c), MM-1, p. 50) and on April 18, 1980 (*id.*, p. 54).

51. *Meetings between Argentine and Norwegian Governments.* (a) By as early as April 15, 1980, Ivaran was confident that there would be new pool meeting in May:

meanwhile norw dlgtm coming to ba 24/4 will meet with ut authrts 24/25. then 28 norw undersecretary of state p m oelberg will be coming down. plstlx u later what matter to be discussed. meanwhile sr ehs wrking around the clock to prepare memos etc.

* * *

hwr feel that norw dlghts will remove treat of cargo ban and that will be new mtngs in ba month of may. [ASX-11(c), MM-1, p. 49.]

(b) After Assistant Secretary Nemirow met with Admiral Guevara in March, he met with representatives of the Norwegian Government. They had a general discussion concerning the position of the Argentine Government on fixed shares and the regulation of the trade (*SX-3A*, p. 50), and discussed a possible meeting between Norwegian and Argentine authorities (*id.*, p. 62). Assistant Secretary Nemirow briefed the Norwegians on his view of Admiral Guevara's position:

A. Well, I told them that I believed he was sincere, he was committed to pursue this course, and that I believed that he had the support of his government with a capital "G" behind him and that they would have to make some serious decisions as to what impact that would have on their carriers and on the [their] policies; and we even discussed the possibility of them meeting with Guevara so they could be as convinced as I was that he was resolved to pursue a resolution of the third-flag participation in that trade either on a bilateral basis or any commercial other basis he could find.

Q. In other words, if it were not commercially done, he would do it on a bilateral basis; was your advice to the Norwegians. Is that true?

A. Or he might do it on a unilateral basis.

Q. But one way or another, your advice was that he was going to accomplish it in your judgment.

A. That is what he told me, and I know that is what he told them. I was convinced that he was sincere, and I assume they were also. [*SX-3A*, pp. 61-62.]

(c) Meetings were held in Buenos Aires between Norwegian and Argentine officials, including Admiral Guevara, on April 25, 1980 (*ASX-11(c)*, MM-1, p. 57) and April 28, 1980, (*id.*, p. 59). Minutes of these meetings were transmitted to Mr. Holter-Sorensen by Mr. Wegener of the Norwegian Shipowners Association who attended the meetings (*ASX-11(c)*, Tr. 28, 60). At these meetings Admiral Guevara stated he would extend SEIM's approval of the prior agreement (No. 10349) through June 30, 1980; that the new pool should be disregarded for the time being; that new conference meetings would be called for May to allow Ivaran to renegotiate its share; and that the shares should be reached strictly on a commercial basis—SEIM had "no views" as to percentages for each third-flag (*ASX-11(c)*, MM-1, p. 58). Mr. Holter-Sorensen assumed that since SEIM was willing to give Ivaran another opportunity to negotiate that SEIM believed Ivaran's share was unfair (*ASX-11(c)*, Tr. 27-28, 187).

(d) Ivaran has been in contact with its Government subsequent to the May 19-20 Atlantic Principals' Meeting (*ASX-11(c)*, Tr. 35-37). Ivaran has not received any further communication from its government concerning pool negotiations or the size of its share since the May meeting at which Ivaran agreed to join the pool (*ASX-11(c)*, Tr. 39). So far as

the record shows, the Norwegian Government has taken no action in Ivaran's behalf since Ivaran signed Agreement No. 10386-3 in May.

52. *SEIM call for further negotiations.* (a) On April 30, 1980, SEIM telexed the F.M.C. that, in response to the requests of F.M.C. and Marad, SEIM was extending its approval of the existing northbound and southbound pools through June 30, 1980 (*GS-41; SX-18*). SEIM then directed ELMA to call further principals' meetings of both the Atlantic and the Gulf carriers "in order to allow third-flag lines to renegotiate their pool shares and to materialize their entry into the corresponding pool agreement" (*SX-21A*).

(b) Pursuant to SEIM's direction, ELMA requested the IAFC to call principals' meetings for May 19-23 in Buenos Aires (*GSX-8*, pp. 2, 4; *ASX-5*).

53. *May 19-20 Atlantic principals' meeting.* At the outset of the meeting ELMA announced that it had called the meeting "to allow the non-national lines who may wish it, particularly Ivaran, to renegotiate their respective quotas" (*ASX-6*, p. 1). Mr. Schmeltzer again acted as spokesman for Ivaran and promptly agreed to a third-flag caucus to discuss division of the third-flag 20% share (*ASX-6*, p. 2). After the first caucus, in which the prior shares were discussed, no agreement was reached. Ivaran argued that the Norwegian Government had advised Ivaran that both SEIM and the F.M.C. had indicated that Ivaran's share under the prior agreement (9% for Ivaran) was "unfair" (*ASX-6*, pp. 2, 4-5). Ivaran's position was that they did not "think a Pool is necessary, but if that is the will of the group here [we] will and we want to participate in the Pool but we have to have a viable share" (*ASX-6*, p. 3). A second third-flag caucus was held and Ivaran stated it was willing to reduce its demands to 15.5% for 1980-1981, 15% for 1982, and 14.5% for 1983; however, the other third-flag lines did not agree (*ASX-6*, pp. 9-10) as this would permit only 4.5% to 5.5% among the three of them. The next day at the third-flag caucus Lloyd proposed for the year 1980: Lloyd Brasileiro 8%, Hopal .75%, Montemar .75%, Ivaran 10.5%; for the year 1981: Lloyd 8.5%, Hopal .85%, Montemar .85%, Ivaran 9.8%; for the year 1982: Lloyd 9%, Hopal 1%, Montemar 1%, and Ivaran 9%. This proposal was acceptable to all third-flag lines in the caucus; however, Ivaran did not express a position until the plenary meeting (*ASX-6*, p. 13). At the plenary meeting, Ivaran indicated that its "request is much larger than as indicated by Lloyd" (*id.*) and suggested one of the national-flag lines act as a mediator (*id.*, pp. 13-14). Mr. Schliemann, "in order to solve the gap," offered the following "suggestion" to the third-flag lines:

. . . I think it would be a possible solution to give in 1980-81, 8% to the Brazilian line, 10.5% to Ivaran, .75% to Hopal, and .75% to Montemar. In the beginning of 1982, or January 1st, 1982, 8.5% to Brazilian lines; Ivaran 9.8%; Hopal .85%; Mon-

temar .85%. In the beginning of 1983, January 1st, 1983, 9% to Brazilian lines; Ivaran 9%; Hopal 1% and Montemar 1%. . . . I will ask to the third flag lines to have the necessary flexibility to try to reach an agreement and to find a solution. I think this is fair to all the third flag lines and the most important thing is to reach an agreement and to find the necessary stability in this trade. [ASX-6, p. 15.]

All the third-flag lines agreed to those shares and an amendment to the agreement reflecting these shares was signed the next day (ASX1(c)).

54. *Negotiation and position—Lloyd Brasileiro.* Lloyd believes that the shares it negotiated are the minimum needed to provide an economically sound and competitive service (Ex. 11 (Ornellas), p. 4). One percent of the Argentine pool is about equal to 1,800 tons of cargo and no common carrier could possibly hope to make its commercial presence felt with such a minuscule share (Ex. 11 (Ornellas), pp. 45). It rejected Ivaran's position of giving a new carrier only 1 or 2 percent²⁴ and forcing it to overcarry and negotiate a higher share, because such a concept would have the effect of substantial overtonnaging in the trade, creating an incentive to malpractice and the resultant instability that follows (*id.*, p. 5). Lloyd's position is that it is entitled to its share because of the following factors: (1) it has the capacity available and the capability to perform its pool obligations; (2) it believes it has demonstrated a commitment to Argentine shippers with its sailings and carryings under Agreements 10346 and 10349 (*id.*, p. 6); (3) it looks on pool minimum sailing requirements as commitments and will serve the trade even if there is no cargo available; (4) Argentine and Brazilian vessels do not operate exclusively in just their national trades; they rely on and need cargo from ports of call in other countries, and Brazil provides cargo to Argentine carriers, and Brazilian carriers should accordingly have access to Argentine cargo (*id.*, pp. 7-8); (5) as a "zonal" flag, consideration should be given to the economic community of interest between Brazil and Argentina, and the related economic and maritime strength of each; and (6) its belief that it is entitled to reciprocity, *i.e.*, if Argentine-flag carriers are to share in the Brazil trade, Brazilian-flag carriers should share in the Argentine trade (*id.*, p. 8). Lloyd testified, without contradiction, that no carrier had any specific share imposed on it and no carrier was denied the opportunity to negotiate (Ex. 11, (Ornellas) p. 4).

55. *Negotiation and position—Ivaran.* Ivaran emphasized in negotiations its past carryings in the trade (see FF's 46 and 56, *infra*) and its belief that the F.M.C. and SEIM thought it did not obtain a fair share of the pool negotiated in March (see FF's 50(a), 51, 53, *supra*). Among

²⁴ Holter-Sorensen at his deposition agreed that a one or two percent share would involve several years of losses (ASX-11(c), Tr. 117, 120).

the considerations it weighed in the negotiations was how the F.M.C. would view its "bottom line." It did not believe the F.M.C. would approve an agreement giving it a share lower than that received in the prior agreement (*ASX-11(c)*, Tr. 26-27; *ASX-6*, p. 5), and in negotiations it did not "reduce [its] requirements down to 12 or 13%" because it felt the F.M.C. would dismiss any protest by Ivaran where "the margin between what the other lines were prepared to agree to and what our requirements were, were . . . insignificant" (*ASX-11(c)*, MM-1, p. 77). The factors Ivaran weighed in reaching its ultimate position in the May negotiations are perhaps best summarized in Mr. Schmeltzer's report on those negotiations to his superiors. That contemporaneous report reflects Ivaran's attitude at that time, uncolored by an expectation that there would be future litigation:

Our opening offer was the same as we had proposed at the last meeting on March 19th, that is, starting off with the 16% requirement. Lloyd Brasileiro insisted on a 9% minimum, Montemar insisted their share be 1% and Hopal, their share be 1%. Most of the discussions centered around Lloyd Brasileiro and ourselves and neither line seemed disposed to reduce their requirements.

* * *

At the caucus meeting the following morning Lloyd Brasileiro was not going to alter their position at all and Ivaran, in order to show some good faith and intention of trying to negotiate, agreed to make a final proposal as follows. The first year 15.5%, the second year 15%, third year 14.5%. This proposal fell upon deaf ears. We felt that if we reduced our requirements down to 12 or 13% and still did not sign the pooling agreement and continued our protest in the FMC that the margin between what the other lines were prepared to agree to and what our requirements were, were so small the FMC would say the difference was so insignificant that they would dismiss our protest.

* * *

Bottachi's representative indicated that now that we were all in the same group he hoped that we would work together and no individual line, and particularly directed the remarks at Ivaran, would protest this newly signed agreement. We indicated that although we reserved our legal rights at this time we had no intention of protesting and would sign the agreement as indicated above.

* * *

In conclusion I believe that the signing of this Pooling Agreement was not only proper but also a practical decision for Ivaran. . . . Also, during our meetings it was indicated that if we could not reach some satisfactory arrangement in the Argentina Northbound pool that certain measures might be taken to restrict Ivaran southbound carryings which of course could be very serious for us. The line is virtually living on the Southbound carryings to Argentina. I think we had reached a point where if we did not conclude some sort of an agreement with Argentina that both the governments of Argentina and Brazil would institute retaliatory measures against Ivaran and although we could go to court, this could be an expensive process. Ivaran has spent over \$200,000 in legal fees so far. There is also the possibility that after operating under this pooling agreement for a year that Lloyd Brasileiro, Montemar and Hopal will not lift their respective shares and it is entirely possible that we can then file a complaint with the FMC and request revisions in our pool shares. Also one of the most important factors in concluding this pooling agreement is that Ivaran will be able to continue in this trade and if the trade continues as strong, it will put Ivaran in a sound financial position. [ASX-11(c), MM-1, pp. 76-78.]

56. *Ivaran's negotiating position—Holter-Sorensen deposition.* (a) At the deposition of Mr. Holter-Sorensen, taken in New York on April 8-9, 1981, he provided the following insights on Ivaran's view of what "commercial" negotiations under the pool would entail:

(b) As an initial matter, Ivaran believes that commercial negotiations should be based solely on historic participation (ASX-11(c), Tr. 30). Based on previous carryings, Ivaran feels it is entitled to the full non-national-flag 20% portion (*id.*, Tr. 95) and believes there should be no restrictions on its ability to carry cargo in the trade (*id.*, Tr. 95-96).

(c) New entrants, or carriers without substantial prior participation in the trade would be assigned a one percent share (*id.*, Tr. 101) without commercial negotiation or consideration of other factors. Mr. Holter-Sorensen conceded that such a carrier would be limited to a token percentage (*id.*, Tr. 117). A share of 1% in the East Coast pool would be equal to approximately 1800 tons, based on 1979 figures of 180,000 tons for the trade (*id.*, Tr. 101). It would not be economical to call at an Argentine port for 1800 tons (*id.*). Mr. Holter-Sorensen agrees that a 1% share is essentially an illusory pool share (*id.*, Tr. 102). Unless a carrier could negotiate a "big" share in the Brazil trade²⁵ (*id.*) or

²⁵ Ivaran is also a participant in the Brazil/U.S. pools under a 5050 bilateral agreement (*id.*, Tr. 102, 104, 106).

carries significant cargo southbound (*id.*, Tr. 96), it could not expect to survive with such a share (*id.*, Tr. 102).

(d) In order to increase its pool share above that initially allocated to a line, Ivaran believes the carrier must first load in excess of its share during the pool period and then seek to renegotiate (*id.*, Tr. 115). In negotiations, however, a carrier cannot ask for any share larger than that portion of the pool cargo which it has already transported during the previous pool period (*id.*, Tr. 118), even though competition in the Argentine trade is only on a service basis (*id.*, Tr. 97).²⁶

(e) Mr. Holter-Sorensen recognizes that this procedure would require that a line become an overcarrier in the pool, and pay continuing overcarriage penalties in order to be permitted to renegotiate its pool share (*id.*, Tr. 115, 117). He further acknowledged that if all third-flag lines sought to overcarry in order to improve their respective pool positions, the carryings of the third-flags would quickly exceed the entire 20% share set aside for them (*id.*), entailing both significant costs in providing service (*id.*) and substantial overcarriage penalties (*id.*, Tr. 115, 117). However, in Ivaran's view "That's the only way to do it" (*id.*, Tr. 115, 116).

(f) For a carrier seeking to establish itself, the upshot is that the line can expect several years of significant costs of service and penalties to break into the trade (*id.*, Tr. 117); Mr. Holter-Sorensen admits that even the most efficient line will suffer losses during the first few years (*id.*, Tr. 120). Further, Mr. Holter-Sorensen concedes that the negotiation of a fixed share in the pool provides only the *opportunity* to carry cargo (*id.*, Tr. 98). Thus, despite the fact that a carrier commits itself to provide a minimum number of sailings under the pool (*id.*), the cargo will go to the carrier that has a ship on berth (*id.*, Tr. 97), but the commitment must be met whether cargo is available or not (*id.*, Tr. 98).

57. *Gulf Principals' Meeting, May 22-23, 1980.* (a) The further Gulf Pool Principals' Meeting was held in Buenos Aires on May 22-23, 1980. As with the prior Gulf meeting, the Principals' Meeting was recorded, and a transcription thereof is *GSX-9A* (Spanish original) and *9B* (English translation). No recordings or transcripts exist of the separate third-flag caucuses, although the results thereof were reported at the Principals' Meeting (*GSX-9B*, pp. 9, 51). (*GS-46.*)

(b) Unlike the February meeting, TMM was represented by its principals this time and evidenced a more flexible position. TMM initially requested 7%, and later proposed a sliding scale whereby it would receive 4.3% in 1980, 5.2% in 1981 and 6.2% in 1982 (*GSX-9B*, pp. 9, 51). Montemar stated that it did not seek a higher share than the 1.9% agreed to in February (*id.*, p. 9); however, Navimex stated that it

²⁶ Under the IAFC conference rate system, there is no rate competition (*id.*).

wanted 50% of the entire share allocated to the two Mexican-flag lines, and in any event not less than 4% (*id.*). No agreement was reached (*id.*, p. 51).

(c) Considerable discussion also took place regarding TMM's statement in its protest to the Commission that TMM would accept the 4.3% share on the conditions that (1) TMM's and Navimex's minimum sailing requirements be proportional to their shares, and that there be an adjustment of shares between those lines at the end of the pool period in proportion to any sailing deficiency by either, and (2) that all third-flag shares be renegotiated annually, subject to F.M.C. approval (*GSX-9B*, p. 13 *et seq.*; *GS-33*). The lines expressed a willingness to agree to TMM's first condition, but rejected the concept of annual renegotiation of shares (*Ex. 7*, ¶37, p. 18 and *DGX-8*) because the lines feared such would just result in more disagreements and litigation (*Tr. 114*).

(d) The Gulf meeting ended without any new agreement being reached.

58. *Navimex withdrawal*. On June 30, 1980, Navimex submitted its resignation from the Gulf Agreement and from the IAFC (*GS-51*; *GSX-10*, p. 2). Pursuant to the terms of both Agreement No. 10382 as amended (*GSX-1A*, Art. 10b, p. 20) and the Conference Agreement, this resignation was effective July 30, 1980 (*GS-51*). The F.M.C. was informed of this resignation by IAFC telex dated July 17, 1980 (*GSX-11A*).

59. *TMM request for further Gulf principals' meeting*. In early September 1980, TMM requested the IAFC to include the Gulf pool on the agenda for the September 21-24, 1980, annual Conference Principals' Meeting being held in New York to discuss the question of "Amendment of the Agreement due withdrawal of Navimex, [and] Allocation of Navimex quota to TMM" (*GS-54*; *GSX-13A and B*, pp. 2, 4).

60. *Gulf Principals' Meeting, September 22, 23, 1980*. (a) A further Gulf Pool Principals' Meeting, including TMM, was held in New York on September 22, 1980 (*GS-58*). As with the prior Principals' Meeting, this meeting was taped and a transcript thereof is *GSX-14A* (Spanish original) and *14B* (English translation). There were no separate third-flag caucuses during this meeting (*GS-58*).

(b) This meeting resulted in a commercial division of the thirdflag shares among the third-flag lines (*Ex. 7*, ¶42, pp. 19-20; *Tr. 78*; *Ex. 11*, pp. 3, 5). Immediately prior to the meeting Commandante Reis Vianna of Nacional informed Captain Dandois of ELMA that the third-flag lines had reached a mutually acceptable agreement whereby Montemar and REL maintained the same shares previously accepted by them and Lloyd, Nacional and TMM would divide the 18.1% balance on the basis of 12.1% for the two Brazilian lines and 6.0% for TMM (*Tr. 301*; *GSX-14B*, p. 3). Reis Vianna of Nacional requested ELMA to present

this proposal at the Principals' Meeting (*Tr.* 307). After a brief preliminary caucus with Bottacchi and Delta (*Tr.* 301, 121-22, 205), ELMA proposed the agreed upon division (*GSX-14B*, p. 3), which was accepted by all the third-flag lines (*id.*, p. 5). TMM stated that it would withdraw its Petition for Review in the court of Appeals and support approval of the amended Agreement (*id.*, p. 6; *GSX-15*).

(c) Amendment No. 2 to Agreement No. 10382 (*GSX-1B*) was executed in New York the next day with the agreed upon shares and a minimum sailing requirement for TMM equal to one-half that previously assigned to the two Brazilian lines together. This Amendment was filed with the Commission on September 26, 1980, and approved *pendente lite* by Order December 16, 1980 (*GS-43*).

K. AGREEMENT NOS. 10382, AS AMENDED, AND 10386, AS AMENDED.

61. *General provisions—pool shares, etc.* (a) Agreement No. 10382, as amended, (Gulf) (*GSX-1A*, *GSX-1C* and *GSX-1D*) covers revenue earned from all cargo (except that specified in Article 3(a)) carried by the signatories from the La Plata/Rosario port range in Argentina to discharge ports on the Gulf coast of the United States, Brownsville, Texas, to Key West, Florida, inclusive (*GSX-1A*, p. 2). Agreement No. 10386, as amended, (*ASX-1(a)* and *ASX-1(c)*) covers revenue earned from all cargo (except that specified in Article 3(a)) carried by the signatories from the La Plata/Rosario port range in Argentina to discharge at ports on the Atlantic Coast of the United States, Key West, Florida, to Portland, Maine, inclusive (Article 1(a); *ASX-1(a)*, p. 2). Both agreements are open to membership for new liner operators, both national-flag and third-flag, upon negotiation of pool shares within the general framework of at least 40 percent for vessels of each reciprocal national-flag and no more than 20 percent for all third-flag carriers (Article 2(b), (c) and (d)) (*Ex.* 7, p. 33) (see also PF's 37 and 40). Each carrier except for REL has a minimum sailing obligation (Article 5(a)) (*GSX-1D*, p. 2; *ASX-1(c)*, p. 2) and a specific percentage share of the pool revenue (Article 2(b)) (*GSX-1D*, p. 1; *ASX-1(c)*, p. 1); however, each party "exercises its sole discretion in the manning, navigation and operation of its vessels" (Article 12(a); *GSX-1A*, p. 22; *ASX-1(a)*, p. 22). The agreements have administrative provisions common to similar such agreements (see, e.g., Articles 9, 13, 16, etc.), and provide on the signature page that the lines "executed [it] voluntarily, of their own free will" (*GSX-1A*, p. 31 and *GSX-1D*, p. 2; *ASX-1(a)*, p. 31 and *ASX-1(c)*, p. 1). The shares and minimum sailings of the lines are set forth below:

(b) *U.S. Atlantic*, (*ASX-1(c)*, p. 1; *ASX-1(a)*, p. 8).

FEDERAL MARITIME COMMISSION

National Flag	No less than 80%
Argentine	40%
U.S.A.	40%
Non-National Flag	No more than 20%

	1980/1981	1982	1983
Brazilian (Lloyd Bras.)	8.0	8.5	9.0
Ivaran	10.5	9.8	9.0
Holland Pan Am	0.75	0.85	1.0
Montemar	0.75	0.85	1.0

The minimum number of sailings for each party are:

National Flag	48
Argentine	24
U.S.A.	24
Non-National Flag	20
Lloyd Brasileiro	8
Ivaran	8
Montemar	2
Holland Pan Am	2

(c) *U.S. Gulf*, (GSX-1D, pp. 1-2).

National Flag	No less than 80%
Argentina	40%
U.S.A.	40%
Non-National Flag	No more than 20%
Lloyd Bras./Nacional	12.10
Montemar	1.9
TMM	6.0

The minimum number of sailings for each party are:

National Flag:	32
Argentina	16
U.S.A.	16
Non-National Flag:	11
Lloyd Bras./Nacional	6
Montemar	2
TMM	3

62. *Pooling provisions—cargo and revenue exclusions.*²⁷ Specifically excluded from revenue pooling are the following: operated liquid bulk

²⁷ The summary discussion of the revenue pooling provisions which follows is taken from the detailed explanations of those provisions in the written testimony of Mr. Crowley (*Ex. 19*, pp. 1012) and Mr. Wendt (*Ex. 7*, pp. 29-32).

cargo and dry bulk cargo (with certain exceptions), explosives, live-stock, mail, corpses, and exhibition cargoes (*GSX-IA*, p. 6; *ASX-1(a)*, p. 6). Before any carrier revenue is pooled, there is also excluded from each carrier's earnings all "surcharges, container rental, taxes levied against cargo and port differential" charges (Article 4(c)). These exclusions particularly the bunker surcharge, which in the Atlantic trade presently equals 20.5% of the ocean freight rate (*Ex. 19*, p. 11), represent a substantial part of the total charges paid to the carrier. In addition, each carrier retains a "carrying compensation" which is not contributed to the pool and which is intended to cover cargo handling and other expenses. The carrying compensation is equal to 45% of the average revenue per revenue ton of all parties during the pool period (Article 7(b)(3) and (5)).²⁸ (*Ex. 19* (Crowley), p. 11; *Ex. 7* (Wendt), p. 32).

63. *Pooling provisions—sailing deficiency forfeiture.* The pooling provisions are designed to encourage the carriers to adequately accommodate their shares and, in providing for flexibility in serving the needs of the trade, to not unduly penalize a line which overcarries its share. On the other hand, the pooling provisions severely penalize a line which does not meet its assumed service obligations to the trade (*Ex. 19*, p. 10). To insure that no carrier gets a "free ride" by not competing for its share, the pool has forfeiture provisions. If a party fails to make its minimum sailings during the "pool period" (*i.e.*, the calendar year, except for the first pool period which runs from October 1, 1980, to December 31, 1981), that party's share is reduced in the proportion that the number of unmade sailings bears to its minimum sailing obligation, and the part of its share thus reduced is redistributed to those carriers within its flag group meeting or exceeding their sailing obligations. It is important to note that the share of a line failing to meet its sailing obligation is redistributed only to the other carriers in its flag group, *i.e.*, to the other national or non-national flags, as the case may be (Article 6(a)). For example, in the Atlantic agreement if Montemar fails to make any sailings, its 1 percent share will be distributed among Hopal, Ivaran and Lloyd Brasileiro (*Ex. 19* (Crowley), pp. 11-12; *Ex. 7* (Wendt), p. 30).

64. *Pooling provisions—undercarriage forfeiture.* In addition to the minimum sailings obligation, a carrier which fails to earn revenues to the extent of 85% of its pool share forfeits all overcarriage due it corresponding to the difference between its actual revenue performance and 85% of its pool share (Article 7(c) VIII). The undercarriage forfeiture is distributed among the carriers whose pool contribution equals or exceeds 85% of their share, in proportion to their respective shares

²⁸ The carrying compensation is 10% for F.I.O., F.I.O.S. and F.I.O.S.T. cargo rated at less than \$45 per revenue ton (Atlantic) and \$35 per revenue ton (Gulf) (*ASX-1(a)*, p. 12; *GSX-IA*, p. 13).

(Article 7(c) IX). This provision promotes competition in that it encourages each line to strive to carry at least 85% of its pool share (*Ex. 7 (Wendt)*, p. 31) (see also *Ex. 19 (Crowley)*, p. 12). Both forfeiture provisions strongly encourage carriers to meet their service obligations to the trade, to offer a competitive service, to penalize them when they do not, and to protect those carriers who meet their service obligations (*Ex. 19 (Crowley)*, p. 12).

65. *Pooling provisions—penalty payment only 50%*. If a penalty is assessed because a party's contribution (net revenue less carrying compensation) has exceeded its pool share, the penalty is only 50% of that part of the party's pool contribution in excess of its share; the overcarrier retains the other 50% (Article 7(c) VII) (*Ex. 19, (Crowley)*, p. 11). The 50% penalty paid is credited to the other parties proportionately to their negative contributions (subject to the minimum sailing and undercarriage provisions (*Ex. 7 (Wendt)*, p. 32).

L. IMPACT OF AGREEMENT NO. 10386 ON IVARAN.

66. *Ivaran Offered No Case in Opposition*. (a) Ivaran did not present any witnesses in opposition to Agreement No. 10386 and never intended to do so.²⁹ It offered no affirmative evidence in the proceeding, and has consistently taken the position in papers it has filed that "Ivaran is not a protestant nor has Ivaran claimed it will be forced out of the trade" (e.g., Reply of A/S Ivarans Rederi to Motions to Compel, served October 3, 1980, p. 8). When Moore McCormack and ELMA sought to take the oral deposition of Mr. Holter-Sorensen, Ivaran considered the deposition upon written interrogatories as submitted by the Bureau to be sufficient and opposed the oral deposition thereby requiring Moore McCormack and ELMA to agree in advance to bear the cost.

(b) When Moore McCormack sought information in discovery to test any allegations of economic harm to Ivaran, Ivaran stipulated that economic injury was not in issue (Transcript of Prehearing Conference, February 19, 1981, pp. 50-51):³⁰

MR. FORT: * * * And then we've asked for some other financial information.

We have conditioned our request for this information on page 15, and I think the condition explains why we've asked for it.

We've conditioned our request upon the condition that if Ivaran contends or intends to contend or present evidence that

²⁹ Its discovery responses indicated that it would present no witnesses (see, e.g., Moore McCormack's Motion to Terminate Proceeding, etc., dated October 20, 1980, p. 7).

³⁰ See Moore McCormack letter dated 2/27/81, p. 2, requesting corrections of the transcript, and the ruling served March 18, 1981, granting the request.

approval of agreement number 10386 will or may cause any curtailment of its service to the trade or jeopardize its ability to continue serving the trade, or would adversely affect its profitability, or economic position in the trade, then we would like the information.

The purpose for the financial information is to meet such a contention. Ivaran had not made that contention yet, and if they're not going to make it, then they don't have to produce it. . . . And I think it's essential to our case if Ivaran intends to make such a contention that we have it.

MR. MADDY: Your Honor, we don't intend to make that contention in that case.³¹

Finally, the Commission's April 3, 1981, discovery order stated: "Moreover, Ivarans points out that it has not claimed that the present Agreement will force it out of the trade or have an adverse impact upon its profitability." (Order on Discovery served by the Commission on April 3, 1981, p. 5.)

67. *The Pooling provisions will prevent any actual unfairness to Ivaran.* (a) As noted (PF 63, 64, and 65), the pooling provisions of Agreement No. 10386 are designed to penalize a line which does not meet its assumed service obligations to the trade, and to cushion the impact on an overcarrier. These provisions, as the actual pool calculation for October December 1980 shows, will prevent unfairness to Ivaran (*Ex. 19* (Crowley), Att. D). First, because Lloyd and Montemar failed to make their minimum sailings during this period, their shares were reduced and redistributed to Ivaran and Hopal, giving Ivaran a 14.933% share rather than 10.5%. Second, of its total pool earnings of \$629,194 Ivaran deducted and retained \$228,059 in carrying compensation. Third, because Lloyd and Hopal did not carry 85% of their share, most of their undercarriage was forfeited to Ivaran, Moore McCormack, and ELMA/Bottacchi (see, *Ex. 19*, Att. D, part D Forfeiture Calculation). The net effect of these adjustments was an overcarriage penalty payment by Ivaran of \$21,835 and by the Argentine lines of \$486 (*Ex. 19*, Att. D, (Column 33)). Comparing Ivaran's penalty with its gross revenue (including surcharges, etc., which are not pooled), the pool penalty cost Ivaran less than three cents on the dollar of gross revenue (*Ex. 19* (Crowley), p. 13).

(b) Another way of looking at the impact of the pool on Ivaran is to compare its average revenue per revenue ton before pooling with its average revenue per revenue ton after pooling. Ivaran carried 4,544 revenue tons and earned \$629,194, for an average of \$138.47 per revenue ton (*not* including surcharges, etc.). It should be noted that this far

³¹ See also, Moore McCormack's Motion to Compel A/S Ivarans Rederi to Answer Discovery, served September 22, 1980, pp. 14-15.

exceeded the average revenue per revenue ton of all carriers which was \$111.53 (*Ex. 19*, Attachment D (Column 9)), indicating that Ivaran has been carrying mostly very high-rated cargo. After deducting Ivaran's pool payment of \$21,835 from its pool revenue, Ivaran earned \$607,359 for carrying 4,544 revenue tons, or \$133.66 per revenue ton (*Ex. 19*, p. 13). The pool penalty reduced its average revenue per ton by \$4.80. However, it still earns in excess of \$20 per ton more than the average of all lines. The actual experience for the first three months of the pool shows it has neither been unfair to Ivaran nor unduly penalized it (*Ex. 19* (Crowley), pp. 12-13).

M. IMPACT OF GULF AGREEMENT NO. 10382 ON THIRD-FLAG CARRIERS.

68. *The maximum 20% third-flag share exceeds past participation.* The Commission determined in *Docket Nos. 78-51 and 78-52* that the maximum 20% share allocated to the third-flag lines under the prior Gulf Agreement No. 10346 was reasonable in view of the past carryings of the national-flag carriers in the Gulf trade, and in fact represented a concession of a portion of the past national-flag share to the third-flag lines (*supra*, 511). This finding is supported by the IAFC Conference statistics for the two and a half years from July 1, 1976, through December 31, 1979, which show that the national flag lines accounted for approximately 89% of total cargo tonnage and freight revenues during that period (*SX-37A*, p. 1; *Ex. 7A*, *DGX-12*, p. 1). Moreover, during the 19 months under Agreement No. 10346 from December 1, 1978, to June 30, 1980, including almost one year of "open competition" thereunder, the national-flag lines accounted for 87.1% of cargo tonnage and 91.0% of cargo revenues (*GSX-18H*, p. 2; *Ex. 7A*, *DGX-12*, p. 3). In the six months after Commission approval of Agreement No. 10382, as originally amended, national-flag carriage decreased to 77.3% of cargo tonnage and 88.4% of cargo revenues (*id.*), notwithstanding TMM's refusal to join the pool during that period. The maximum 20% third-flag share under Agreement No. 10382 as amended therefore continues to exceed the historical aggregate third-flag share in the Gulf trade.

69. *The individual third-flag shares exceed past participation.* Moreover, the individual third-flag shares allocation under Agreement No. 10382, as amended, exceed the historical participation of the respective lines. Lloyd and Nacional did not even participate in the trade during the two and a half years from July 1, 1976, to December 31, 1978 (*SX-37A*, p. 1), while TMM suspended its brief participation in the trade in January 1977 (*Ex. 4*, Tr. 1086). Montemar and REL had only minor participation during this period with 2,836 and 33 freight tons respectively (*SX-37A*, p. 1). The Brazilian lines, Lloyd and Nacional, have established a capability to compete and serve the trade during the

subsequent period in which they have participated, however. Thus, in the seven months from December 1, 1978, to June 30, 1979, Lloyd and Nacional made a total of four sailings carrying 8,936 revenue tons or 14.7% of total pool tonnage during that period (*GSX18H*, p. 1; *GSX-18A*, p. 1), and in the last six months of 1980, Lloyd and Nacional made three sailings and carried 8,150 revenue tons or 23% of total pool cargo tonnage (*id.*). Similarly, TMM has shown an ability to compete and attract cargo, although to a somewhat lesser degree. Thus, in the six months from January 1, 1980, to June 30, 1980, TMM made four sailings and carried 1,415 revenue tons, constituting 4.8% of total cargo tonnage during the period (*GSX-18H*, pp. 1, 2).

70. *The third-flag shares negotiated under Agreement No. 10382 are not unjustly discriminatory or unfair.* Although the allocated third-flag shares under Agreement No. 10382 as amended exceed historical participations, they are not unjustly discriminatory or unfair as between the carriers, given the willingness of the national-flag lines to cede a portion of their past share and the reasonableness of the maximum 20% third-flag share. REL's share is fair in view of the position it took at the February 1980 Gulf Principals' meeting (*GSX5B*, pp. 11, 14). Similarly, the 1.9% allocated Montemar is reasonable and is what Montemar agreed to accept. The 18.1% balance of the third-flag share is divided among the three remaining lines on essentially an equal basis, with Lloyd and Nacional having a combined 12.1% or 6.05% each under their separately filed Association Agreement (*GSX5B*, p. 40), and TMM having 6.0% (*GSX-1D*, p. 1). Each of these three lines also has similar minimum sailing requirements (*id.*, p. 2).

71. *Basis for third-flag shares.* The basis for the third-flag shares was commercial negotiation among the third-flag lines. There is no evidence of any governmental influence upon the specific size of the shares. Indeed, Captain Dandois testified that his instructions were to let the third-flag carriers reach agreement, if possible, and to accept any distribution the third-flags independently reached (*Tr.* 331). Similarly, the evidence indicates that the other national-flag lines had no interest in the actual division of shares (*Ex.* 7, ¶31, at p. 15; *Tr.* 331, 408). While the third-flag lines did not reach agreement at either the February or May 1980 Gulf Principals' Meetings, they did reach a mutually acceptable agreement at the September 1980 Meeting in New York, embodied in Agreement No. 10382-2. Both the Brazilian lines and TMM have stated that these negotiations were commercial in nature (*Ex.* 11, pp. 3, 9; *Tr.* 8).

72. *Competitive impact of approval of the fixed shares under Agreement No. 10382.* Approval of the fixed third-flag shares negotiated under Agreement No. 10382, as amended, should promote third-flag participation and competition to the national-flag lines. At least in the Gulf trade, "open competition" did not result in increased third-flag partici-

pation as hoped by the Commission in *Docket No. 78-52*. Indeed, during the almost eight months from the date of the Commission's Order in *Docket Nos. 78-51 and 78-52* and the February 12-13, 1980, Gulf Principals' Meeting in Buenos Aires, only one third-flag carrier—TMM—made any sailings in the Gulf trade, and TMM carried a total of only 23 tons of pool cargo (*Ex. 7, ¶49, pp. 24-25*). There is no evidence that this lack of participation was the result of any action by either the Government of Argentina or any of the national-flag lines (cf. *Ex. 7, ¶50, p. 25*). Mr. Ornellas, however, testified that the Brazilian lines consider their minimum sailing requirements as commitments (*Ex. 11, p. 7*), and that Lloyd has a goal of fulfilling its shares in all pools in which it participates (*Tr. 167-68*). The Brazilian lines, with a combined six minimum annual sailings under Agreement No. 10382 as amended, in fact did make a combined three sailings in the last months of 1980 (*GSX-18H, p. 1*).

N. AGREEMENT NOS. 10386 AND 10382 ENTRY AND WITHDRAWAL.

73. *Agreements—open entry.* Agreement No. 10382, as amended, includes all IAFC members who have expressed a present interest and intent in serving the Argentina/U.S. Gulf trade (*Ex. 7, ¶65, p. 33; Tr. 134*). Both northbound agreements provide for the prompt entry of any additional national and third-flag line participating in the scope of and requesting entry into the Agreements (*GSX-1A; Art. 2(c), (d), (f), and (g), at pp. 4-5; ASX-1(a), pp. 3-4*). There is no established procedure for a new line seeking entry (*Tr. 333-334*), but such new line could contact either the national-flag lines (*Tr. 133-134*) or the IAFC-B Executive Administrator (*Tr. 335*). In either case, the line would be referred to the third-flag lines and would have to negotiate a mutually acceptable share with those lines (*Ex. 77, ¶65, p. 33; Tr. 134, 333*). There is no third-flag carrier who desired to enter the trade during the period January 1, 1978, through December 30, 1980, who was unable to do so (*Ex. 7, ¶66, p. 33; Tr. 134*).

74. *Carrier withdrawals.* (a) There were two carriers who withdrew from the Argentina/U.S. Gulf trade during the period January 1, 1978, to December 31, 1980—Oivind Lorentzen Ltd. or Nopal Line ("Nopal") which resigned from the IAFC and northbound Argentina/U.S. Gulf and Brazil/U.S. Gulf pools on September 25, 1979 (*GS-19; GSX-20, p. 2*), and Navimex which resigned from the IAFC and the Argentina/U.S. Gulf pool on June 30, 1980 (*GS-51; GSX-10, p. 2*). In neither instance is there any evidence that the Argentina/U.S. Gulf pools or the share of the two lines thereunder was a significant factor in such withdrawals, and indeed the evidence suggests that other fac-

tors not fully apparent on the record were responsible for such withdrawals.

(b) *Nopal*. Under Agreement No. 10346, Nopal, which had carried only 4.8% of cargo tonnage and 7.8% of freight revenues in the trade during the period July 1, 1976–December 31, 1978 (*SX-37A*, p. 1; *Ex. 7A*, *DGX-12*, p. 1), was allocated a considerably larger pool revenue share of 11.1% in 1978 declining to 10.05% in 1980 (*GSX-2A*, Art. 2, p. 3). Nopal accepted that share, but during the period under Agreement No. 10346 from December 1, 1978–July 22, 1979, carried only 1.6% of total cargo tonnage for 2.3% of total pool revenue (*GSX-18H*, p. 2; *Ex. 7A*, *DGX-12*, p. 3). Moreover, at the time Nopal withdrew, the Commission had decreed “open competition” within the third-flag share under Agreement No. 10346, and was considering imposing “open competition” in the northbound Brazil/U.S. Gulf pool F.M.C. No. 10320 as well (*GS-17*). There was therefore sufficient cargo available to Nopal under Agreement No. 10346 at the time of its withdrawal had it wished or been able to stay in the trade. However, Nopal apparently had other difficulties. In late 1978 it had entered into a management agreement with Ivaran, F.M.C. No. 10352 (*Ex. 9A*), whereby Ivaran had full management authority of Nopal’s East Coast of South America/U.S. Gulf trade for a limited trial period. This agreement was not renewed or extended. However, in May 1979, during the evidentiary hearings in *Docket Nos. 78-51 and 78-52*, Nopal entered into a proposed management agreement with TMM, F.M.C. No. 10370 (*Ex. 10*), whereby TMM essentially would operate in the trade under Nopal’s name and using Oivind Lorentzen, Inc., as its general agent in the U.S. Under this proposed agreement, TMM would have been responsible for all expenses, including claims, and would have received 97.5% of gross pool revenue and 98.75% of nonpool revenue. The Commission’s imposition of “open competition” in its June 30, 1980, Order destroyed the premises upon which this agreement was reached (*Ex. 12*), and the agreement subsequently was withdrawn (*GSX-3*, ¶2, pp. 2, 4). Nopal thereafter withdrew from the trade without making any further sailings (*GS-19*; *GSX-18H*, p. 1).

(c) *Navimex*. Under Agreement No. 10346 Navimex accepted a 1% revenue share (*GSX-2A*, Art. 2, p. 3) which was closely in line with its carryings of 0.73% of total freight tons and 1.09% of freight revenues during the preceding two years from July 1, 1976, to June 30, 1978, (*Ex. 13*, note 4). Navimex was a slight overcarrier during the initial pool period under Agreement No. 10346 from December 1, 1978, to July 22, 1979, with 1.19% of total cargo tonnage and a 1.45% pool revenue contribution (*GSX-18H*, p. 2; *Ex. 7A*, *GSX-12*, p. 3), but failed to participate during the “open competition” period from July 23, 1979, to December 31, 1979 (*id.*), apparently due to internal problems having nothing to do with the pool (*GSX-5B*, p. 28-29). Notwithstanding Navi-

mex's lack of participation during the previous seven months, but giving recognition to Navimex's past participation in the trade and its stated intent to put two vessels into the trade, the lines at the February 1980 Gulf Principals' meeting offered Navimex a 1.9% share (*GSX-5B*, p. 33), which was virtually identical to the 1.96% revenue share which Navimex had carried during the period of its greatest participation in the trade from July 1, 1977, to July 22, 1979 (see *Ex. 13*). In addition, of course, Navimex was free to compete for the substantial non-pool cargoes available from Brazil (see *FF 21, supra*). Under these circumstances, it cannot be concluded that Navimex's share under Agreement No. 10382 was a factor in its withdrawal from the trade and subsequent bankruptcy. Rather it appears that such were the results of the internal difficulties referenced by Navimex's agent at the February and May 1980 Gulf Principals' Meetings (*GSX-5B*, pp. 9, 28-29; *GSX-9B*, p. 12).

(d) *Netumar*. *Netumar*, a Brazilian carrier, has suspended its participation in the Argentine/U.S. East Coast trade during the period January 1, 1978, through 1980. Should it resume operations in the trade, its participation in any pooling agreements then in force will be derived from the Brazilian-flag quota (*Stip. 2*).

O. SOUTHBOUND NATIONAL-FLAG EQUAL ACCESS POOLS— AGREEMENT NOS. 10388 (ATLANTIC) AND 10389 (GULF).

75. *Agreement Nos. 10388 and 10389—purpose and effect*. Moore McCormack and Delta have been parties to equal access and pooling agreements covering the southbound trades since 1973. The first pooling agreements, Agreement Nos. 10038 (Atlantic) and 10039 (Gulf), were entered into in 1973 after the intervention of the Maritime Administration and State Department with Argentine Authorities to resolve problems occasioned by Argentine preference laws (*Ex. 19*, p. 2; *GS-2*). Those agreements were superseded by Agreement Nos. 10345 (Gulf) and 10350 (Atlantic) (*GS-9*; *Ex. 4* (Crowley), *MM-2*, p. 11). Current Agreement Nos. 10388 (Atlantic) and 10389 (Gulf) were negotiated contemporaneously with the respective northbound agreements (*Ex. 19*, p. 7; *Ex. 7*, p. 9), and were filed with the F.M.C. in late April 1980 (*Ex. 19*, pp. 7-8; *GS-40*). These agreements between Moore McCormack (and Sea-Land), Delta, ELMA and Bottacchi form the basis for the U.S. flag carriers' equal access to Argentine government-controlled cargo moving in the southbound trades (*Ex. 19*, p. 7). On January 29, 1981, the Commission found:

The Southbound Agreements provide the means for increased shipper service with respect to government controlled cargoes in these trades by permitting United States and Argentine-flag carriers equal access to the otherwise restricted cargoes. Moreover, these agreements facilitate the free-flow of the United States foreign commerce with Argentina. In the ab-

sence of these agreements, Argentine import cargoes would be subject to the 30-day prewaiver requirements of Argentine Resolution 507 (footnote omitted). [*Order Denying Motion to Terminate, Vacating the Stay of Proceedings, and Approval of Agreement Nos. 10388 and 10389*, p. 6.]

The Commission concluded that these agreements "meet the standards for section 15 approval" (*id.*, p. 6).

76. *The southbound and northbound trades and agreements are interlinked.* (a) The Argentine Government has repeatedly made known its position that the "southbound trade, and the availability of Argentine imports for carriage by non-Argentine-flag carriers, was tied to the Northbound trade . . ." (19 S.R.R. 510). This was made clear to former Assistant Secretary Blackwell when he negotiated the Memorandum of Understanding. (*SX-2*, pp. 27, 32, 33).

(b) The Government of Argentina has advised the national-flag carriers that in order to achieve a complete regulation of the Argentina/U.S. traffic it considers all four agreements as an "indivisible whole" (*SX-14A*, p. 2; *SX-14B*, p. 2). The Government's position was expressed in meetings with Mr. Nemirow, (*SX-3A*, p. 69) and is also evident from SEIM's communication of December 26, 1979, to Section B of the IAFC (*SX-8*). Its advice to the F.M.C. of the short-term extensions of the predecessor agreements pending Commission action on the new agreements (*SX-12A* and *SX-18*) and its recent temporary suspension of approval of all agreements pending a Commission decision in the proceeding (*Ex. 19*, p. 8; *SX-31*) further confirm this fact. As Reginald A. Bourdon, Director of the Office of International Activities of the Maritime Administration, stated:

SEIM has stated it wants to consider the four northbound and southbound Argentine/U.S. Atlantic and Gulf Port's pooling agreements at the same time. This latter is consistent with Argentina's previous position that the northbound and southbound trades are inextricably interlinked. [*SX-16*, p. 3.]

77. *Dislocation of the southbound trade.* It was Secretary Blackwell's opinion that if the northbound pools were disapproved "there is a strong likelihood" that the Argentine government would take action to dislocate the southbound trade, thereby depriving U.S. carriers of Argentine government-controlled cargo (*SX-2*, pp. 62-63). The U.S. State Department confirmed his testimony:

On December 22, 1976, the Government of Argentina enacted Resolution No. 507 . . . [which] provided that Argentine authorities would then determine the vessel upon which the cargo would move, giving first refusal to the Argentine national line, ELMA, thereby implementing 100 percent southbound Argentine cargo preference.

* * *

Argentine officials have informed their U.S. counterparts and U.S. shipping executives that, absent a commercial pooling agreement in the northbound trade that has been approved by the appropriate authorities of each government, the Argentine government will reinstitute the provisions of Resolution 507. [SX-5, pp. 1-2 (Bank Affidavit).]

Assistant Secretary Nemirow testified:

Q. Mr. Nemirow, if the Federal Maritime Commission were to disapprove the northbound pools or to approve the northbound pool without fixed shares, do you have any opinion as to what the Argentine response to that situation might be?

A. Do I have an opinion?

Q. Or do you have any knowledge as to what the Argentine response might be?

A. I think that Argentina at that point would disapprove the pools. There would be no pools. The conditions in the trade would revert to the kinds of situations which existed prior to the negotiation of the pools, of the government-to-government agreement.

And I think that they would use whatever powers were available to them, and I think it requires a review of their legislation, to assure that third-flag carriers would have a lesser participation in their trade than they have today. [SX-3A, p. 69.]

When the carriers in the Argentina/European trades could not reach pooling agreements acceptable to SEIM, the Argentine Government reserved substantially all inbound cargo in the Argentina/European trades to Argentine-flag vessels, and those trades were apparently thrown into chaos (*Ex. 19*, p. 8).

78. *Disapproval of the agreements will cause serious financial injury to Moore McCormack and Delta.* If the northbound agreements are not approved, Moore McCormack and Delta stand to suffer serious financial injury through termination of the southbound equal access agreements and resulting loss of competitive access to Argentine Government-controlled cargo (*Ex. 7*, ¶15, pp. 7-8; *Ex. 19*, p. 8). Argentina has controlled upwards of 80% of the southbound East Coast trade and 85 to 90% of the southbound Gulf Coast trade in recent years (*Ex. 19*, p. 8; *Ex. 7*, ¶17, p. 9). At present the percentage of controlled cargo on the East Coast has temporarily declined (*Ex. 19*, p. 8). However, Moore McCormack could not continue to operate a viable service at present levels if it were shut out of the Argentine controlled traffic (*Ex.*

19, p. 8).³² Likewise, the Argentina/U.S. Gulf trade constitutes an important part of Delta's overall service and loss of access to Argentine Government-controlled cargo would cause serious financial injury to Delta. (See FF 5(c).)

79. *Serious adverse impact on commerce from disapproval.* The Department of State has reported:

MORE IMPORTANT, A BREAKDOWN OF THE POOLING AGREEMENTS WOULD CAUSE A SEVERE DISRUPTION IN A BILATERAL TRADE IN WHICH THE U.S. ENJOYED ABOUT A \$1.3 BILLION SURPLUS IN 1979. [SX-35, p. 9.]

Mr. Crowley testified "if there is a stalemate between the U.S. and Argentina over these pooling agreements, then in my opinion Argentina will act to reserve substantially all the southbound cargo to the Argentine-flag, as it did in the European trades. That action will tie up all U.S. liner exports to Argentina, last year amounting to over one billion dollars worth of cargo from the East Coast of the United States" (*Ex. 19* (Crowley), p. 9).

80. *Strong potential for unilateral northbound controls.* There is also a strong possibility that the Argentine Government may unilaterally take action affecting the northbound trade. A similar problem arose in the Brazil-to-U.S. Atlantic trade in the later 1960's and early 1970's with precisely that result, and it was this sort of problem that Mr. Blackwell sought to avoid in entering into the Intergovernmental Agreement (*SX-2*, pp. 33-34). There, the Government of Brazil, to implement its national cargo policies, instructed Lloyd to call a meeting of all conference lines to form a pooling agreement for the carriage of coffee and cocoa. When no agreement was reached, the Brazilian carriers, and thereafter the U.S. carriers and other Latin American lines, withdrew from the existing conference. A new conference was then formed and the Brazilian Government decreed that only members of that conference could carry Brazilian export cargo. The other third-flag lines ignored the new conference and the government imposed a northbound loading ban on the third-flag carriers which remained in the old conferences, the ban being effective until they joined the new one. Continuing efforts by the conference carriers to negotiate pools in the northbound trade were unsuccessful, and finally on April 24, 1970, the Brazilian Government issued a resolution requiring that all coffee and cocoa be shipped on Brazilian-flag vessels with a provision for a waiver of up to 50% to U.S.-flag vessels. To implement this resolution, the Brazilian Government thereafter unilaterally allocated the carriage of coffee (*Ex. 4*, MM-

³² The Department of State has estimated that: "IN THE U.S.-ARGENTINE TRAFFIC, ABOUT SEVENTY-FIVE PERCENT OF THE FREIGHT REVENUE IS GENERATED BY SOUTHBOUND CARGO." [SX-35, p. 9.]

2, p. 16) (see also *SX-2*, p. 33). And, as Secretary Nemirow testified, SEIM might very well take unilateral action to control the participation of third-flag carriers in the northbound U.S./Argentine trade (*SX-3A*, pp. 61-62).

81. *Potential for intergovernmental confrontation.* Should Moore McCormack be denied equal access in the southbound trade, or should the Argentine Government take unilateral action to Moore McCormack's detriment in the northbound trade, then Moore McCormack will consider requesting appropriate countervailing relief by the United States Government through invocation of section 19, Merchant Marine Act, 1920, or section 301 of the Trade Act (*Ex. 4, MM-2*, p. 16). As Mr. Blackwell testified, "[T]he fact is that to call those types of very severe remedies into effect is in itself not an indication but a manifestation that there are already conditions very unfavorable to shipping and to commerce existing in the trade" (*SX-2*, p. 70). There is also substantial question whether an appropriate remedy could be devised to deal with the problem, or that these remedies ultimately could or would be invoked to satisfactorily resolve the problem. Should either be pursued to the point of countervailing action, there would be a diplomatic confrontation between the United States and Argentina (*Ex. 4, MM-2*, p. 16). As Mr. Blackwell testified, the Argentine Government has a firm policy with respect to enforced cargo sharing arrangements (*SX-2*, p. 62), and it is extremely difficult to change its views with respect to the U.S./Argentina trade (*id.*, p. 68). It is evident that retaliatory action by the United States against Argentina or its government-owned line would seriously disrupt diplomatic relations, commercial dealings, and trade between the two countries, where matters of national pride and prestige would be at stake (*Ex. 4, MM-2*, p. 16). The real losers from such a contest would be the carriers and the importers and exporters who would be in the middle of, and subject to, the conflicting requirements and obligations imposed by both nations (*Ex. 4, MM-2*, pp. 16-17). In the past there have been instances where, as a result of retaliation, commerce has been seriously disrupted and the American line injured (*SX-2*, pp. 70-71). From Moore McCormack's point of view, there would be no assurance that it would not suffer irreparable damage while these retaliatory remedies were employed. Past experience in such confrontations indicates that the ultimate outcome would likely take the form of a carrier agreement such as the one now before the Commission (*Ex. 4, MM-2*, p. 17).

P. IMPACT OF AGREEMENTS ON SHIPPING PUBLIC.

82. *No long- or short-term adverse impact on the shipping public if agreements are approved.* Affidavits were received into evidence from 24 U.S. importers (19 in the East Coast trade and 5 in the Gulf Coast trade). The shippers were specifically asked by BIE to describe the

short-term and long-term effect of approval of the subject agreements on their business. All 19 of the East Coast importers responded that approval of the agreements with fixed shares would have no impact whatsoever upon their businesses (*Ex. 5*).

In the Gulf trade, importer "A" responded that "it would appear reasonable that a limitation of third-flag carriage to a fixed share by line would be preferable to open competition, which could affect that stability of the trade." Importers "B" and "C" did not believe approval would have any short-term or long-term effect. Importer "D" responded that since "one-hundred percent of our northbound Argentine trade is carried by U.S. or Argentine lines . . ." it could not determine at this time whether open competition or approval of the agreement as submitted would affect its business. Finally, shipper "E" was concerned that if Argentina were to disapprove all pools in the trade as a result of a requirement that there be open competition, that "would have an immediate and permanent negative effect because Argentina would undoubtedly limit cargo movement to their vessels alone. . . . We emphatically do not wish a change in the status quo. 'E' therefore supports approval of the agreements" (see *Ex. 5(a)*).

Mr. Holter-Sorensen's statements confirm that the pools do not adversely affect shippers: "The shippers don't think about the pool. They see what is the first ship to come into the port and what is the first ship to go to the States, and they give the cargo" (*ASX-11(c)*, p. 97; see also *ASX-11(c)*, p. 98).

83. *Shippers noticed no difference in service between the period of open competition and fixed shares.* (a) The same 24 importers were advised:

The difference between these agreements and the agreements the parties were operating under before June 30, 1980, is that previously, the non-national-flag lines were not assigned shares, but competed among themselves for a maximum of 20% of the pool revenues. . . . [*Ex. 5, Questionnaire, p. 2.*]

Of the 19 East Coast shippers, 17 noticed no difference in service provided by carriers in the northbound Argentine trades between the time before June 30, 1980, and the time after that date. One shipper did not respond to that question, and one responded: "A few days slow" (*Ex. 5*).

(b) All 5 of the Gulf Coast importers noticed no difference in service (*Ex. 5(a)*). Thus, from a shipper's perspective, open competition did not result in better or worse service (*Ex. 5, 5(a)*).

84. *Shipper reliance on Moore McCormack and Delta.* (a) The importers were asked what the effect would be on their operations if carriage in the northbound Argentine trades were available to non-Argentine lines only by previously authorized waiver. Every shipper but two stated that this condition would be unacceptable.

(b) In response to different questions, almost every shipper stated that any action which would affect its ability to utilize the service of Moore McCormack and Delta, would be very unsatisfactory, or an unworkable situation: "If this will restrict U.S. lines in any way, it will work to our disadvantage" (North American Crop Services, Ltd.); "Whenever possible we use American-flag lines" (Kayan International Corporation); "We see little effect because American-flag lines are first choice due to better service" (Irwin-Harrison-Whitney Importers); "No effect at all, we currently only use American Flag Vessels due to the service and attention we receive" (William H. Hall & Co., Inc.); would "cause extreme delays, paperwork and again effect the service—we need steamers of Moore McCormack and/or Argentine lines" (C.A. Andres & Co., Inc.).

(c) The results of BIE's "shipper-survey" comport with the findings of a study prepared by an independent consultant for Marad based on a comparison of the rationalized Brazil trades with two trades that do not have pooling arrangements, the Australian and South Africa trades (*Ex. 7, DGX-11, p. 4*). That report concludes that there has been no adverse impact upon shippers in rationalized trades.

85. *No basis for implying adverse impact on freight rates.* (a) In the Argentine and Brazilian trades, rate increases have been imposed at levels lower than experienced in many other trades (*Ex. 7, DGX-10, p. 2a*). In a comparison of freight rates on the top 10 commodities moving in three trades—Brazil/United States, Argentina/United States, and the U.S. North Atlantic/Continental Europe trade—utilizing the most recent data available in the year 1979, an F.M.C. study indicated that, over a five year period on a percentage basis, the North Atlantic trades witnessed an 11.66% higher increase in rates than did the Argentine or Brazil/U.S. trades (*id.*, p. 4). Specifically, in a comparison of the north-bound U.S. Atlantic and Gulf/ Brazil and U.S. Atlantic and Gulf/ Argentina trades with the North Atlantic/Continental Europe inbound trades, on a percentage basis, rates increased 9.14% more in the North Atlantic as compared to Argentina and 23.82% more than rates in the Brazilian trade (*id.*, p. 10). These findings "offer evidence that it cannot be dogmatically concluded that pools must result in higher freight rates" (*id.*, p. 10). The Commission's chief economist (*Tr. 514*), who has appeared as an expert witness in seven or eight proceedings before the Federal Maritime Commission (*Tr. 527, 528*), testified that the results of this study indicate:

that it cannot be dogmatically concluded that pools must result in higher freight rates. So in other words, the burden of proof is now on the other side if you will. . . . You cannot say with certainty that pools must lead to higher freight rates, given the result of this study. Because the evidence of the study would leave you in the opposite direction. [*Tr. 527.*]

That same witness testified that the results of the study were statistically valid (*Tr.* 526), and that two techniques were utilized in performing the study "in order to arrive at the fairest figures" possible (*Tr.* 521). He concluded:

that you could not empirically prove that pools must lead to higher freight rates. [*Tr.* 522-523.]

(b) The findings of this F.M.C. report were similar to those contained in a report performed for the Office of Commercial Development of the United States Maritime Administration in May of 1979 (*Ex.* 7, DGX-11, p. 4).

86. *No shipper or other trade interest appeared in opposition to the agreements.* No shipper, importer, exporter, port, or other trade interest appeared in opposition to the agreements. Ivaran produced no shipper evidence, and none of the shipper affidavits in evidence identified Ivaran's service as being important to its business (see generally *Ex.* 5).

Q. MISCELLANEOUS RELEVANT PROPOSED FINDINGS.

87. *Brazil/Argentina Agreement of August 10, 1979, was not a factor in negotiations of third-flag share.* (a) On August 10, 1979, SEIM and SUNAMAM signed a Memorandum of Understanding agreeing to cooperate in a broad range of Maritime matters (*SX-33*). A copy of the agreement was provided to the Federal Maritime Commission (*SX-33(B)*, p. 2). Mr. Ornellas, on behalf of Lloyd Brasileiro, testified that his company had received no instructions from SUNAMAM to implement the memorandum in negotiating Agreement Nos. 10386 or 10382 (*Ex. 11* (Ornellas) pp. 8-9,³³ whereas Lloyd had received such instructions when pools in the Europe/Brazil trade were negotiated (*Tr.* 202-203). Likewise, Captain Dandois, who was in charge of ELMA's negotiating team for the Atlantic trade, testified he had no instructions regarding specific third-flag shares and was instructed to allow the third-flag carriers to reach whatever agreement was acceptable among them (*Tr.* 330-331). SEIM's Aide Memoire in evidence as Exhibit *SX-40* states that "The instructions of SEIM to ELMA were that all carriers should have fixed shares but SEIM *did not specify* what the non-national-flag shares should be, *and left it up to those lines to agree*" (*SX-40*, p. 10; emphasis in original). Mr. Schliemann testified that he was of the personal opinion that the guidelines of the memorandum should have been followed in negotiation of the agreements, but his company had not received any instruction from SEIM to apply them (*Tr.* 428).

(b) One of the memoranda prepared by Mr. Holter-Sorensen suggested that Lloyd was indirectly pressuring ELMA to establish pools in the

³³ This was confirmed by the U.S. State Department which raised the matter with SUNAMAM in March 1981 (*SX-34(D)*, p. 2).

trade through the influence of SUNAMAM, the Brazilian regulatory authority (*ASX-11(c)*, BIE-6, p. 3); however, Mr. Holter-Sorensen subsequently testified that he had no proof of any such pressure (*ASX11(c)*, Tr. 179) and had based his view on recollection from a period prior to 1978 (*id.*, Tr. 179-182), and his understanding of the agreement was that the pools would have common termination dates (*ASX11(c)*, Tr. 166), and that the only statement made by Lloyd at a thirdflag caucus regarding the agreement concerned the termination dates (*ASX-11(c)*, Tr. 166-167). Mr. Holter-Sorensen also testified that he had never been told that the Argentine Government had provided reciprocal treatment to Lloyd, and his understanding of the Brazil/Argentina agreement was that it did not promise such treatment either (*ASX11(c)*, Tr. 193).

88. *Argentine-flag shares in northbound Brazil/U.S. pools.* There is no evidence that the shares of the Argentine-flag lines in the Brazil/U.S. trades are the result of any agreements or understanding between the Governments of Brazil and Argentina. Neither Lloyd nor Nacional received any instructions from SUNAMAM with respect to implementation of the Brazil/Argentina August 10, 1979, Memorandum in the Brazilian/U.S. trades (*SX-39*, p. 3). The transcript of the Brazil pools which are in evidence (*GSX-17A, B, C, and D; ASX-8 and 10*) demonstrates that the Argentine-flag shares are the result of commercial negotiations, as testified by Mr. Wendt with respect to the Brazil/U.S. Gulf pool (*Ex. 7*, ¶48, pp. 48-49). Further, the very substantial difference in the values of the respective Gulf trades—million revenue tons for the Brazil/U.S. trade compared to 150,000 revenue tons for the Argentina/U.S. trade renders completely meaningless any concept of an equal share in the trade of these adjoining nations (*SX-39*, p. 3).

POSITIONS AND CONTENTIONS OF THE PARTIES

In order to place this proceeding in perspective, it is almost obligatory to note initially the varying positions and contentions raised by the parties.

Basically, the positions of the parties are represented in the views of Moore McCormack, Delta, ELMA, Lloyd and Nacional, as proponents of the agreements (sometimes referred to as proponents collectively), Ivaran and the Bureau.

The Bureau's position is that: (1) Agreements Nos. 10386-2 and 10382-2 are both approvable, with modifications, under the standards provided in section 15; (2) approval of the agreements is in the public interest for several compelling reasons, including that they are consistent with United States laws and policy, and although they restrict competition, they do not do so beyond the point necessary to achieve valid regulatory purposes; and, (3) a failure to approve the agreements will undoubtedly result in the strict implementation of the Government of Argentina's cargo preference laws and disrupt the trade.

The Bureau also submits that certain modifications in the Agreements should be required. In that respect, it concludes that the particular shares assigned to the non-national flag lines in Agreement No. 10386-2 are discriminatory between carriers in that they do not reflect the past service of the carriers in the trade. The Bureau urges that the Commission should require the non-national flag lines to renegotiate their shares. Finally, the Bureau submits that both Agreements should be modified to require all discussion between non-national flag lines concerning renegotiation of shares be recorded.

The Bureau generally supports the proponents' position regarding the approvability of the Agreements. It argues that the provision of both Agreements which provide for fixed shares for non-national flag lines carriers meet the standards of section 15 and should be approved. Specifically, it argues that "[f]ixed shares, rather than open competition, is in the public interest and meets a serious transportation need." In reaching that conclusion, the Bureau realistically evaluates the record as reflecting that the policy of the Argentine government is clear by stating that "if the fixed share provisions of the agreements are not approved, the Argentine cargo preference laws will operate so as to virtually exclude U.S. national-flag carriers from operating in the trade without first obtaining waivers from the cargo preference laws." The Bureau considers that such an eventuality "would so severely disrupt the trade for shippers, importers and the U.S. national-flag lines that the 'public interest' consideration of section 15 mandates the approval of these agreements. Furthermore, there are no substantial reasons why the 'fixed share' provisions should not be approved in light of the consequences of disapproval: the concept is not inconsistent with the policies of the United States as set forth in the Argentine-U.S. Memorandum of Understanding or any U.S. treaty obligations, open competition versus closed competition has not had a measurable impact on the trade, and fixed shares will still provide for a significant degree of competition among the members of the agreements."

In supporting these conclusions, the Bureau has turned to a number of considerations. It argues that: (1) Argentine law and policy are intended to restrict competition; (2) in negotiations with Argentina, the United States has not sought to guarantee open competition among non-national flag lines; (3) tangible benefit of open competition versus fixed shares is indeterminable from the facts of record; (4) fixed share provisions of the Agreements neither eliminate competition among participants to the Agreements nor prevent the inclusion of new third-flag members; (5) approval of the Agreements with fixed shares is in the public interest because they permit a degree of competition that would not exist if Argentine cargo preference laws were fully applied; and (6) fixed shares are consistent with the Memorandum of Understanding and

whether that memorandum is consistent with U.S. treaty obligations is not a matter for the Commission.

The Bureau also considers that the individual non-national flag shares set forth in Agreement No. 10386-2 are unjustly discriminatory and unfair as between carriers and the Agreement, therefore, does not meet the standards of section 15, and should not be approved by the Commission as submitted. It argues that the share assigned to Ivaran is unduly small in light of its past service in the trade and the share assigned to the Brazilian-flag line, Lloyd, greater than its past service merits. It urges approval of the Agreement "but with the caveat that the third-flag shares must be renegotiated."

Insofar as Agreement No. 10382, as amended, is concerned, the Bureau concludes that the shares assigned the non-national flag carriers are consistent with the standards of section 15. In that respect, it considers the "shares of each of the non-national flag lines that sought more than a nominal share of the trade (1-2%) are approximately equal, and are larger than their respective past carriage in the trade."

In approaching its analysis of the issue of the fairness of the non-national flag shares contained in the agreements, the Bureau details the negotiating factors influencing the non-national flag lines as well as the negotiating process itself. It concludes that "[a]lthough many of the negotiating factors discussed by the parties during the Principals' Meetings are elements the Commission should consider when determining if the agreement is approvable under section 15, they do not justify the agreement as submitted under the standards of that section. . . ." In addition, it also details those other factors which influenced the allocation of shares, particularly the role of the governments of the lines participating in the negotiations. It concludes that although commercial considerations played a large role in the negotiation of these Agreements, the governments of Argentina, Brazil, Norway, and the United States also influenced the negotiations. It points out that "the role of Norway and the United States can be fairly well ascertained, however, the influence of the Brazilian and Argentine governments cannot be clearly defined due to a refusal of Argentina and the Argentine-flag line to provide all pertinent information. However, even assuming the 'worst possible case' of government influence, the Commission is not deprived of jurisdiction over these agreements."

Ivaran contends that Agreement No. 10386-2³⁴ is unjustly discriminatory and unfair and that the Agreement should be modified to provide for "open competition" within the third-flag sector. In the alternative, "Ivaran believes that the third-flag shares should be renegotiated

³⁴ While Ivaran's position is directed only to Agreement No. 10386, Delta considers its argument as "not limited to the Agreement in its substantive impact." Accordingly, Delta has submitted a reply brief directed to arguments presented by both the Bureau and Ivaran.

according to directed guidelines which permit Ivaran to obtain a share commensurate with its past history and demonstrated capability of service to the trade."

Ivaran points to a "continuing pattern of domination" of the trade by the Argentine government through SEIM. It considers that this domination, in favor of the neighboring Brazilian government line, is based upon the concept of reciprocity.

It has summarized its major concern and position as follows:

Ivaran has been consistently of the view that a pooling agreement of any sort is not necessary. However, if it is decided to, once again, accede to the demands of the government of Argentina and establish a pool then the third flag share of such a pool should be open and *not* assigned. This will foster competition in the third flag sector and is significantly more pro-competitive than fixed third flag shares. In the alternative, if it is determined that fixed third flag shares should be implemented then Ivaran asserts that they should be arrived at by true commercial negotiations and rely on valid and traditional commercial factors and not on governmental trade-offs.

Furthermore, Ivaran's dilemma must be considered in light of its more than 50 years of service to the Argentina United States East Coast trade and it must be considered with the view that this trade is Ivaran's business. If Ivaran is out of this trade its business is lost and service to shippers will suffer.

Basically, Ivaran contends that the Agreement fails to meet the standards for approval since it is a "commercial agreement" arising in the context of a bilateral understanding between the governments of Argentina and the United States. It states, however, that the "bilateral agreement memorialized in the Memorandum of Understanding Between the Government of the United States of America and the Government of Argentine Republic . . . does not address and specifically does not 'affect' the issue which is central to this case: whether the third-flag allocation should be on an assigned share basis." It considers that the Commission's authority under section 15 has not been "usurped" by the Maritime Administration "at least insofar as the third flag allocation is concerned" and, therefore, the reviewing authority is free of "overriding foreign policy constraints."

Ivaran contends that the Agreement also is contrary to the public interest of the United States by pointing to: (1) the antitrust implications and the necessity that the Commission weigh the benefits of competitive service within the third-flag share; and (2) the "lack of the issue of intergovernmental harmony" in this proceeding, and that even if the issue existed, other public interest considerations outweigh those of intergovernmental harmony. It also contends that the Agreement is unfair and unjustly discriminatory because (1) the requirement by the

Argentine government for fixed third-flag shares is unequal in its application to Ivaran by favoring another third-flag line, Lloyd; (2) the Agreement goes beyond the actual terms of the Blackwell-Guevara Memorandum; and (3) the method by which the third-flag shares were "negotiated" was devoid of "true commercial considerations" and, therefore, contrary to guidelines previously enunciated by this Commission.

Proponents collectively provide a multitude of arguments demonstrating that the record supports that both Agreements, as amended, are justified and should be approved as submitted.

Moore McCormack contends that Agreement No. 10386, as amended, meets every test for approval under the Act. It argues that the Agreement, which implements a government-to-government agreement, carries a presumption of approvability since it: (1) is a binding Executive Agreement of the United States; (2) successfully accommodates United States and Argentine maritime policies; and (3) is the policy of the United States in maritime relations with Argentina. It also contends that the regulatory policy of the Shipping Act favors approval since the Commission's grant of antitrust immunity arises expressly out of section 15; that there have been no allegations of carrier conduct outside the scope of section 5; and the considerations of competition support approval. It is argued that the Agreement meets serious transportation needs, provides significant public benefits and furthers valid regulatory purposes by the maintenance of U.S.-flag carriers' access to cargo, the avoiding of potential intergovernmental confrontations, and points out that: such issues were previously decided by the Commission, approval will prevent disruption in the trade, and the maintenance of intergovernmental harmony requires fixed pool shares which are otherwise justified under the Act.

In viewing the issue of the division of the third-flag shares, Moore McCormack contends that (1) the shares resulted from commercial negotiations in which each competing interest bargained to achieve the most favorable result; (2) the shares were the product of the best bargain each line could make under the circumstances; (3) the Agreement is not unjustly discriminatory or unfair to Ivaran since Ivaran has the burden of proving these considerations and has failed to produce any case and stipulated that approval would not economically harm it; and (4) the evidence shows the Agreement will not in fact be unfair since the pooling provisions will operate to prevent any unfairness to Ivaran.

Delta contends that the record conclusively establishes: (1) that Agreement No. 10382, as amended, is the result of commercial negotiations and not some direct or indirect coercion by either the Government of Argentina or any other person; and (2) the legitimate and unequivocal interest of the Argentine government is in requiring fixed

shares with minimum sailing requirements for all lines. It argues that the Agreement (1) is a commercial agreement subject to the Commission's jurisdiction under section 15; (2) serves a serious transportation need; (3) is in the public interest since is not unjustly discriminatory or unfair, does not transgress the antitrust laws more than is necessary to serve the regulatory purposes of the Act and contains substantial pro-competitive features, and does not exclude carriers wishing to participate in this trade.

The joint position of Lloyd and Nacional is that Agreement Nos. 10382, as amended, and 10386, as amended, should be approved without change or modification. Lloyd and Nacional contend the Agreements are not discriminatory or unfair, are not detrimental to commerce or otherwise violative of the provisions of the Shipping Act, 1916, and are wholly consistent with the public interest. They argue that the Agreements, as filed by the parties, fully comply with the standards necessary for consideration in that they meet a serious transportation need, serve a valid regulatory purpose and their implementation will provide important public benefits.

Lloyd specifically argues that approval of Agreement No. 10386, as amended, will provide the Argentine/U.S. East Coast trade with better and more competitive service than either of the alternatives proposed by the Bureau (renegotiation) or by Ivaran (open competition). In considering the specific circumstances of the trade here involved, it claims that: the share negotiated by Lloyd is the smallest share capable of permitting an economically viable and credible service for shippers in the Argentina/U.S. East Coast trade; any lesser share or "open competition" will effectively result in Ivaran's monopolization of the third-flag shares; Ivaran's allegations concerning the negotiations of the pool are without basis in fact; and, Ivaran is essentially opposed to any negotiation which would result in its having less than virtually all of the 20 percent pool share set aside for all third-flag lines serving or desiring to serve the trade.

Lloyd and Nacional submit that on the basis of the evidence and the applicable case law, the pooling agreements, as filed, represent the best, most viable, and most competitive approach to providing service in the trades from Argentina to the United States.

ELMA considers that the crucial issue is whether the Agreements should be approved as filed, with the third-flag shares therein contained, since none of the parties to this proceeding have requested outright disapproval of the pools. It contends that the Commission therefore faces four alternatives, *i.e.*, to open the third-flag shares of 20% to free competition as was done in the prior proceeding; to require the third-flag lines to renegotiate their shares; to assign a share of the 20% to each third-flag carrier different from the shares which the parties negotiated; or to approve the pools as filed. It submits that the

only alternative which will satisfy the requirements of both United States and Argentina law and will bring "an end to this long and protracted litigation is the last alternative." It claims that the first means a direct confrontation between the two governments involved; the second is doomed to failure since there is no evidence to indicate that new negotiations will produce any different shares from those reached during the long negotiations in 1980; and the third is impractical since there is no evidence to enable the Commission to devise a formula to fix each third-flag carrier's percentage precisely.

In addition to the above, a few observations should be noted concerning the reply briefs.

Briefly, the Bureau's position remains unchanged. It disagrees with the proponents' claim that the Agreements are vested with presumptive approvability; believe that the proponents "have carried the burden of going forward in regard to section 15's public interest criterion"; concludes that "Ivaran's argument really goes to the *size* of its share and little further" in addressing the public interest aspects of allocation by fixed shares rather than by open competition. The Bureau submits that "the avoidance of certain trade disruption is sufficient public benefit to justify fixed shares"; that both open competition and fixed shares are consistent with the Argentine/United States Memorandum "but that neither is mandated by it"; that the Commission decision in favor of fixed shares "must be grounded in the Shipping Act, 1916, rather than any mandate of the Memorandum of Understanding."

In discussing "the non-commercial pressures" exerted on the third-flag lines in the negotiations, such as Resolution 619, the Bureau states "Unlike the other parties to this proceeding, except Ivaran, who refuse to admit that these influences existed, the Bureau submits that they did exist but they do not render the agreements unapprovable under section 15." Finally it contends that the "special interest" of Argentine government in the share of the Brazilian flag lines does not deprive the Commission of jurisdiction over the Agreements or make them inconsistent with section 15.

Ivaran argues that the third-flag shares are not mandated by the Blackwell-Guevara Memorandum, or Argentine Law, and that Agreement No. 10386, as amended, is not entitled to a "presumption of approvability"; that the Agreement is more anticompetitive than necessary and is not otherwise in the public interest; and that the Agreement was not the product of true commercial negotiations. In conclusion, Ivaran states:

Proponents argue that Ivaran wishes to maintain its monopoly on third flag shares; shares which Ivaran obtained through efficient service to the trade. Proponents' preference is to substitute an unproven carrier (Lloyd) into a significant portion of Ivaran's rightful slot. The proponents propose a mo-

nopolistic agreement which, coupled with Resolution 619 has severe anti-competitive impact. This agreement provides for fixed third flag shares grounded almost entirely on zonalism and arrived at in so-called "commercial negotiations" which were completely dominated by SEIM and SUNAMAM (and their respective national lines).

Moore McCormack observes that it disagrees with the Bureau "only upon one of the ultimate issues" where the Bureau "contends that notwithstanding the host of factors considered in negotiation, Ivaran's share is unjustly discriminatory and unfair because Ivaran was not given sufficient 'credit' for past carryings." Moore McCormack's position, on the other hand, is that "the third-flag shares are the product of a true commercial negotiation in which the shares represent the best bargain each line could make under the circumstances, and the difference between Ivaran's share and its past carryings, in-and-of-itself does not render Agreement No. 10386 unjustly discriminatory." Turning to the position of Ivaran, Moore McCormack observes that they "are in disagreement upon virtually the entire case." Accordingly, its reply brief centers only upon the Bureau's position that the third-flag share be renegotiated and directs a major portion to the arguments raised by Ivaran.

Delta supports the Bureau's position, except as to the scope of the proposed modification, and contends that the arguments raised by the Bureau, and the record in this case, fully justify approval of Agreement No. 10382, as amended. Delta also responded to certain "factual errors and subsidiary arguments" posed by the Bureau which it "does not believe are supported by the record" but do "not adversely impact the validity of [the Bureau's] position on approvability, and in fact strengthen[s] the arguments in favor of approvability."

On the other hand, while first observing that Ivaran is not a party to Agreement No. 10382, as amended, Delta states that the "substance of several of Ivaran's arguments have applicability beyond that Agreement and warrant reply here. Specifically, Ivaran argues (1) that pooling agreements in these trades, and particularly the inclusion of fixed third flag shares, are contrary to the antitrust laws and therefore contrary to the public interest, and (2) that disapproval of fixed shares will not result in intergovernmental confrontation." It submits that these arguments are without substance and offers detailed and supportive argument as to why they should be rejected.

Lloyd and Nacional direct most of their attention to urging that fixed shares are in the public interest and are not unjustly discriminatory or unfair to Ivaran. In addition, the brief contains arguments in opposition to the Bureau's proposal to require transcripts of the third-flag caucuses.

ELMA, like the other proponents, responds to the positions of both Ivaran and the Bureau. As to the latter, it argues that the Bureau's "solution" would result in further "destabilization" of the trade. Like Lloyd it opposes the Bureau's requirement of transcripts of the third-flag line caucuses.

PRELIMINARY OBSERVATIONS CONCERNING THE BASIS FOR THE DECISION TO APPROVE THE AGREEMENTS

As noted earlier, the Commission has determined that this proceeding be treated on an expedited basis. The Bureau, in particular, has sought extensive discovery requests geared to the many issues posed by the Commission's Orders. The hearing and exhibits have resulted in what has aptly been described as a "massive record." A record of that magnitude usually provides, by the process of selective record references, a basis of support for many and varied arguments. And as shown in the preceding section, this record has produced a veritable arsenal of ammunition for the advancement of divergent arguments and positions. As a monument to the parties' endeavors, collectively they submitted briefs and findings of fact in excess of 750 pages. On the other hand, what also emerges are those discussions relating to the matters central for the determination of the ultimate issues herein. The inclusion of a detailed discussion of each disagreement among the parties in this decision would not only be counterproductive, but also unnecessarily extend an already lengthy decision. Moreover, the time allotted by the Commission for the submission of an initial decision (July 31), coupled with an expedited schedule agreed to by all of the participants (reply briefs were filed on June 19), by necessity, reduces a compulsion to treating each and every collateral factual point or varying interpretations placed upon selective excerpts of a record of this nature. What can be said is that these matters have been carefully considered and reviewed by this Judge. For example, the Bureau's position in favor of the approvability of these Agreements, in many instances, is based upon a view of the evidence that differs from those of the proponents. On the other hand, Ivaran's arguments are directed toward its position and are clearly distinguishable from those of the proponents. Consequently, in treating the issues in this proceeding, it will not be my intent, nor do I consider it necessary, to provide a point-by-point recitation or refutation of those matters not considered primarily directed to the resolution of the ultimate issues. The refinements to these arguments can be found fully explored in the briefs. Indeed, Moore McCormack itself has determined it unnecessary to refute each of the arguments of the Bureau except as to the one "ultimate issue." Also Delta has responded to the Bureau's position in a limited fashion as do the other proponents.

The Judge also considers it unnecessary to quote the many lengthy excerpts from this record and cases which are relied upon by the

parties. Suffice to say that these excerpts have been considered and require, in most instances, only a brief reference either to the case or to the particular part of the record.

Finally, a review of the record and arguments presented by the proponents seeking approval of the Agreements has provided the ingredients necessary for a determination of the decision herein. In that regard, proponents have offered a persuasive treatment of the issues and provided abundant record support for the conclusions to be drawn. Inasmuch as the arguments of the proponents are virtually identical in all major respects, in many instances, a single summary of their position will be sufficient to indicate their views. As a consequence, this decision will not contain references to all of the citations and support appearing in the briefs submitted by the proponents. Again, it is unnecessary to do so since they are contained in their briefs and are part of this record. Accordingly, references will be made, at times, to the specific briefs of certain proponents which should be understood to convey that the Judge agrees with the position stated and with the support provided for that position as contained in that brief.

DISCUSSION AND CONCLUSIONS

STANDARDS FOR REVIEW OF THE AGREEMENTS

The Agreements under consideration in this proceeding, involving cargo revenue pooling and minimum annual sailing provisions, must be filed for approval with this Commission under the provisions of section 15 of the Shipping Act, 1916, as amended (46 U.S.C. § 814). Such agreements are to be approved unless found:

. . . to be unjustly discriminatory or unfair as between carriers, shippers, exporters, importers, or ports, or between exporters from the United States and their foreign competitors, or to operate to the detriment of the commerce of the United States, or to be contrary to the public interest, or to be in violation of this Act. . . . 46 U.S.C. § 814.

See *Federal Maritime Commission v. Seatrain Lines, Inc.* ("Seatrain"), 411 U.S. 726, 727-28 (1973) ("The Commission is directed to approve all other agreements . . .").

Also under section 15, the Commission is required to consider the antitrust aspects of all agreements submitted for its approval and to make sure that the agreement does not invade the prohibitions of the antitrust laws more than is necessary to serve the regulatory purposes of the Shipping Act. And the Commission has long held that proponents of anticompetitive restraints must demonstrate that the restraint is required by a serious transportation need, necessary to secure important public benefits or in furtherance of a valid regulatory purpose. *Investigation of Passenger S.S. Conferences Regarding Travel Agents*, 10 F.M.C.

27, 33 (1966), *rev'd sub. nom.*, *Aktiebolaget Svenska Amerika Linien v. F.M.C.*, 372 F.2d 932 (D.C. Cir. 1967), *rev'd*, 390 U.S. 238 (1968) ("Svenska"). And it has been recognized that exemptions from antitrust laws are to be strictly construed since they represent a fundamental national economic policy. *Seatrain, supra*, at 733; *United States v. McKesson & Robbins, Inc.*, 351 U.S. 305, 316 (1956); *Carnation Co. v. Pacific Westbound Conference*, 383 U.S. 213 (1966); and *Gulf States Utilities Co. v. Federal Power Commission*, 411 U.S. 747, 759 (1973).

Courts are reluctant to imply an exemption from the antitrust laws merely because business activities are subject to either state or federal regulatory control, see, e.g., *Cantor dba Selden Drugs Co. v. Detroit Edison Co.*, 428 U.S. 579, 596-97 & n. 36 (1976) (state regulation of electric utility does not imply antitrust immunity), *Mt. Hood Stages, Inc. v. Greyhound Corp.*, 555 F.2d 687, 691-92 (9th Cir. 1977) (conduct not immunized merely because it falls within the jurisdiction of Interstate Commerce Commission), and statutory provisions granting exemptions from the antitrust laws are strictly construed. *Seatrain, supra*, 411 U.S. at 733; and *Mt. Hood Stages, Inc., supra*, 555 F.2d at 691. In such cases, courts analyze the statutory scheme and purposes of the regulatory legislation, and when they conclude that Congress rejected a pervasive regulatory scheme in favor of voluntary relationships, they "must be hesitant to conclude that Congress intended to override the fundamental national policies embodied in the antitrust laws." *Otter Tail Power Co. v. United States*, 410 U.S. 366, 374 (1973). Moreover, the courts have considered that competition may be a healthy and desirable feature even in the regulated industries. *Bowman Transportation, Inc. v. ArkansasBest Freight System, Inc.*, 419 U.S. 281, 298 (1974); *Trans-American Van Service, Inc. v. United States*, 421 F. Supp. 308, 321 (N.D. Tex. 1976).

**THE AGREEMENTS, AS AMENDED, IMPLEMENT AN
INTERGOVERNMENTAL AGREEMENT AND ARE ENTITLED
TO PRESUMPTIVE APPROVABILITY IN THE PUBLIC
INTEREST**

The Agreements are in the public interest and should be approved since they implement and are entirely consistent with the intergovernmental Memorandum of Understanding between the Governments of the United States and Argentina.

The Memorandum of Understanding was signed on March 31, 1978, and arose out of negotiations following the disruptions in the trade in 1977 caused by Argentina's implementation of its cargo preference laws (FF 31). Assistant Secretary Blackwell was formally authorized by the Department of State to negotiate for the United States and to sign that document (FF 33). Mr. Blackwell was the chief negotiator on behalf of

the Executive in negotiating bilateral agreements and the chief spokesman for maritime policy matters in that context and acted in conjunction with the Department of State and other interested agencies (FF 33, SX-3A, p. 6). The Memorandum of Understanding had been "blessed by the State Department," (SX-2, p. 29) and it is a binding agreement, executed by responsible officials of both governments, and is an Executive Agreement between the two countries (FF 33).

As testified by Assistant Secretary Nemirow, the purpose of the Memorandum was to reconcile the potentially conflicting policies of the United States and Argentina, and avoid the disruption of the free flow of commerce between the two countries (SX-3A, pp. 34-35). Mr. Nemirow further testified that, in his opinion, the negotiations were successful and in the national interests of the United States (*id.*, p. 78).

The Memorandum of Understanding on its face contemplates that the lines will enter into implementing commercial agreements, including, *inter alia*, "revenue shares for the lines in the trade, number of sailings, over-carriage and under-carriage provisions, and similar matters . . ." and that the resulting agreements would be "subject to approval by the appropriate governmental agencies of each of the parties." (SX-3A, Ex. 3, ¶2.) And the Agreements, as amended, are on their face consistent with the terms of this Agreement.

Furthermore, Assistant Secretary Nemirow testified that agreements, such as those under consideration here, which implement an intergovernmental agreement should be treated in a special way by this Commission and are presumptively approvable (SX-3A, p. 64). In a letter to the then Chairman of the House Committee on Merchant Marine and Fisheries, former President Carter stated:

. . . agreements implementing government-to-government negotiations should receive prompt presumptive approval by the FMC. (SX-3A, Ex. 2, p. 4.)

The intergovernmental agreements, once negotiated, presumably represent the policy of the United States in the trades in question. It could rightfully be observed that there would not be any point in negotiating an executive level diplomatic agreement calling for a commercially negotiated agreement, and then stating it was United States policy that such a commercial agreement was contrary to the public interest.

Of course, these observations are not intended to categorically find that the intergovernmental agreements have rendered the Agreements here as "conclusively approvable." The Memorandum itself recognizes that the implementing agreements would be "in accord with the appropriate legislation in each country" and, as such, would be subject to review under the Shipping Act, 1916. As will be shown, *infra*, the Agreements have not produced any "irreconcilable conflict" between the Shipping Act or the Memorandum of Understanding despite the

arguments arising over the inclusion of fixed third-flag shares as contained in the Agreement Nos. 10382-2 and 10386-2.

THE AGREEMENTS, AS AMENDED, DO NOT INVADE THE PROHIBITIONS OF THE ANTITRUST LAWS ANY MORE THAN IS NECESSARY TO SERVE THE PURPOSES OF THE SHIPPING ACT, 1916

All parties to this proceeding concur that the Agreements are subject to the Commission's jurisdiction under section 15 of the Shipping Act, 1916 (46 USC § 814). Only Ivaran, however, urges that Agreement No. 10386-2 should not be approved with fixed shares for all carriers. Ivaran suggests that Agreement No. 10386 is not the "least anticompetitive alternative" available to the parties or the Commission. Ivaran urges the Commission, in exercising its responsibilities "in the public interest" under the *Svenska, supra*, standard to disapprove Agreement No. 10386 or order open competition in the third-flag share.

The *Svenska* decision requires that in granting antitrust immunity to an arrangement which would be otherwise violative of the antitrust laws, the Commission give consideration to the competitive philosophy of the antitrust laws. The responsibility of the Commission is to consider carefully the antitrust aspects of all agreements submitted for its approval. *United States Lines, Inc. v. Federal Maritime Commission*, 584 F.2d 519, 530-531 (D.C. Cir. 1978). Once the Commission considers the antitrust issues, however, its grant of antitrust immunity arises expressly out of the statutory grant contained within section 15. The Supreme Court recognized that Congress had found significant advantages in allowing agreements among carriers so as to, *inter alia*, preserve more competition than if the agreements were not approved (*Svenska*, p. 242).

Under the rules of statutory construction, antitrust exemption provisions must be read as narrowly as possible in favor of competition. *Seatrain, supra*, 733; *United States v. McKesson & Robbins, Inc., supra*; *United States v. Masonite Corp.*, 316 U.S. 265, 280 (1942); and *Mt. Hood Stages, Inc. v. Greyhound Corp., supra*. This principle is a corollary of the rule that business conduct is not immune from the antitrust laws merely because it falls within the jurisdiction of a regulatory agency or within the scope of a regulatory statute. *Cantor v. Detroit Edison Co., supra*; and *United States v. Philadelphia Nat'l Bank*, 374 U.S. 321, 350-351 (1963). These rules have their origin in a view taken by the courts that in the scheme of national policy, the position of the antitrust laws is fundamental. *Gulf States Utilities Co. v. Federal Power Comm'n, supra*; and *Otter Tail Power Co. v. United States, supra*.

Thus, antitrust exemption statutes must be construed narrowly so as not to derogate the antitrust laws unnecessarily.

The promotion of competition among carriers is a component of the national transportation policy as well as a basic concern of the antitrust laws. The courts have generally construed this policy to require that, absent factors indicating the contrary, competition should be considered a healthy and desirable feature even in regulated industries: See *Trans-American Van Service, Inc. v. United States*, *supra*. The Supreme Court, in *Bowman Transportation, Inc. v. ArkansasBest Freight, Inc.*, *supra*, has strongly endorsed competition within the same mode of transportation as an aid in the attainment of the objectives of the national transportation policy as contemplated under the Interstate Commerce Act.

This Commission's obligation is to scrutinize the Agreements and "make sure that the conduct thus legalized does not invade the prohibitions of the anti-trust laws *any more than is necessary to serve the purposes of the regulatory statute.*" *Isbrandtsen Co. v. United States*, 211 F.2d 51, 57 (D.C. Cir. 1954).

Considerations of competition support approval of Agreement No. 10386. It can be, in fact, considered pro-competitive. As the record clearly shows if Agreement No. 10386 is not approved, the result will be not an unfettered, open market, but, rather, the imposition by Argentina of a highly restrictive regime of cargo preservation with a resultant loss of competition (FF's 77-80). And while Ivaran claims that "the trade is a complete monopoly," there are at least seven carriers serving the trade, competing on the basis of service, and any carrier under the terms of the Agreement can enter the conference or pooling agreement at any time. Another consideration is that the provisions of Agreement No. 10386, other than pool shares, contain light penalties (*ASX-11(c)*, MM-1, pp. 2, 43), are pro-competitive in nature (FF's 61-65), and the record reflects that under open competition the other third-flag lines were unfairly penalized. The advancement of the theory that "open competition means more competition" becomes suspect under considerations shown in this record. Even if Ivaran were correct in its theory, the record reflects that if the Commission orders open competition, Ivaran will not, at least initially, suffer any detriment, since it cannot now carry government controlled cargo. But the effect of open competition on other carriers could be considerable.

Moore McCormack presently transports all cargo, without any discrimination distinction between either controlled or non-controlled cargo. Thus, at least initially, potentially all of its southbound cargo marketing ability could be disrupted and, moreover, it conceivably could lose outright its ability to carry the substantial percentage of the market controlled by Argentine preference laws during the duration of any trade disruption. The effect upon its operations would be clear-cut, it would require alteration in its current service pattern and would have severe adverse impact on shippers in the trade (FF 78).

Likewise, Delta's Argentine/U.S. Gulf southbound trade constitutes an important part of its overall service. And the potential loss of equal access to government controlled cargo would cause Delta also to suffer serious financial injury (*id.*).

The Commission's consideration of such adverse consequences would hardly be either original or novel to this proceeding. This Commission has approved commercial agreements which preserve U.S.-flag carriers access to the trade, thus resolving the problem of potential U.S. carrier loss of access to controlled cargoes. *West Coast Line, Inc. v. Grace Line Inc.*, 3 F.M.B. 586 (1951); *Alcoa S.S. Co., Inc. v. Cia. Anonima Venezolana*, 7 F.M.C. 345 (1962), *aff'd sub. nom Alcoa Steamship Company v. Federal Maritime Commission*, 321 F.2d 756 (D.C. Cir. 1963); *Agreement Nos. 9847 and 9848—Revenue Pools, U.S./Brazil Trade*, 14 F.M.C. 149 (1970); *Agreement Nos. 9932 and 9939 Equal Access to Government-Controlled Cargo and Interim Cooperative Workings Arrangement*, 16 F.M.C. 293 (1973); *Agreement No. 10066—Cooperative Working Arrangement*, 21 F.M.C. 462, (1978); and *Approval of Agreement No. 10330-1*, 20 S.R.R. 725 (1980).

Docket Nos. 78-51 and 78-52, supra, which approved the Northbound Argentina/U.S. pooling agreements in 1979 reaffirmed the policy of preferring commercial resolution of problems which threaten U.S. flag carriers with loss of access to South American trades over that of confrontation and retaliation. And this Commission, in this proceeding, has granted final approval to Agreements 10388 and 10389, revenue pooling agreements in the southbound United States/Argentine trade in this proceeding. It found that those agreements met the standards for section 15 approval, because, *inter alia*, they "provide the means for increased shipper service" and "facilitate the free flow of the United States foreign commerce with Argentina." (*Order Denying Motion to Terminate, Vacating the Stay of Proceedings, and Approval of Agreements Nos. 10388 and 10389, supra*, slip op. 6.) On the other hand, the imposition of a modification to the Agreements, as urged by Ivaran, would seriously endanger those same public benefits which the Commission found would flow from approval of Agreement Nos. 10388 and 10389 (FF's 75-77).

Furthermore, the Commission's role, as delineated in *Svenska, supra*, 242-46, is to balance the public interest, which includes the general public interest in encouraging competition, with the regulatory purposes of the Shipping Act—one major purpose of which was to avoid the hazards of unfettered competition. As stated by the Supreme Court, the Shipping Act "is not an historical anachronism that we are entitled to ignore." *Federal Maritime Commission v. Pacific Maritime Association*, 435 U.S. 40 (1978).

Congress anticipated that various anticompetitive restraints, forbidden by the antitrust laws in other contexts, would be acceptable in the shipping industry. (53.)

The Commission thus is charged with consideration of "economic relations, of facts peculiar to the business of its history, of competitive conditions in respect of the shipping of foreign countries, and of other relevant circumstances. . . ." *Far East Conference v. United States*, 342 U.S. 570, 573 (1952); accord, *United States Navigation Co. v. Cunard Steamship Co.*, 284 U.S. 474, 485 (1931). Like other agencies empowered to approve cooperative, as opposed to competitive, arrangements, "the Commission is not so bound by the antitrust laws that it must permit them to overbear what it finds to be in 'the public interest'." *Minneapolis & St. Louis Railway Co. v. United States*, 361 U.S. 173, 187 (1959) (Interstate Commerce Commission may approve joint control of railroad service, even though the arrangement may contravene the considerations of the antitrust policy).

Ivaran has devoted much of its attention of the consideration of the antitrust laws beyond those especially applicable to this proceeding. For instance, it argues that the Agreements pose an anticompetitive restraint on prices. The short answer is that the Agreements here do not deal with rates, which are set by the Conference and separately approved by this Commission. Moreover, as this record shows, studies of the pools in the East Coast of South America trades have shown that rates increased at lower percentage rates than in other non-pooled trades (*Ex. 7, DGX-11 & 12*) (FF 85).

Ivaran, more appropriately, also argues that the terms and conditions of Agreement No. 10386 constrain the parties from competing aggressively for all available cargo. On the other hand, the record shows that the Agreements not only do not prevent competition, they in fact encourage it by means of their various minimum sailing, undercarriage and overcarriage provisions.

Also the contention that "open competition" within third-flag shares would be less anticompetitive than fixed shares is without substantial support in this record. It also argues that the "imposition of fixed third-flag shares will only worsen the competitive imbalance within the market." At the least, Ivaran has an incentive to improve its service or maintain its position, in view of the "extremely moderate" overcarriage penalty provisions (*ASX-11(c)*, MM-1, p. 2). As the Bureau correctly concluded, "open competition benefited Ivaran but penalized smaller non-national flag carriers." And the Bureau has pointed out that the trial period of "open competition" failed to bear out the hypothetical benefits claimed.

Realistically, if the Commission were to require "open competition," it would result in disapproval by the Government of Argentina and trade disruption would surely follow. On the other hand, the record

also establishes that the present Agreements promote competition and do not infringe upon the considerations expressed in the antitrust laws any more than is necessary. As Ivaran recognizes, the policies of the Shipping Act and of the antitrust laws are not irreconcilable. *Latin America/Pacific Coast Steamship Conference v. Federal Maritime Commission*, 465 F.2d 542, 545 (D.C. Cir. 1972) (purposes of ocean carrier regulation and antitrust law service to the public are complementary); and *Northern Natural Gas Co. v. Federal Power Commission*, 399 F.2d 953, 959 (D.C. Cir. 1968). Here the record supports a finding that approval of the Agreements reaches an appropriate reconciliation of those considerations. And disapproval or modification of the Agreements based upon this record and a theory that competition simply "is good" would be unwarranted and unsupportable under any circumstances involving these trades.

**THE INTERGOVERNMENTAL AGREEMENT IS AN
IMPORTANT FACT FOR CONSIDERATION BY THE
COMMISSION**

Ivaran contends that the Intergovernmental Agreement "does not address" or specifically affect the central issues in this proceeding, *i.e.*, "whether the third flag allocation should be on an assigned share basis?" It states that the issue of fixed third-flag shares was not a part of the negotiations leading to the Memorandum and that according to Assistant Secretary Nemirow, the Memorandum is not inconsistent with open competition within the third-flag share. It considers MARAD's policy as "simply irrelevant since the Memorandum specifically requires that the rights be determined in accordance with governmental legislation, and not policy." It contends that, "Nothing has changed with respect to Argentinean law since the Commission handed down its decision in *Docket No. 78-51* on June 22, 1979." It further argues, "After the dust settles on the question of Argentinean policy, the fact remains that Argentinean law simply does not require fixed third flag shares."

The government of Argentina has consistently made it clear that it intended for the implementing carrier agreements to contain fixed shares for all lines (FF's 36-41). Assistant Secretary Blackwell testified that he understood the Memorandum of Understanding would be implemented by "the traditional cooperative arrangements that we have understood to have been involved in the shipping business for years" (SX-2A, p. 36). Assistant Secretary Nemirow (through the Maritime Administration's Director of International Activities) confirmed that Argentina's interpretation is valid:

Read together, paragraphs 1 and 2 of the Memorandum also contemplate that there will be commercially agreed shares for such third-flag carriers as participate in the trade. [SX-22(B).]

Neither the United States nor Argentina nor any of the carriers contemplated a pooling agreement without fixed shares prior to the Commission's decision in *Docket Nos. 78-51 and 78-52, supra*. It clearly was the expectation of both the United States and Argentina in 1978 that the commercial agreements would contain fixed shares for all parties. The Intergovernmental Agreement does not specify "fixed shares" for revenue pools because it was a basic assumption by both countries' negotiators that any "pool" would contain fixed shares since established shares for each carrier would be the essence of a cargo and revenue pool.

Moreover, both Argentine law and policy require fixed shares. Mr. Nemirow testified that he was told by Argentine officials that fixed shares were required "in order to comply with their law" (SX-3A, p. 33). The Argentine Aide Memoire states that "such 'open competition' is contrary to the maritime laws and policies of Argentina" (SX40, p. 9). Captain Dandois testified that "SEIM's instructions were that, in accordance with Argentine law and policy, the new pools were to have fixed shares" (Ex. 15, p. 2). Admiral Guevara, in a meeting with the F.M.C. staff in October 1980, advised that "according to Argentine law a party must determine and agree to its shares in a pool on a commercial basis" (SX-27, p. 4). Law No. 18.250 provides in Article 7 (SX-1A, p. 6) that "When third-flag lines operate regularly in the same service [to and from Argentine ports], a certain share of the traffic may be reserved to them." The record abundantly establishes Argentina's insistence upon fixed shares and that SEIM views such as a requirement both of Argentine law and policy.

In short, while Ivaran relies upon a limited reading of the Intergovernmental Agreement, it also fails to provide an adequate recognition to the evidence or testimony in this proceeding. That evidence demonstrates that fixed-flag shares are a requirement of Argentine law and policy and that United States law does not prohibit fixed-flag shares in agreements such as under consideration in this proceeding. Ivaran points out that in *Docket Nos. 78-51 and 78-52, supra*, the Commission concluded that "open competition within the third flag share appears to be consistent with the Blackwell-Guevara Memorandum," p. 1114. However, that portion of the Commission's Order based upon the conclusion that the Argentine Government failed to insist upon fixed shares simply is not conformable now to the ample testimony and evidence developed in this proceeding (FF's 36-41).

THE PUBLIC INTEREST REQUIRES THE ATTAINMENT OF
INTERGOVERNMENTAL HARMONY

Ivaran indicates that the Commission's responsibility under the Act "is free of overriding foreign policy constraints" and that the "public interest" favors disapproval of Agreement No. 10386. However, in *Agreement No. 9932 Agreement No. 9939, Equal Access to Government Controlled Cargo and Interim Cooperative Working Arrangement, supra*, 306 (1973), the Commission held that "the public interest in intergovernmental harmony is clear." And in *Agreement No. 10056 Pooling, Sailing and Equal Access to Cargo in the Argentina/U.S. Pacific Coast Trade*, 20 F.M.C. 255, (1977), it was held that a clear likelihood of intergovernmental conflict must be shown before "intergovernmental harmony" would justify an agreement under section 15. Furthermore, the Commission in *Agreement No. 10066 Cooperative Working Arrangement, supra*, rejected the heavy burden placed on proponents that they "first establish a clear likelihood that a specific type of confrontation would be avoided . . ." (*id.*, p. 1241) and instead held that "a commercial arrangement which avoids *potential* intergovernmental conflict is clearly preferable to disruptive retaliatory action. The avoidance of such potential 'intergovernment conflict' and the maintenance of intergovernmental harmony is a legitimate public interest objective . . ." (*id.* p. 1242).

Here proponents have abundantly demonstrated that intergovernmental harmony is clearly within the "public interest" considerations warranting approval under that standard. And the evidence here also substantiates the Commission's earlier judgment in *Docket Nos. 78-51 and 78-52, supra*, that:

These Agreements serve an important public benefit by maintaining international harmony through the avoidance of disruptive statutory action and resultant international conflict. Additionally . . . the agreements serve a serious transportation need by avoiding a disruption of United States foreign commerce and the consequential injury to shipper and carrier interest in the United States/Argentina trades, particularly southbound. p. 1111.

Indeed, governmental harmony is also a significant issue in this proceeding, and the consideration of that issue has a meaningful influence in favor of the approval of both Agreements.

Ivaran also suggests that even if approval of Agreement No. 10386 results in "international harmony," the Commission should not be concerned with the results of disapproval because the achievement of intergovernmental harmony "is outweighed by the other public interest factors." It appears that Ivaran's attention here is directed principally toward "other" public interest factors, such as, that (1) fixed shares will

be less competitive than open competition, and (2) the views of the shippers in the trade. The latter point will be treated now.

The Bureau has concluded that there is "no evidence that open competition had any effect one way or the other on importers." Twenty-four shippers were surveyed by the Bureau during the course of this proceeding. Of the twenty-four, only eight, or one-third of the shippers surveyed had something positive to say about open competition (e.g., should stimulate service). Twelve of the twenty-four said that open competition would have no effect or would be disadvantageous to them. The four remaining responses were equivocal on the question and could be fairly interpreted either way. In sum, a clear 50% of the shippers surveyed did not see any particular benefit to them from open competition, whereas only 33% viewed open competition positively (*Ex. 5; Ex. 5A*). It should be noted that the question was put to these shippers in the abstract—they were asked to express an opinion on open competition or fixed share competition. They were not told that the alternative to fixed shares would be imposition of the Argentine cargo preference laws and disruption of commerce. And while Ivaran points out that all of the affidavits were provided by Moore McCormack shippers, nonetheless, Ivaran itself determined not to supply any affidavits or other shipper evidence in this proceeding. (See FF's 82-86 for a discussion of the impact of the Agreement upon the shipping public.)

By way of summary, the record clearly shows that intergovernmental harmony would be in the public interest and a factor for consideration of approval of the Agreements. That is not to say that other public interest considerations are to be neglected. As will be shown, *infra*, serious transportation needs and other factors also warrant approval of these Agreements.

THE BUREAU'S POSITION AND ARGUMENT

As discussed above, the Bureau's position generally supports the approval of the Agreements. As to Agreement No. 10386, as amended, it agrees with the proponents' conclusions that: fixed shares rather than open competition is in the public interest and meets a serious transportation need.—The fixed share provisions neither unduly eliminate competition nor exclude new third-flag members.—The record discloses no tangible benefits which resulted from open competition.—Agreement No. 10386 permits third-flag competition which would not exist if the agreement were disapproved and Argentina's cargo preferences laws were applied.—Argentine law and policy are intended to restrict competition.—Fixed shares are consistent with the Intergovernmental Agreement, and the fact that Agreement No. 10386 implements the Intergovernmental Agreement does not render it beyond the scope of section 15 of the Shipping Act or the Commission's jurisdiction.—Governmental influence, if any, does not require disapproval of Agree-

ment No. 10386. The Bureau's position is also that the fixed third-flag shares negotiated under Agreement No. 10382, as amended, are not unjustly discriminatory or unfair, and that Agreement No. 10382 should be approved. However, the Bureau urges that the Agreements be modified (1) to provide for transcripts of the negotiations of the non-national flag lines, and (2) that Agreement No. 10386-2 should be approved only pending renegotiation of third-flag shares. The former will be treated later.

The Bureau submits a number of considerations contained in the record which, in its view, point to the need for the renegotiation of the pool shares. By way of summary, the Bureau states as to Agreement No. 10386-2:

The shares in the agreement are clearly discriminatory and cannot be permitted to go into effect. However, the Commission cannot inject itself into the process by using its own judgment to assign pool shares. In addition to depriving the parties of notice and an opportunity to comment on the assigned shares, the Commission would be entirely removing any commercial aspects of these agreements that presently exist. If the Memorandum of Understanding requires commercial negotiations free from all governmental influence then it applies to the governmental influence of both the United States and Argentina. The Commission is no more free to impose a specific non-national flag share than is SEIM.

Nor is it a feasible alternative for the Commission to order that the parties renegotiate their pool shares each year. The contentious nature of these negotiations is evident from the past proceeding and negotiations. Each negotiation is a very expensive proposition considering trips to South America for the Principals' Meetings and the inevitable hearing process. Mr. Wendt testified that during one of the Principals' Meetings when TMM suggested annual renegotiation the parties did not agree simply because annual renegotiation would be too expensive. [Tr. 114.] The Bureau submits that the only alternative is for the Commission to order renegotiation of the shares under the modification set forth above requiring transcripts of the caucuses and to permit these shares to remain in effect until the agreement expires in 1983.

Initially, it is considered by this Judge to be counter-productive to treat separately the myriad of contentions raised by the Bureau in its briefs. It should be observed also that the Bureau undertook the difficult task of securing by discovery measures the information geared to many of the varied issues and questions posed for resolution here by the Commission's Orders. And, on the basis of the enormous record developed by the parties, the Bureau has provided an in-depth analysis of the controlling issues from its standpoint. What has emerged is that the

Bureau essentially reaches the same conclusions, as proponents, on most issues but, in many instances, from a differing emphasis to the material contained in the record. As noted earlier, fn. 3, *supra*, the proposed findings of facts posed by the Bureau, which formed the nucleus of their argument and position, posed some specific factual problems and represented selective excerpts to fortify their position. (See Moore McCormack and Delta's Reply Briefs.) On the other hand, it is readily admitted that the position of the Bureau on many of those issues finds support in a record of this magnitude. But in viewing these differences, the proponents have clearly demonstrated that their treatment of the areas of disagreement is persuasive in reaching the same conclusions as the Bureau. Delta has provided a concise view of these differences by first observing:

In the course of its argument, however, [the Bureau] raises several collateral factual points or comments which require clarification and reply. [The Bureau's] position in favor of approvability of these Agreements does not rest on these points, and indeed in several instances was reached in spite of the points noted. The following reply therefore does not adversely impact the validity of [the Bureau's] position on approvability, and in fact strengthens the arguments in favor of approvability.

Delta then persuasively disputes, with appropriate citations to the record, the Bureau's suggestion that Argentina's policy favoring fixed third-flag shares is based upon general economic philosophy and not the actual conditions in the trade. As Delta points out, the record establishes that while Argentina's policy favoring fixed shares may be based in part upon Argentina's general economic philosophy, it also is directly based upon the realities of conditions in this trade. (Delta Reply Brief, pp. 11-14.) Next, the Bureau argues that the third-flag shares under Agreement No. 10382, as amended, are not unjustly discriminatory or unfair and should be approved. The Bureau suggests, however, apparently in an attempt to bolster its argument against the Atlantic Agreement, that the record of the Gulf negotiations indicates that ELMA improperly influenced the negotiations in favor of the Brazilian flag lines. The underlying proposed findings of fact in support of the Bureau's position have been thoroughly treated by the proponents. Moreover, the record reveals that the national flag lines, and not just ELMA, attempted to reach a reasonable accommodation to assist the third-flag lines. (Delta Reply Brief, pp. 14-15, Appendix A.) The Bureau also suggests "SEIM may have exerted an indirect influence on the negotiations by using ELMA as a conduit." In support of this suggestion, the Bureau relies on the acknowledged existence of certain confidential instructions from SEIM to ELMA, and the Argentine Government's alleged refusal to disclose these instructions or to permit

ELMA to testify with respect thereto. Delta, on the other hand, points out that there is nothing which can be drawn from this record to establish that SEIM actually influenced the conduct of the negotiations, either directly or indirectly. As Delta concludes:

The negotiations ultimately turned on the various commercial arguments raised by the lines and the lines' respective perceptions of their own best interests, including whether they felt that they possibly could get a better result from this Commission. (Delta Reply Brief, pp. 15-17.)

In its discussion of the factors considered by the parties in negotiating their shares, the Bureau argues that little weight should be given to actual capability and future trade intentions and observes that "the parties themselves do not even correlate the pool share to their future services." Delta, on the other hand, responds by showing that the record of the Gulf negotiations establishes that the lines considered not only past carryings (see *GSB-5B*, pp. 7-10), but also the present capabilities and specific vessel commitment and service intentions in their negotiations (*GSX-5B*, pp. 27-29). All of these factors were discussed by the lines, and considered in the proposals made by the national flag lines (*id.*, pp. 33, 37). (Delta Reply Brief, pp. 17-18.)

Finally, the Bureau argues that the withdrawals of Nopal and Navimex from the trade were not related to Agreement Nos. 10386 and 10382, as amended, or the shares of those lines thereunder. While this position is fully supported by the record (see FF's 16 & 74), the Bureau relies in part on the Nopal and Navimex affidavits (*Ex's. 6 & 6A*). These affidavits were admitted, over the objection of the proponents, "as strictly an indication of these individuals [present] state of mind," and not for the truth of the matters asserted therein. (Tr. 32, lines 12-14; 61, lines 12-19). Delta maintains its previously stated position that these affidavits are inadmissible and moves that they be stricken from the record and claims that the Bureau's purported use of these affidavits goes beyond the purposes for which they were admitted. And while Delta's motion will be denied, the facts here, in any event, regarding the withdrawals of Nopal and Navimex establish that the pools and shares therein were not the reasons for the withdrawals (see *FF 74*). (Delta Reply Brief, pp. 18-20.)

The one major issue of disagreement is that the Bureau considers that the Commission should approve Agreement No. 10386, as amended, "pending a renegotiation of the third-flag shares." It contends that the "[s]hares assigned in the agreement do not accurately reflect the past service of Ivaran or Lloyd." The Bureau observes:

While the other factors the Commission should consider may account for some of the difference between the pool contributions in the past and the shares assigned in Agreement No. 10386-2, these factors are not so great that they should out-

weigh the credit which should be given to Ivaran's past service. The shares assigned Hopal and Montemar however, are consistent with section 15 in that prior to the negotiation of the agreement, Hopal provided very little service to the trade, and Montemar provided none.

The Bureau also agrees:

. . . that Ivaran should not be permitted to carry all of the third-flag share or even such a large portion that the other lines are not able to develop a stable service. In this respect, Ivaran was unreasonable in requesting 16 to 17% of the third-flag share.

Proponents have addressed a number of arguments which ultimately resolve this issue. Lloyd and Nacional argue that the Bureau's position "simply stands without support in the record." (Lloyd and Nacional Opening Brief, pp. 9-14, Reply Brief, pp. 22-23.)³⁵ Lloyd points to the testimony of Mr. Ornellas, who described the nature of the negotiations as showing that: (1) each party always wants more than it gets, (2) that there are intangibles to be considered, and (3) that each party operates from its own evaluation of the real, the perceived and the intangible factors (*Ex. 11*, p. 4). Most important, he stated specifically that "no carrier . . . in any way denied any carrier the opportunity to negotiate" (*id.*). Lloyd also argues:

Moreover, what results can be expected to obtain from re-negotiation? Given the [Bureau's] well-founded reluctance to define how much "room" it believes Ivarans needs, or how much weight should be accorded the issue of past participation, we submit that the parties should not be subjected to yet another lengthy and expensive round of negotiations, only to find themselves engaged in another lengthy and expensive round of second-guessing by [the Bureau].

ELMA contends that the Bureau offers no guidelines as to what might be an acceptable outcome of such further negotiations. It also argues that the Bureau has failed to consider "what will happen in the trade while these endless purported negotiations are going on with the Agreement 'approved' subject to such renegotiation." In ELMA's view, the trade would revert to "chaos, and severe prejudice to shippers, consignees and carriers." (ELMA Reply Brief, pp. 10-12.)

Moore McCormack also provides the ingredients which necessitate the rejection of the Bureau's suggestion. As it persuasively points out, the Bureau has not provided the specific shares that would be fair to both Ivaran and Lloyd and would, in effect, require the Commission to

³⁵ As part of their argument, Lloyd and Nacional rely upon "a telex supplied by Ivarans in discovery but not part of the record here" (Opening Brief, p. 11). Both Ivaran and the Bureau properly object to the consideration of the telex "as a late-filed counsel's exhibit." No consideration will be given to the telex, and it is hereby rejected as an exhibit.

order renegotiation based upon the concept that Ivaran's share under the pool is too low. The result of such an Order may well lead again to protracted litigation. On the other hand, if the Commission determines to set a specific share for Ivaran, the shares of others would be altered with the probable result that SEIM would, in regulating Argentina's foreign commerce, set shares that differ from this Commission.

Furthermore, Moore McCormack realistically evaluates another of the consequences of the Bureau's requirement as follows:

If the Commission orders renegotiation it will be injecting another factor into the negotiating process by placing a "veto" in the hand of one line, Ivaran. If one line knows that the Commission will order renegotiation of "commercial" arrangements because of a dispute over 3 or 4 percent, that line can frustrate the wishes of the other parties by failing to negotiate in good faith, and waiting for the F.M.C. to act. Moreover, the Commission would be placed in a position of continuously second guessing the actions of the lines. (Moore McCormack Reply Brief, pp. 21-24.)

Under the circumstances presented by this record, the Bureau's proposed modification of Agreement No. 10386-2, to the effect that the Commission should require the non-national flag lines to renegotiate their shares, is found to be impractical, unnecessary, and not warranted. The Bureau's proposed modification seeking the transcripts of the negotiations of the non-national flag lines will be treated later.

AGREEMENT NO. 10386, AS AMENDED, IS FOUND NOT TO BE UNJUSTLY DISCRIMINATORY OR UNFAIR TO IVARAN

The Bureau, in considering the arguments raised by Ivaran and the record, observes:

The only party to argue against the allocation by fixed share of the third flags' carriage has been Ivaran.

In so arguing, Ivaran has emphasized certain factors and totally ignored others. Its antitrust discussion concludes that its share is too small and thus contrary to the public interest. Although the Bureau agrees that Ivaran's share is too small within the fixed shares, we believe fixed shares are in the public interest. Instead of addressing the public interest aspects of allocation by fixed share rather than by open competition, Ivaran's argument really goes to the *size* of its share, and little further.

The Bureau also has argued that the allocation of fixed shares for the non-national flag lines is in the public interest. (Reply Brief, pp. 12-16.) The Bureau also concluded that the factors influencing the negotiations of the Agreements do not render them unapprovable by the Commission. In that regard, the Bureau states:

. . . an analysis of the negotiating process demonstrates that certain pressures influenced the third-flag lines to accept, if not specific shares, relative share sizes, but that the existence of these influences does not a) deprive the Commission of jurisdiction to approve the agreements, or b) render the agreements contrary to the public interest and therefore unapprovable under section 15. (Reply Brief, p. 16.)

As the Bureau has noted, Ivaran has emphasized certain factors and totally ignored others in its argument. Indeed, as Moore McCormack also pointed out, Ivaran's argument here "is premised upon a host of erroneous factual contentions." Moore McCormack has supplied a detailed treatment to almost all of the record "support" relied upon by Ivaran. (Moore McCormack Reply Brief, Appendix A, pp. 37-77.) A few examples will point to the problem in relying upon Ivaran's factual contentions. Ivaran claims that SEIM and SUNAMAM refused to allow ELMA's representative to testify to any instructions that SEIM gave to ELMA. (Ivaran Reply Brief, pp. 23, 30.) However, the witnesses' testimony does not support such a conclusion. (Moore McCormack Reply Brief, Appendix A, pp. 71-73.) Ivaran also states, "As previously demonstrated (Iv. PFF 12-24), Ivaran has provided a much more efficient, innovative and loyal service over a period of years to the shipping public in this trade than Lloyd. These factors must weigh heavily in share negotiation." (Ivaran Reply Brief, p. 33.) But the sweep of Ivaran's reliance upon its proposed findings is diminished considerably when viewing the considerations of the record omitted from Ivaran's proposed findings. (Moore McCormack's Reply Brief, Appendix A, pp. 46-56.) Ivaran also makes the claim that it "is the only carrier introducing new tonnage to the trade (Iv. PFF 2)." (Ivaran Reply Brief, p. 33.) A review of Ivaran's proposed finding reveals that of the four vessels listed, two are on short-term charter and that Ivaran's "commitment" to the trade may be more limited than its argument suggests. (Moore McCormack Reply Brief, Appendix A, p. 38.) Ivaran also states, "As Mr. Holter-Sorensen explained when lines are granted a share far beyond its ability to carry, the only way to meet its share is by rebating which, coupled with decreased service to shippers, benefits no one. (*ASX-11(c)*, p. 80 and pp. 211-215 and Iv. PFF 39)." (Ivaran Reply Brief, p. 34.) However, Mr. Holter-Sorensen also testified that with respect to his allegation of rebating that "This is second-degree hearsay . . . I don't have any evidence" (*ASX-11(c)*, p. 81). Later he testified that he was "quite sure" Lloyd Brasileiro was not rebating (*id.*, p. 212). Ivaran also states that Moore McCormack "conveniently ignores Mr. Holter-Sorensen's testimony that Ivaran began cutting back its service because of these fixed shares. (Iv. PFF 17 & 18)." (Ivaran Reply Brief, p. 36.) However, a review of Ivaran's PFF 17 and 18 reveals misstatements of the record and argument without

supporting citations. (Moore McCormack's Reply Brief, Appendix A, pp. 50-53.) And even assuming that a pool share restricted an ability to lift cargo, an assumption not justified on this record, the question here is whether Ivaran in the next year will carry slightly more than 3,000 tons of cargo. And the suggestion that Ivaran "may be forced to withdraw from the trade" is considerably weakened considering its stipulation that approval of Agreement No. 10386, as amended, will not cause any curtailment of its service, jeopardize its ability to continue serving the trade, or adversely affect its profitability (FF 66). And while Ivaran takes issue that "it stipulated that the Agreement would not economically harm" itself, nonetheless it "agreed it would not raise any contentions of its economic position." (Ivaran Reply Brief, pp. 35-36.) A stipulation of that nature has, of course, at least two results: (1) based upon the stipulation, the proponents failed to pursue discovery requests in this area, and (2) the record is devoid of supportable conclusions concerning Ivaran's view of its economic position.

These examples are but a few illustrations which illuminate the frequent use by Ivaran of its proposed findings which are either based upon a selective and narrow view of the record or are argumentative in nature. Certainly, it should be unnecessary here to resort to constant refutation of its many arguments and the supposed record support for each. Again, after a review of this record and because of the expedited nature of this proceeding, this Judge should not be required to provide attentive consideration to arguments based upon such proposed findings. This is especially appropriate where the briefs of the proponents, as well as the Bureau, provide ample and persuasive response to the arguments of Ivaran. Notwithstanding these observations, the treatment of the substantive arguments raised by Ivaran, as provided by the other parties to this proceeding, substantially respond to the contentions raised and will be presented next.

**(1) RECIPROCITY BETWEEN BRAZIL AND ARGENTINA WAS
NOT THE SOLE BASIS FOR DETERMINING THE POOL
SHARES.**

Ivaran argues that the only basis for the third-flag shares was "total reliance on the reciprocity factor in favor of Lloyd" and that "reciprocity" in favor of Lloyd was achieved through an agreement between the governments of Argentina and Brazil. Admittedly, the argument that reciprocity should be considered in fixing shares was one of many negotiating points used by Lloyd, however, the record fails to provide what weight, if any, that factor played in reaching the final pool shares. Moreover, the record fails to demonstrate that there was an agreement in fact between the governments of Argentina and Brazil providing for reciprocity in their trades with the United States (FF 87),

and even if there were, an agreement of that nature would have little impact upon the negotiation of the third-flag shares since SEIM played no role in the third-flag negotiations of the Argentine pool and SUNAMAM played no role in negotiations of the Brazil pool. If there were in fact an agreement for reciprocity, the Argentine carriers necessarily would have received comparable treatment in the Brazil trade. The record shows that in that trade the Argentine lines received no "reciprocity," because of an agreement between the government of Norway and Brazil in favor of Ivaran which precluded any increase in the share of the Argentine lines (Moore McCormack Reply Brief, Appendix A, pp. 42-43, 62-64). Finally, the Commission held in *Docket Nos. 78-51 and 78-52, supra*, that Lloyd's negotiating position urging reciprocity was not in and of itself determinative of the existence of an agreement between the carriers to that effect (pp. 1114-1115). (See also FF 46, 53-55 and the treatment of Ivaran's factual contentions concerning reciprocity, Moore McCormack Reply Brief, Appendix A, esp. pp. 56-66, 68-69, and Lloyd's Opening Brief, pp. 10-14, 18-20.)

(2) FIXED SHARES WERE NOT UNEQUALLY APPLIED.

In its opening brief, Ivaran claims that "there was *no* commercial basis for the allocation. Ivaran submits that reciprocity was the determinative factor and that total reliance on the reciprocity factor in favor of Lloyd was manifestly unfair to Ivaran and the shippers of the trade." (Brief, p. 58.) It also argues that:

[T]he situation at hand has not appreciably changed from June 22, 1979, [the date of the service of the Commission's Order in *Docket Nos. 78-51 and 78-52, supra*]. The only change has been SEIM's statements that fixed third flag shares are desirable based upon reciprocity with Brazil. It has not been shown that SEIM's position is not supported by any Argentine statutes legislation or resolutions. Therefore, the Commission's decision in Agreement 10349, that the allocation of fixed third flag share was unjustly discriminatory and unfair, is equally applicable here. (Brief, p. 60.)

Again, the claim that the requirement for fixed shares represents any kind of "arrangement" with Brazil finds little support of record. Actually, the requirement for fixed shares applies to all carriers (in both the Atlantic and Gulf trades). And it is justifiable to argue, as Moore McCormack has, that if Ivaran had been able to persuade other third-flag carriers that it was entitled to virtually the entire 20 percent third-flag share, then perhaps it would not be complaining about the application of the fixed share requirement.

(3) THE CLAIM OF CONFLICT BETWEEN THE TERMS OF AGREEMENT NO. 10386, AS AMENDED, AND THE INTERGOVERNMENTAL AGREEMENT IS IRRELEVANT IN CONSIDERING WHETHER THE AGREEMENT IS UNJUSTLY DISCRIMINATORY OR UNFAIR.

The claim that Agreement No. 10386, as amended, "goes far beyond the actual terms" of the Intergovernmental Agreement, even if true, would be irrelevant to whether the agreement was unjustly discriminatory or unfair, unless the Intergovernmental Agreement provided that there would *not* be fixed third-flag shares. The evidence indicates that fixed shares for all lines participating in the commercial carrier agreements was what the two countries anticipated (FF 40). And the record shows that the Argentine Government understood (and insists) that the Intergovernmental Agreement would be implemented by fixed shares (*SX-40*, p. 8). The Maritime Administration has advised the Commission that paragraphs 1 and 2 of the Agreement³⁶ "also contemplate that there will be commercially agreed shares for such third-flag carriers as participate in the trade" (*SX-22B*). And Mr. Nemirow testified at his deposition that the agreement contemplated that third-flags would participate in accordance with the appropriate legislation in each country, and if Argentine law required fixed shares then that is the way in which the third-flags should participate (*SX-3A*, p. 32). And, as noted above, the testimony and evidence show fixed shares to be a requirement of Argentine law. (FF 37 and 38, Moore McCormack Reply Brief, Appendix B, pp. 78-79.)

³⁶ As the Bureau points out:

Ivaran mischaracterizes the Argentine/United States Memorandum as not addressing fixed third-flag shares. In citing the Memorandum's intent not to affect third-flag rights, it fails to quote all of the relevant language:

1. Each party recognizes the intention of the other Party in carrying a substantial portion of its liner trade in vessels of its own flag in accord with appropriate legislation in each country. For purposes of this paragraph, vessels of Argentina shall include vessels under Argentine registry or charter.

This provision, established in the light of the reciprocal interests of the two countries, *does not affect the rights of flag vessels of third parties to carry goods between the ports of the two Parties, as implemented in the terms of Paragraph 2 below*, and in accord with the appropriate legislation in each country.

2. The establishment of *mechanisms and procedures necessary to the implementation of the carriage of cargo envisioned in Paragraph 1 of this Memorandum of Understanding, such as revenue shares for the lines in the trade, number of sailings, over-carriage and under-carriage provisions, and similar matters*, will be determined by commercial agreement between their respective national flag carriers, subject to approval by the appropriate governmental agencies of each of the Parties. (Emphasis added.) (Bureau's Reply Brief, pp. 14-15.) (See also FF 31-33.)

(4) THE RECORD ESTABLISHES THAT IVARAN'S SHARE IS
BOTH JUSTIFIED AND FAIR.

In the Commission's *Order Denying Motion to Terminate, Vacating the Stay of Proceedings, and Approval of Agreement Nos. 10388 and 10389*, served January 29, 1981, *supra*, two issues were raised with respect to the division of third-flag shares: (1) whether the specific shares "are based on valid commercial considerations" (Appendix first unnumbered paragraph), and (2) if any of the third-flag carriers "accepted a significantly larger or smaller share . . . than its historical share . . . what is the basis for the new share?" (*id.*, p. 6).

What emerges from an evaluation of these issues is that this record cannot possibly provide answers to the precise weight that should be afforded to *all* factors utilized in arriving at any given share. Although Ivaran's share is several percentage points below its actual participation in 1979 and 1980 (FF 17), and Lloyd's is significantly larger (*id.*), the "basis" for these shares appears to be the "best bargain" each could reach under all of the considered circumstances.

In Ivaran's limited view of the record, "its past history and demonstrated capability went for naught in the Atlantic because it was totally overshadowed by Lloyd's high card zonalism and reciprocity with the attendant supporting hands of SEIM and SUNAMAM." (Reply Brief, p. 25.) Ivaran's principal argument is that past participation should operate to the virtual exclusion of all other factors, and that a carrier offering new service had to be content with an unprofitable one or two percent and then fight its way in (FF's 53, 55, 56). But it also argued that both the F.M.C. and SEIM were of the opinion that the share it negotiated in March (9%) was unfair (FF 55). It considered both the financial and political impact of continuing to fight the other lines (*id.*; *ASX-11(c)*, MM-1, p. 78). And Ivaran's decision as to the point at which it would yield to arguments of the third-flag lines was demonstrated to be on numerous factors (FF 55). One factor was how this Commission would view its "bottom line." In mid-1979 when operating under "open competition," Ivaran had "hoped" to "carry a position between 12 and 15%" (*ASX-11(c)*, MM-1, pp. 3 and 16), and during the May negotiations it "felt that if we reduced our requirements down to 12 or 13% and still did not sign . . . the margin between what the other lines were prepared to agree to and what our requirements were, were so small that the F.M.C. would say the difference was so insignificant that they would dismiss our protest" (*ASX-11(c)*, MM-1, p. 77). See also *ASX-11(c)*, Tr. 21-23. Ultimately, "one of the most important factors . . . [was] that Ivaran will be able to continue in this trade and if the trade continues as strong, it will put Ivaran in a sound financial position." (*ASX-11(c)*, MM-1, p. 78.) These are but a few examples of factors other than its "past participation" in arrival as to the shares. Moreover,

the Bureau concluded that it does not "dispute that Ivaran's tactics contributed to the size of the pool share it accepted." Its area of disagreement, on the other hand, "goes to the point that Ivaran was not dictated a particular pool share, a position with which the Bureau agrees." (Reply Brief, p. 18.)

Lloyd argued first that its share must be sufficient to enable it to offer an economically sound and competitive service (FF 54; *Ex. 11* (Ornellas), p. 4). It also argued, *inter alia* that its share should reflect its capability³⁷ and commitment to the trade and its position as a "zonal" flag and entitlement to reciprocity because of the substantial contribution that the Brazil trade makes to the entire cargo movement on the trade route (FF 54).

The record clearly has demonstrated that many factors contributed to the final results reached after negotiations. It is equally clear that each factor cannot be assigned with any mathematical precision in the eventual outcome. But most important is that "past participation" was considered to the extent that Ivaran received the largest third-flag share. Also what clearly amounts to commercial negotiations involving many factors defies any realistic attempt to determine the exact role of each in reaching shares. Indeed, the unknown and unstated rationalization behind any possible "bluffing" or otherwise in the negotiations certainly cannot be fixed with a percentage point one way or the other.

Other observations are necessary concerning Ivaran's past carryings. First, Ivaran's recent past carriage, as reflected in FF 17, is not so much greater than its initial pool share. Second, Ivaran's claim of 16 or 17 percent of the pool had to give way to a lesser share since it had sought virtually the entire third-flag share, and in order to make room for the other third-flag lines to operate economic services, Ivaran had to reduce its share demands below its past participation. In *Docket Nos. 78-51 and 78-52, supra*, the Commission acknowledged that if past carryings were the principal factor in reaching shares, "Ivaran . . . would be entitled to the entire third-flag allocation . . . [and that] . . . would be inequitable and would unreasonably deny the other third-flag carriers access to the United States/Argentine trades" (p. 1113). The Commission qualified its endorsement of the importance to be attached to past carryings in considering pool shares (emphasis added):

[P]ast carryings of other carriers cannot be disregarded. *To do so could well result in the abrupt curtailment of the services provided by a carrier who had been carrying significant amounts of cargo. (Id.)*

³⁷ Ivaran recognized that "Lloyd has, of course, the financial backbone to install a larger number of vessels if they feel so compelled." (*ASX-11(c)*, MM-1, p. 3.)

And as noted above, Ivaran has failed to persuasively show that approval would force it to curtail its service; it has stipulated that approval will not "cause any curtailment of its service to the trade" (FF 66(a) and (b)), and has stated that approval will not force it out of the trade (*id.*). And the record also shows that the 1981 cargo theoretically "lost" to Ivaran because of its reduced share is approximately 3,300 tons. (Moore McCormack Reply Brief, Appendix A, pp. 5153.)

Moreover, the so-called "national interest" factor commented unfavorably upon by the Commission in *Northern Pan-American Lines (Nopal) v. Moore McCormack Lines, Inc., et al.*, 8 F.M.C. 213 (1964), a proceeding relied upon by Ivaran here, was included by the Commission in *Docket Nos. 78-51 and 78-52, supra*:

Since its decision in Nopal, the Commission has, at least to some extent, determined that national-flag interests *are an appropriate factor that should be considered* when evaluating Section 15 agreements that derive their impetus from foreign cargo preference laws. [p. 1113, note 40; citations omitted; emphasis added.]

Certainly there are additional factors that operated in a fashion to determine the shares in addition to the reliance upon past carryings as argued by Ivaran and to an extent by the Bureau. (Moore McCormack Reply Brief, pp. 31-34.) But the Bureau, unlike Ivaran, has recognized that "past carriage is not the only factor which the Commission should consider under section 15" and agrees that "Ivaran does not have a 'property right' to a certain share by virtue of its past carriage. . . ." (Bureau Reply Brief, p. 23.)

Finally, as Moore McCormack also points out, the pools have revenue exclusions and forfeiture provisions which will protect Ivaran from any actual unfairness. The minimum sailing forfeiture provision, the undercarriage forfeiture provision, the carrying compensation provision, and the 50 percent penalty payment provision (FF 62-65) all operate to severely penalize a line which does not meet its service obligations or does not carry its share, and to cushion the impact that the agreement has upon an overcarrier. (Moore McCormack Reply Brief, p. 34, Opening Brief, pp. 53-56.) Ivaran points to the testimony of Mr. Crowley concerning the undesirable features of utilizing penalty provisions (*Tr.* 487-488) and claims that it would be losing the support of shippers not being served during this "forced" period of acceptance of penalty payments which it may receive from lines that cannot meet their share. (Ivaran Reply Brief, p. 34.) But, as Moore McCormack has shown, in the pool calculation for the first three months of the pool (October through December 1980) (*Ex. 19* (Crowley) Attachment D), Ivaran had a pool share of 10.5%. It carried 14.95% of the pool revenue during this period, but paid a "penalty" of only \$21,835. The pooling provisions had the following effect: First, because Lloyd Brasi-

leiro and Montemar failed to make their minimum sailings, their shares were reduced and redistributed to Ivaran and Hopal, giving Ivaran a 14.933% share rather than 10.5%. Second, of its total pool earnings of \$629,194 (the 20.5% bunker surcharge was *not* pooled), Ivaran deducted and retained \$228,059 in carrying compensation. Third, because Lloyd and Hopal did not carry 85% of their share most of their undercarriage credit was forfeited to Ivaran, Moore McCormack, and ELMA/Bottacchi (see *Ex. 19*, Attachment D, part D, Forfeiture Calculation). The net effect of these adjustments was an overcarriage penalty payment by Ivaran of \$21,835 and by the Argentine lines of \$486 (Column 33). Comparing Ivaran's penalty with its gross revenue (including surcharges, etc.), the pool penalty cost Ivaran less than three cents on the dollar of gross revenue (FF 67(a)). The actual experience for the first three months of the pool shows it has neither been unfair to Ivaran nor unduly penalized by it. Furthermore, the carriers must earn their respective percentages by serving the trade and carrying the cargo. (FF 67(b); *Ex. 19*, pp. 12-13; Moore McCormack Opening Brief, pp. 54-56).

In balancing *all* of the factors necessary, especially the impact upon Ivaran as opposed to the many benefits derived from approval of the agreement, it is found that Agreement No. 10386, as amended, is not unjustly discriminatory or unfair or contrary to the public interest considerations imposed under section 15.

THE RESPONSE TO THE INCLUSION BY THE COMMISSION OF SPECIFIC ISSUES AND QUESTIONS TO BE ADDRESSED IN THIS PROCEEDING

The Commission's Order Denying Motion To Terminate, Vacating the Stay of Proceedings, and Approval of Agreement Nos. 10388 and 10389, served January 29, 1980, *supra*, amended the earlier Order of June 30, 1980, "to include the issues set forth in the Appendix to this Order," slip. op. 77. The Appendix (pp. 1-4) listed four issues and added, "In addressing these issues, the parties to this proceeding should develop information in response to the following specific questions. They should not, however, consider the proceeding limited to these questions if circumstances indicate other areas of inquiry." The Appendix listed 14 specific questions.

A few preliminary observations are necessary before the treatment of these issues and specific questions. The resolution of many of these issues and questions can be found in the extensive findings of fact utilized in this decision. Furthermore, the position of the parties has been detailed earlier in this decision. Both the Bureau and Ivaran,³⁸ in

³⁸ Ivaran provided its responses in its Reply Brief thereby precluding a treatment of its views by the other parties. (Reply Brief, Appendix 1.)

addressing the four issues,³⁹ have essentially responded by references to portions of their briefs which also have been considered and treated to the extent necessary in this decision.

The discussion of the fourteen questions by proponents are contained in Lloyd and Nacional's Opening Brief (Appendix pp. 1-13), and both Moore McCormack and Delta concur in the presentation of the summary of those views.

The following will set forth the Commission's specific questions, a summary of the responses, and the conclusions of this Judge which adopt, in large measure, those submitted by the proponents. The Bureau has provided references to its Opening Brief in support of its responses, while Ivaran, for the most part, provided none.

1. Does Argentine law require fixed third-flag shares and, if so, does it specify the size of any such shares?

Both the Bureau and Ivaran agree that the "record does not reveal a requirement of Argentine law but Argentine policy clearly favors it."

This issue has been treated above and, although the record does not contain a specific Argentine law to that effect, the testimony reflects that the Argentine Government has stated that its laws require fixed shares (*SX-40*, pp. 8-10) and this was confirmed by the Assistant Secretary of Commerce (*SX-3A*, p. 33). See also, *SX-10*, p. 6, Ex. 15, p. 2.

In addition, the record supports the contention that neither Argentine law nor policy specified the size of any share of the third-flag lines. Argentina's position, as set forth by SEIM, has been that there should be fixed shares with no less than 80% reserved for the national lines, and no more than 20% reserved for the third-flag lines (*Ex. 15*, p. 4), and that it has no views as to specific percentages to be determined among the lines (*SX-40*, p. 10; *Tr. 331*; *ASX-11(c)*, MM-1, pp. 30-31, 58).

³⁹ The four issues set forth by the Commission are as follows:

Whether fixed, individual shares for third-flag carriers in these trades are necessary to meet serious transportation needs, to achieve important public benefits, or to fulfill valid regulatory purposes of the Shipping Act and, if so, whether the specific third-flag shares fixed by these Agreements are unduly discriminatory or unfair between carriers, whether they are based on valid commercial considerations, and whether they are the result of direct or indirect coercion by the Government of Argentina or any other person.

Whether the facts surrounding the negotiations and execution of these agreements indicate conduct inconsistent with the provisions of the United States/ Argentina Memorandum of Understanding of March 31, 1978, requiring that the "mechanisms and procedures necessary to the implementation" of the Memorandum be determined by "commercial agreement", either by showing imposition of the will of the Government of Argentina, directly or indirectly, or coercion by any other party.

Whether the provisions of the Agreements providing for penalties for overcarriage and undercarriage unnecessarily restrict competition among third-flag lines within the 20 percent share to these lines and, if so, whether those provisions should be amended.

Whether the provisions of the Agreements giving third-flag carriers who are parties to the Agreements control over the cargo shares assigned to any new third-flag parties are unnecessarily restrictive or unduly discriminatory among carriers, and, if so, whether those provisions should be amended.

2. Is there any evidence that the decision to renegotiate Agreement Nos. 10346 and 10349, to provide for fixed third-flag shares, resulted from requests to do so by non-Argentine carriers?

The Bureau states that the record reveals that Delta requested a Gulf Principals' Meeting, but that ELMA had been planning to call one. Ivaran's response is simply "that the decision to renegotiate fixed third-flag shares had its origin in the position of SEIM and possibly SUNA-MAM."

The record reflects that the decision to renegotiate those Agreements was indicative of a policy determination of the Argentine Government. On December 26, 1979, SEIM advised the Inter-American Freight Conference Section B that its approval of these Agreements (and the corresponding southbound pools) would expire on March 31, 1980, and before that date SEIM "will definitely decide on the manner in which third-flag lines will participate in the trade from Argentina to the U.S. East and Gulf Coast ports" (SX-9). SEIM has stated that "Because such 'open competition' is contrary to the maritime laws and policies of Argentina, SEIM, after consultation with and the support of the U.S. Maritime Administration and the State Department, instructed ELMA to call another meeting to arrive at fixed shares." (SX-40, pp. 9-10.) Delta also requested ELMA to call a meeting of the Gulf pool principals at the earliest possible date to discuss SEIM's announcement and possible alternative pool conditions to be adopted (GS-25; Ex. 7, pp. 12-13).

3. Are executives of the involved Argentine carriers Government officials? If not, were they appointed to their positions by the Argentine Government, or can they be disciplined or discharged by the Argentine Government?

The Bureau concludes that "the record reveals that the Board of Directors of ELMA is appointed by an agency of the Argentine government but is incomplete beyond that." Ivaran agrees and adds that "Bottacchi was described as a privately held company in testimony given."

The record indicates that the Board of Directors of ELMA is appointed by the State Secretary of Maritime Interests, which in turn designates the executive officers of ELMA (SX-36, p. 1). SEIM does not control ELMA's commercial operations (Tr. 306), and the available evidence is that ELMA's executives are not government officials (Tr. 302). Bottacchi is a privately-held company which appoints its directors and officers without the involvement or approval of the Argentine government (SX-36, pp. 1, 6). Moreover, the record fails to establish that these executives are even subject to discipline or discharge by the Argentine Republic.

4. Are there transcripts available of the negotiations for third-flag participation in the northbound trades?

Although there were no transcripts made of any of the caucuses of the Principals' Meetings in which Agreement Nos. 10382 and 10386 were negotiated, the pool transcripts contain reports by the third-flag lines of the results of the caucus (Stipulation of Fact No. 1). And while no recordings were made of the separate third-flag caucuses which occurred in the Atlantic Coast (March 18-19, 1980, and May 19-20, 1980) or Gulf Coast (February 12-13, 1980, and May 22-23, 1980) pool meetings, statements regarding the caucuses were made at the Principals' Meetings and are reflected in the transcripts thereof (*ASX-4* and -6, and *GSX-5* and -9).

The Bureau has urged that both Agreements should be modified to provide for transcripts of the negotiations of the non-national flag lines. That contention will be treated in the next section of this decision.

5. What are the carryings (by shares of total revenue tons) of all third-flag carriers in the northbound trades for the period from January 1, 1975, through the most recent date for which such information is available?

The Bureau's response to this question is: "See *ASX-9* and *GSX-18* for carrying statistics since the second semester of 1976. The Bureau has been informed that earlier statistics were not kept. The Bureau believes that the available record on this point is sufficient to support decisions regarding approvability." Ivaran contends "that the available record on this point clearly demonstrates the inequality of granting Ivaran and Lloyd comparable pool shares."

A brief summary of the cargo carryings and sailings of the lines for the period 1977 through 1980 is provided in FF 17 and 18 regarding the Argentine/East Coast trade and in FF 22 and 23 covering the Gulf trade.

Prior to July 1976, reliable statistics on the carryings of the individual lines in the Argentina-U.S. trades are not available. A summary of carrying statistics for the period beginning July 1976 through December 1978 is provided in *SX-37(A)*, based on carrying statistics of conference members moving cargo from Argentina to U.S. East Coast and Gulf Coast ports.

Carrying statistics for Gulf pool members under Agreement Nos. 10346 and 10382 are summarized in *GSX-18(H)*, and the specific pool reports for the period December 1978 through December 31, 1980, are set forth in *GSX-18(A)-(G)*. For the Atlantic agreements, northbound cargo statistics are provided in *ASX-9*. These statistics include conference reports for the period July 1976 through December 1978 (*ASX-9*, pp. 1-15); carryings under former Agreement No. 10349 for the period through June 30, 1980 (*ASX-9*, pp. 16-34); and pool accountant's reports pursuant to Agreement No. 10386 through the period ending December 31, 1980 (*ASX-9*, pp. 34-40).

6. Have any of the third-flag parties to these Agreements accepted a significantly larger or smaller share of the pooled cargo than its historical share? If so, what is the basis for the new share? The Bureau summarizes its position developed on brief as follows: "The Brazilian flag and Ivaran have accepted larger and smaller shares, respectively, in Agreement No. 10386-2." Ivaran agrees by relying upon the citations to the Bureau's brief and adds thereto *SX37*.

As to the Argentina-U.S. East Coast pool, the evidence indicates that in the Argentina-East Coast pool, Agreement No. 10386, as amended, Lloyd negotiated a larger share than it has historically carried. Ivaran, on the other hand, negotiated a share smaller than its historical carriage in this trade. Also, the shares ultimately accepted by the parties to Agreement No. 10386 were established on the basis of commercial negotiations among the lines participating in the third-flag portion of the pool. Although the parties have argued both sides of the question of whether the third-flag shares resulted from the "commercial negotiations," this Judge is persuaded that the predominance of the evidence supports a finding that the Agreements are true commercial agreements where (1) the competing interests bargained to achieve the most favorable result; (2) there was no showing of actual "dictation" or "coercion" by the governments or carriers involved; and (3) the pooling agreements are a result of the type of arrangement contemplated by the Intergovernmental Agreement. All witnesses presenting direct testimony or appearing at the hearing expressly indicated that the shares agreed upon were the result of open, commercial discussions (*Ex. 11* (Ornellas), pp. 3-4, 5; *Ex. 15* (Dandois), pp. 4, 6; *Ex. 18* (Schliemann) pp. 2-3; *Ex. 19* (Crowley) pp. 6-7). The substance of the third-flag negotiations are described in FF's 46, 53, 54 and 55. Moreover, while the commercial considerations underlying each share are not capable of precise formulation and assignment of weighted value, the substance of these discussions are described in FF 44, 54, 57, 58, 59 and 60.

Turning to the Gulf pooling agreement, No. 10382, all third-flag carriers negotiated shares in excess of their historical carrying prior to the pools. Lloyd and Nacional jointly negotiated a Brazilian-flag share which was less than their carriage participation under the "open competition" requirements of Agreement 10346, as amended (*Ex. 11*, p. 6; *Ex. 7*, pp. 27-28).

7. Did the divisions of third-flag shares in the northbound Argentine trades under these Agreements arise from any agreement or understandings, formal or informal, between the Argentine Government and any other third-flag government?

The Bureau summarizes its position, taken on brief, that "the record is not clear on this point." Ivaran agrees with the Bureau by stating that the record is not clear because of the "failure of ELMA and Bottacchi to respond to discovery requests or cross-examination on this

issue. Under the circumstances the Commission should draw the inference that fixed shares were the result of an agreement between Brazil and Argentina." In support of this contention, it points to its brief which treats the so-called "SEIM and SUNAMAM Involvement." (Reply Brief, pp. 21-25.) Although this issue is treated above, the record fails to reflect evidence of any agreements or understandings between the Argentine Government or any other third-flag government concerning the divisions of third-flag shares in the Northbound Argentine trades. The witness for Lloyd testified that, to his knowledge, the August 1979 Memorandum of Understanding between SEIM and SUNAMAM did not apply to the Northbound U.S. trades and that if it did, he would have received instructions from SUNAMAM. (*Ex. 11*, p. 9.) SUNAMAM also confirmed to the United States representatives in Brazil that it did not issue instructions to Lloyd concerning the pools from Argentina to the United States (*SX-34(c)*, *(d)*). Similarly, Mr. Schliemann of Bottacchi testified that the Memorandum of Understanding of August 10, 1979, was not applied to these pooling agreements (*Tr.* 427-428). And meetings were held in April 1980 between Norwegian and Argentine officials concerning shipping matters where Admiral Guevara of SEIM announced that new pool meetings would be convened in May 1980 to permit Ivaran to renegotiate its share (*ASX11(c)*, MM-1, p. 58).

8. Is the current fixed share of northbound pool cargo held by the Argentine flag lines in the Brazil/U.S. trades the result of an agreement or understanding, formal or informal, between the Governments of Brazil and Argentina?

The Bureau concludes that the record is not clear on this point. Ivaran agrees and attributes that again to the "failure of ELMA and Bottacchi to respond to discovery requests or cross-examination on the issue."

The record fails to reflect that the Argentine line's share of the Brazilian pools is the result of any agreements or understandings between those two countries. Mr. Wendt, head of Delta's negotiating team at the Principals' Meetings for the Brazil-U.S. Gulf pools, testified that all pool shares were established on the basis of commercial negotiation (*Ex. 7*, pp. 23-24). The commercial nature of these discussions can be found in the record (*GSX-17*; *ASX-7*; *ASX-8*).

9. Did open competition among third-flag lines under Agreements Nos. 10346 and 10349 result in overtonnaging, unstable rates, rebating or any other malpractices in the northbound trades?

The Bureau concludes that the record reveals that it did not and Ivaran agrees.

The record fails to reflect that open competition resulted in unstable rates, rebating, or other malpractices in the northbound trades (*SX-38*). There is some evidence of overtonnaging during the period of open

competition (*Ex. 11*, pp. 6-7; *SX-38*, p. 3). It was discussed during the March pool meeting (*ASX-4*, p. 11) and commented upon during the hearing (*Ex. 19*, p. 17; *Tr.* 489-490).

10. Were any third-flag lines discouraged from participating in the 20 percent open competition share, required by the Commission under Agreements Nos. 10346 and 10349, by any actions of the national flag lines or the Government of Argentina?

The Bureau concludes "Such reluctance to participate was not evidently caused by national flag or Argentine governmental action." And Ivaran "does not take issue with [the Bureau's] answer."

The record fails to reflect that the actions of the national-flag lines or the Government of Argentina discouraged any third-flag line from participating in the pools under "open competition."

11. Is the United States a signatory to any treaties on maritime matters with any of the countries under whose flags the third-flag carriers participate in the northbound trades? If so, would approval by the Federal Maritime Commission of fixed third-flag shares conflict with the United States' obligations under those treaties?

The Bureau contends that:

. . . the 1928 Treaty of Friendship, Commerce and Navigation between the United States of America and Norway, 47 Stat. 2135, requires that Norwegian flag vessels be given a pool share equal to shares given to any of the United States' trading partners, then both the Argentine share and the Ivarans share must be condemned. Only pooling agreements with equal shares for all would be consistent with an obligation to treat all trading partners equally.

* * *

In acknowledging the right of Argentine flag vessels to carry more cargo in the trade from Argentina to the United States than non-national flag lines, did the Memorandum of Understanding violate a treaty obligation? The question is not one properly before the Federal Maritime Commission. The Memorandum of Understanding was cleared by the Department of State as being consistent with overall foreign policy. (*SX-2*, pp. 28, 29.) Whether the Department of State erred in this regard is not for the Commission to decide.

The Bureau points to *Agreement No. 9939 Pooling, Sailing and Equal Access to Government-Controlled Cargo Agreement*, 16 F.M.C. 293 (1973), where the Commission concluded, in the absence of a Memorandum of Understanding or other agreement, that 50-50 agreement between a United States carrier and a Peruvian carrier, which excluded Westfal-Larsen, a Norwegian carrier, was not contrary to the 1928 Treaty of

Friendship, Commerce and Navigation with Norway. (Bureau Opening Brief, pp. 57-58.)

Ivaran's response is simply that it "does not take issue with [the Bureau's] answer."

The proponents also point out that, by agreement of counsel, it was concluded that the foregoing treaty questions are legal, not factual, issues for determination. (See Transcript of Prehearing Conference, February 19, 1981, at 11-12.) And, it has been settled in at least two additional proceedings that agreements of this type do not infringe on the treaty obligations of the United States: *Agreement No. 10066 Cooperative Working Arrangement, supra*, pp. 1243-44, and *Alcoa Steamship Company, Inc. v. Federal Maritime Commission, supra*, p. 761, n. 12.

12. Have any carriers withdrawn from the northbound trades or been unable to enter them during the period January 1, 1978, through September 30, 1980? If so, what were the circumstances surrounding such occurrences?

The Bureau responded to this question by referring to its brief wherein it concluded:

In summary, fixed non-national flag shares can hardly be blamed for either the demise of Navimex or Nopal's decision to leave the trade. There was a substantial amount of nonpool cargo moving which either line could have carried. . . . Open competition benefited Ivaran and penalized other smaller non-national flag carriers in the Argentina/U.S. East Coast trade. It may have caused the Brazilians to stop service in the Argentina/Gulf trade, although it did not have that effect in the Atlantic. It did nothing to prevent carriers from leaving the Argentine/U.S. Gulf trade. (Bureau's Opening Brief, p. 49.)

Ivaran states "Ivaran does not take issue with [the Bureau's] answer."

The record reflects that Navimex and Nopal are the only carriers which withdrew from the trades during the period January 1, 1978, through September 30, 1980. (Stipulation of Fact No. 2.) In neither instance is there any evidence that the respective shares of the two lines in the Argentina-U.S. Gulf pools was a factor in their withdrawal. (FF 16 and 74.) Netumar has suspended its participation in the Argentine/U.S. East Coast Trade during this period as well. Should it resume operations in the trade, its participation in any pooling agreements then in force will be derived from the Brazilian-flag quota (*id.*). And there is no evidence of any carrier having been unable to enter the trade during this period.

13. What will be the short-term and long-term effect of these Agreements (if they are approved) on U.S. importers in these trades?

The Bureau treated this question in its Opening Brief and a number of its proposed findings of fact. As part of its conclusion, it stated that "There is no evidence that open competition had any effect one way or

the other on importers." (Opening Brief, p. 46.) Ivaran's response is rather brief. "See Iv. PFF No. 23."

The effect upon U.S. importers has been discussed above. Suffice to say here that no shipper affidavits were supplied by Ivaran or by any other source indicating that Agreement No. 10386 would adversely affect their business or their ability to use Ivaran, or that approval would have any adverse impact upon them. There is record support to conclude that in the short term, approval of the Agreements will provide for a continued stability of the trades, and in the long term, will permit continued development and alternative third-flag services to U.S. importers. (For an in-depth discussion of the evidence of record concerning the impact upon shippers, see FF's 82-86.)

14. May a carrier (national or third-flag), who is not a party to these Agreements, obtain cargo in the northbound trades? If not, what is the mechanism which excludes such a carrier from obtaining cargo?

The Bureau in its brief observed that "[w]hatever factors were openly expressed and considered by the parties in agreeing upon shares, all decisions were made against the backdrop of Argentine law and policy. Argentine Resolution 619 excludes carriers that fail to sign pooling agreements approved by SEIM from participating in the northbound Argentina United States trades." (Opening Brief, p. 79.) Ivaran agrees that Resolution 619 would prohibit such carriage.

The record reflects that under Resolution 619, any carrier not a party to the pooling agreements would be restricted to carriage of non-pool cargo northbound.

**THE BUREAU'S SUGGESTION THAT BOTH AGREEMENT NOS.
10386-2 AND 10382-2 SHOULD BE MODIFIED TO REQUIRE
TRANSCRIPTS OF NEGOTIATIONS OF THE NON-NATIONAL
FLAG LINES.**

At the close of the hearing, this Judge provided an opportunity for the parties to state their position regarding the major issues presented for resolution in this proceeding. One of the Bureau's positions was that the Commission should require transcripts be made of future third-flag caucuses (*Tr.* 569). Simultaneous opening briefs were filed by the parties reflecting the following observations as to the Bureau's proposal: (1) Moore McCormack "does not believe keeping transcripts of the third-flag caucuses will be particularly helpful" (Opening Brief, p. 41) but took the position that it would not oppose this limited requirement; (2) Delta also had no objection to such a modification "provided it is limited to that requirement"; (3) Lloyd and Nacional opposed the suggestion because, among other reasons, the very nature of negotiations involve both tangible and intangible factors incapable of accurate portrayal on a record, that the essence of private business negotiations

is that it be private and non-public, and that there would be no benefit derived; and (4) ELMA opposed the Bureau's requirement since the "give and take" for successful negotiations would be impaired. However, after reviewing the Bureau's specific recommendation including the language to be inserted in both agreements as appearing in the Bureau's Opening Brief, the parties now stand united in their opposition. What might have appeared as a "modest proposal" at the hearing is now considered "excessive, and no regulatory purpose would be served by it" (Moore McCormack Reply Brief, p. 35); Delta "would prefer that the proposed modification be rejected in its entirety on the basis that the hypothetical gains are not worth the potential serious impact on the commercial nature of the negotiations" (Delta Reply Brief, p. 22). Lloyd and Nacional argue that the proposal "be rejected in its entirety" (Lloyd and Nacional Reply Brief, pp. 24-27); and ELMA considers that the suggestion, if adopted, would stifle commercial negotiations and is of no importance to this Commission's regulatory purposes. (ELMA Reply Brief, pp. 192-2.)

Apparently, the Bureau has considered it necessary and perhaps meaningful for their purposes to expand upon their initial observations made at the close of the hearing. It would be appropriate now to provide the text—in full—of the Bureau's position and proposed language it determined necessary for inclusion in these Agreements.

Transcripts of the non-national flag lines' negotiations would be very helpful to the Commission in fulfilling its responsibility under section 15 to determine whether the factors used to establish individual shares in the pooling agreements are consonant with the policies and purposes of the Shipping Act. *The Northern Pan-American Line, A/S (Nopal) v. Moore-McCormack Lines, Inc., supra*, p. 228. This inquiry is particularly important here because Resolution 619 permits the majority of the lines to impose a share on a non-national flag carrier on a "take it or leave it" basis. With this obvious potential for abuse, it is essential for the Commission to know which criteria were used to establish the shares.

Knowledge of what went on in the non-national flag caucuses is essential to this inquiry. If the hearing has shown anything, it has shown that the Commission cannot rely on the memories of participants in order to determine what went on in the non-national flag caucuses. Therefore, the Bureau suggests that the following language be inserted in both agreements:

It is agreed by the parties that the Federal Maritime Commission will be furnished with transcripts of meetings, including meetings of Non-National lines, committees, sub-committees or working groups in which any of the following subjects are discussed.

1. Entry of a Non-National Flag line into the Agreement.

2. Participation of a Non-National Flag line in the Non-National Flag proportion established in Article 2(b).
3. Renegotiation of the Non-National Flag proportion established in Article 2(b).
4. Renegotiation of the Non-National Flag minimum sailing requirements.

Transcripts shall include:

1. All discussions relating to any of the subjects identified above, whether or not final action was taken thereon;
2. A full and accurate showing of any action taken on any of the subjects identified above and the reasons therefor;
3. Each of the views expressed during any such discussions;
4. An identification of all documents considered in connection with the discussions of or action taken on any of the subjects identified above.

We do not suggest that this measure is a cure-all to the problems regarding non-national flag negotiations. It is a first step. If parties attempt to circumvent the requirement, other measures will be required. SEIM already sends observers to the pool negotiations. Perhaps the Commission might consider a similar approach if the transcripts are inadequate. Regardless of what other steps may be necessary in the future, we submit that the transcript requirement is a reasonable approach to the problem. (Opening Brief, pp. 89-90.)

While Moore McCormack and Delta apparently do not oppose the requirement that third-flag negotiations of shares, including separate third-flag caucuses, be recorded and transcribed, with such transcripts being provided to the participants, the far reach of what the Bureau considers necessary in order to obtain its objectives is considered objectionable by these parties for a variety of reasons. First, the Bureau itself concedes "that the record [here] is relatively clear as to what transpired at the third-flag caucuses" but wants to examine the source of the information and shows a concern over the memory of potential witnesses. Second, in order to obtain what the Bureau seeks, it will require a modification that, as the parties describe, "is excessive," "the cost alone would outweigh any theoretical benefit," "no reason to require that all transcripts automatically be provided to the F.M.C.," "the definition of meeting is far too broad," "the suggestions as to what the transcripts should include are far too broad," "the proposed language provides a good example of 'regulatory over-reach,'" "the F.M.C. has not, in over 10,400 agreements filed, ever required the parties to file detailed transcripts of their negotiations leading to agreement," and, would "only result in many documents being filed with the Commission

which its staff would have to read and which, for the most part, would be of no importance to the Commission's regulatory purposes."

In my view, the requested modification of both Agreements and the insertion of the language proposed by the Bureau is both unwarranted and unnecessary. It is evident that the purpose in seeking the transcripts is motivated by an eagerness to obtain the most complete record of the parties' negotiations. But the impositions imposed by the proposed language employed in the modification, act in a fashion that would, at the very least, be costly and, in some respects, inhibit the negotiation purposes underlying the functions of a caucus. Furthermore, what is submitted here should be considered as the form the Bureau considers necessary to accomplish its objectives. Since the Bureau's specific language represents its judgment as to best accomplish its purposes, it will be rejected for the many reasons advanced by the parties and because this Judge considers that the requirement would unduly infringe upon the commerciality of the negotiations.

THE AGREEMENTS MEET THE STANDARDS FOR APPROVAL

The record in this proceeding, as reflected in the findings of fact, provides the supportability in favor of the approval of each Agreement without the modifications urged by either Ivaran or the Bureau. Basically, the agreements serve a serious transportation need in that, *inter alia*, they provide for continued stability in the involved trades, encourage additional third-flag participation and service competition to the national flag lines, and encourage regular and comprehensive service through the minimum sailing requirements and pool revenue adjustment mechanisms. The agreements also serve an important public benefit by providing a reasonable commercial resolution, pursuant to the intergovernmental Memorandum of Understanding, of the potentially conflicting policies of the United States and Argentina. The agreements contribute to the maintenance of international harmony and avoidance of disruptive retaliatory action and international conflict, benefiting the lines, the shipping public, and the foreign commerce of the United States. Moreover, the agreements do not invade the antitrust law more than is necessary to promote the regulatory purposes of the Shipping Act and, in fact, contain substantial pro-competitive features. On the other hand, disapproval of these agreements would have a destructive impact upon the shipping public and the commerce between the United States and Argentina. In balancing the interests, the numerous public interest considerations, including the potential for trade disruption and governmental confrontation which would adversely affect the shipping public and the individual carrier interests, these far outweigh any contrary interest as claimed by Ivaran in this proceeding. In a proceeding of this nature, it is the obligation of the Commission to weigh the

conflicting interests. The Commission stated in *Agreement No. 9932—Agreement No. 9939, supra*:

The weighing of the case presented by the proponents of approval against the case made by those protesting approval, of course, resolves the question of whether the ultimate burden of proof has been sustained.

* * *

It is impossible to completely satisfy all of those interests. All that this Commission can do is balance the interests and reach our best judgment under the laws we administer. pp. 302, 305.

The Supreme Court recently observed that the burden of proof standard to be employed in an administrative proceeding is by a preponderance of the evidence.⁴⁰ The proponents have met this burden and the findings of fact attest to the necessary support for the approval of each Agreement.

The Agreements also meet serious transportation needs by providing significant public benefits in the furtherance of valid regulatory purposes.

First, approval here would avoid a potential intergovernmental confrontation wherein both Moore McCormack and Delta may be forced to seek protection through retaliation under section 19, Merchant Marine Act, 1920, or section 301 of the Trade Act if these Agreements are disapproved. Second, the Commission, just two years ago, found that the predecessor agreements in the northbound Argentina/United States Atlantic trade had been justified under the *Svenska* standards. All the underlying questions as to serious transportation need, important public benefits and furtherance of valid regulatory purposes applicable to this proceeding have been previously decided in *Docket Nos. 78-51 and 78-52, supra*. Third, the evidence clearly demonstrates that approval of the agreements will continue to assure all carriers participation in the trade in an orderly manner and to the benefit of the importers. No shipper, carrier, port or other body has protested approval of the agreements. Fourth, the Commission has held in numerous cases that the maintenance of intergovernmental harmony is an important public benefit, *Agreement No. 10066, supra; Agreement No. 10320-4*, 20 S.R.R. 734 (1980). In 1979, discussing the Northbound Argentine/U.S. pooling agreements, the Commission stated: "These Agreements serve an important public benefit by maintaining international harmony through the avoidance of disruptive retaliatory action and resulting international

⁴⁰ The Court stated: "Where there is evidence pro and con, the agency must weigh it and decide in accordance with the preponderance." *Steadman v. SEC*, No. 79-1266, 450 U.S. 91, Slip Opinion p. 10 (February 25, 1981.)

conflict." *Docket Nos. 78-51 and 78-52, supra*, 1111. Likewise, the prevention of disruption of commerce was considered a serious transportation need. And since it is the policy of Argentina that there be fixed shares in the third-flag share, and since their laws and policies are not so incompatible with ours that we cannot reach an agreement (*SX-3A*, pp. 34-35), it is clear that the maintenance of intergovernmental harmony and the free flow of commerce requires the approval of an agreement with fixed shares. Fifth, by approving an agreement with fixed shares, the Commission assures the continuation of third-flag carriage in the trade which cannot otherwise be assured. And sixth, approval of the agreements will have the least adverse impact on any of the regulatory policies which the Commission enforces.

Both agreements have been justified by the proponents. And both are presumptively in the public interest. The preponderance of the evidence developed in this proceeding conclusively permit the finding that the agreements are in the public interest, are required by serious transportation needs, and in furtherance of the valid regulatory purpose of the Shipping Act.⁴¹

As discussed above, the Commission has questioned whether the agreements are truly commercial agreements subject to the Commission's jurisdiction under section 15, or whether they are the product of unilateral government action and thus outside the scope of the Commission's jurisdiction. The record persuasively demonstrates that both are commercial agreements. First, the fixed shares allocated are the result of commercial negotiations among the lines premised upon the considerations of the requirements of the laws and policies of the United States and Argentina and the two regulatory bodies (this Commission and SEIM), which have to approve the resulting agreements. Second, the actual shares assigned were the result of commercial negotiations. Third, the agreements are commercial agreements compatible with the terms of the Memorandum of Understanding. And finally, as discussed above, in the negotiations leading to the third-flag shares, each side advanced the strongest arguments available resulting in the best arrangement that could be reached under the many circumstances involved.⁴²

ULTIMATE FINDINGS

Upon consideration of the evidence, the Administrative Law Judge finds that as to Agreement No. 10386, as amended, and Agreement No. 10382, as amended:

⁴¹ For a detailed discussion of these considerations, see Moore McCormack Opening Brief, pp. 17-33, and Delta Opening Brief, pp. 21-39.

⁴² For a detailed discussion of these considerations, see Moore McCormack Opening Brief, pp. 33-45, and Delta Opening Brief, pp. 6-12, 19-21.

(1) The Agreements are found not to be unjustly discriminatory or unfair as between carriers; detrimental to the commerce of the United States; or contrary to the public interest or otherwise in violation of the Shipping Act, 1916;

(2) The Agreements, which implement a government-to-government agreement, carry a presumption of approvability;

(3) The Agreements meet serious transportation needs, provide significant public benefits, and further valid regulatory purposes;

(4) The Agreements do not invade the prohibition of the antitrust laws any more than is necessary to serve the regulatory purposes of the Shipping Act, 1916; and

(5) The Agreements are the result of commercial negotiations and subject to this Commission's jurisdiction under section 15 of the Shipping Act, 1916.

(S) PAUL J. FITZPATRICK
Administrative Law Judge

FEDERAL MARITIME COMMISSION

DOCKET NO. 81-39

AGREEMENT NOS. 10333, 10333-1 AND 10333-2
CALCUTTA/BANGLADESH/U.S.A. POOL AGREEMENT

ORDER ON MOTION TO TERMINATE AND STAY

February 25, 1982

This proceeding was initiated by Order of Investigation and Hearing, served June 17, 1981, to determine the approvability of Agreement Nos. 10333-2 and the continued approvability of Agreement Nos. 10333 and 10333-1 pursuant to section 15 of the Shipping Act, 1916 (46 U.S.C. 814).¹

Proponents have filed a Motion for Termination, Stay, or Modification of the Commission's Order of Investigation, to which the Bureau of Hearings and Field Operations (Hearing Counsel) filed a Reply. Administrative Law Judge Paul J. Fitzpatrick has certified these pleadings to the Commission for decision.

POSITIONS OF THE PARTIES

Proponents' request to terminate this proceeding is based primarily on Farrell Lines' resignation from Agreement No. 10333 and the conference agreement in the trade, Agreement No. 8650, the Calcutta, East Coast of India and Bangladesh/USA Conference. This "fundamental change in circumstance" and the subsequent withdrawal of Amendment No. 2 allegedly require the termination of this proceeding under the rationale expressed in *Inter-American Freight Conference—Cargo Pooling Agreement Nos. 9682, 9683, and 9684*, 14 F.M.C. 58 (1970). Proponents submit that termination is necessary because a "major portion" of the issues raised in the Commission's June 17 Order are directed to "the problems occasioned by Agreement No. 10333-2 and Waterman's status as an overcarrier in the pool."

¹ Agreement Nos. 10333 (Agreement) and 10333-1 (Amendment No. 1) establish a framework for a cargo revenue pool in the inbound trade from Calcutta, India, and ports in Bangladesh to the Atlantic and Gulf Coasts of the United States. The Agreement, as amended by Agreement No. 1, was approved on January 20, 1981. Agreement No. 10333-2 (Amendment No. 2) would amend the Agreement by, among other things, establishing specific individual revenue shares for the active carrier members. Amendment No. 2 also reserves a revenue share for Cunard-Brocklebank, limited and Hellenic Lines, Limited, who are signatories to the Agreement but not to Amendment Nos. 1 or 2. The signatories to Amendment No. 2 are: Farrell Lines, Inc.; Scindia Steam Navigation Co., Ltd.; Bangladesh Shipping Corp.; Shipping Corporation of India, Ltd.; and Waterman Isthmian Line, Division of Waterman Steamship Corp.

In the alternative, the Commission is requested to stay the proceedings until Proponents can renegotiate and file another amendment to Agreement No. 10333. This amendment would allegedly establish new individual pool shares and remedy the problems which gave rise to this proceeding. Should the Commission decline to terminate this proceeding, Proponents request that the June 17 Order be modified to delete those issues that relate solely to Amendment No. 2.²

Hearing Counsel urges the Commission to deny Proponents' requests to terminate or stay this proceeding. It argues that the Order initiating this proceeding focuses on the continued approvability of Agreement No. 10333 and Amendment No. 1 and not just the approvability of Amendment No. 2. In this regard, Hearing Counsel argues that Proponents' reliance on *InterAmerican, supra*, is misplaced. Hearing Counsel distinguishes *Inter-American* from the instant case on the basis that the proceeding there was discontinued after two signatories repudiated the agreements under consideration but before the Commission acted on those agreements. Accordingly, only those issues relating to Amendment No. 2, which was repudiated by Farrell prior to approval, should allegedly be abandoned here.³

Although Farrell has now resigned from the pool agreements, Hearing Counsel opposes Farrell's dismissal from the proceeding.⁴ It maintains that Farrell is a necessary party since it may have been involved in the pre-approval implementation of Amendment No. 2 which was designated by the Commission as an issue in this proceeding.⁵

DISCUSSION

For the reasons stated below, the Commission will deny Proponents' request to terminate this proceeding but will grant a limited stay.

The Order initiating this proceeding clearly raises issues other than the approvability of Amendment No. 2. One of these is whether Agreement No. 10333, as it stands approved, warrants continued section 15 approval.⁶ The pre-approval implementation of Amendment No. 2 is also presented as an issue in this proceeding.⁷ Farrell's resignation from

² Proponents also request that Farrell, Hellenic, and Brocklebank be dismissed from this proceeding since they have withdrawn from the pool arrangement.

³ The June 17 Order sets forth eleven specific issues to be resolved in this proceeding. Issues 1 and 3 relate to the individual shares in Amendment No. 2. Hearing Counsel would also delete Issue 2 which relates to the participation of Hellenic and Brocklebank.

⁴ Hearing Counsel does not oppose the dismissal of Hellenic Lines and Brocklebank based on their representations that they have not and do not intend to participate in the pool.

⁵ Hellenic and Brocklebank were not signatories to Amendment No. 2 and apparently resigned prior to its filing.

⁶ The first ordering paragraph of the June 17th Order provides:

... a proceeding is hereby instituted to determine whether or not Agreement Nos. 10333, 10333-1 and 10333-2 shall be approved, disapproved or modified under the provisions of section 15.

⁷ Issue 11 in the second ordering paragraph asks: Have the terms of Agreement No. 10333-2 been implemented in any way prior to approval of that Agreement by the Commission?

and the Proponents' subsequent withdrawal of Amendment No. 2 only serves to moot the issues concerning that Amendment's approval. These actions do not affect the other issues presented. Accordingly, Proponents' request to terminate will be denied.

However, the Commission will grant, at least in part, the Proponents' request to stay this proceeding. The Proponents have represented that they are negotiating a new agreement which would supersede, at least in part, Agreement No. 10333, as amended.⁸ If such an agreement is filed, it may require this proceeding to be restructured. The Commission believes, therefore, that some form of stay is warranted in the interest of avoiding unnecessary litigation. However, as the Proponents have advised, the proposed new agreement has been under "active consideration" since September 1981, yet to date no such proposal has been filed. Because one of the objectives of this investigation is to determine whether the current agreement continues to meet the standards of section 15, a grant of indefinite stay would be clearly inappropriate. The Commission will therefore limit the stay granted to 30 days, which should allow the parties adequate time to file any modified agreement.⁹

THEREFORE, IT IS ORDERED, That this proceeding is stayed for 30 days from the date of this Order; and

IT IS FURTHER ORDERED, That the first ordering paragraph of the June 17, 1981 Order initiating this proceeding be amended to read: . . . whether or not Agreement No. 10333, as amended, shall continue to be approved or should be disapproved or modified; and

IT IS FURTHER ORDERED, That the second ordering paragraph of the June 17, 1981 Order be amended by deleting Issues 1, 2 and 3; and

FINALLY, IT IS ORDERED, That Hellenic lines and Brocklebank Lines are dismissed from this proceeding.

By the Commission.

(S) FRANCIS C. HURNEY
Secretary

⁸ Because a major revision to Agreement No. 10333, as amended, appears to be contemplated and because that Agreement is not effectively operable without individual pool shares, Proponents may wish to consider cancelling the existing Agreement at this time without prejudice to the filing of a modified agreement.

⁹ Any new agreement filed will be noticed in the *Federal Register*, after which time an appropriate procedural order will be issued in this proceeding.

FEDERAL MARITIME COMMISSION

DOCKET NO. 81-56

DOCKET NO. 81-67

BELCO PETROLEUM CORPORATION

v.

COMPANIA PERUANA DE VAPORES

NOTICE

February 25, 1982

Notice is given that no appeal has been taken to the January 19, 1982 dismissal of the complaints in these proceedings and that the time within which the Commission could determine to review has expired. No such determination has been made and, accordingly, the dismissal has become administratively final.

(S) JOSEPH C. POLKING
Assistant Secretary

FEDERAL MARITIME COMMISSION

DOCKET NO. 81-56

DOCKET NO. 81-67

BELCO PETROLEUM CORPORATION

v.

COMPANIA PERUANA DE VAPORES

John Martin of Arsham & Keenan for Complainant.

Bert I. Weinstein of Haight, Gardner, Poor & Havens for Respondent.

JOINT MOTION GRANTED FOR APPROVAL OF SETTLEMENT AND FOR DISMISSAL OF PROCEEDINGS

Finalized February 25, 1982

BACKGROUND

In Docket No. 81-56 a complaint filed by Belco Petroleum Corporation against Compania Peruana de Vapores (Peruvian State Line) was served September 18, 1981. Complainant alleged that respondent had subjected it to payment of rates for ocean transportation in violation of section 18(b)(3) of the Shipping Act, 1916. The complainant sought \$27,993.19 from the respondent. Notice of filing of the complaint and assignment of Judge served September 23, 1981, was published in the *Federal Register*, Vol. 46, No. 188, Tuesday, September 29, 1981, page 47661.

In Docket No. 81-67, complaint filed by Belco Petroleum Corporation against Compania Peruana de Vapores (Peruvian State Line) was served October 28, 1981. Complainant alleged that respondent had subjected it to payment of rates for ocean transportation in violation of section 18(b)(3) of the Shipping Act, 1916. The complainant sought \$9,054.97 from the respondent. Notice of filing of complaint and assignment of Judge served October 29, 1981, was published in the *Federal Register*, Vol. 46, No. 212, Tuesday, November 3, 1981, page 54641.

Docket No. 81-56 and Docket No. 81-67 are not consolidated. Consolidation was not requested. Both dockets are acted upon.

Appearance of counsel for respondent in Docket No. 81-56 was entered in response to counsel's request contained in a letter dated October 5, 1981. Counsel for respondent in Docket No. 81-56, in a letter dated October 26, 1981 (received October 28, 1981), requested an extension of time to November 25, 1981, to answer the complaint or otherwise move. Denial of the request for extension of time was served

November 5, 1981. On November 20, 1981, notice was served for hearing to commence in this proceeding on Tuesday, December 1, 1981.

On November 23, 1981, the respondent served its answer to the complaint and a Counterclaim (received November 25, 1981) in Docket No. 81-56 and in Docket No. 81-67 (however, in Docket No. 81-67, instead of a counterclaim, the respondent asserted an Affirmative Defense).

On Wednesday, November 25, 1981, the Presiding Administrative Law Judge received a telephone call from Attorney Weinstein for the respondent and Attorney Martin for the complainant, who advised they can possibly settle the proceedings in Docket No. 81-56 and Docket No. 81-67 within two weeks. This was confirmed by them in writing in a letter dated November 25, 1981, sent by Express Mail No. B-04311619, postmarked New York, November 27, 1981 (received November 30, 1981). The official stenographer was telephoned to cancel the December 1, 1981, hearing date. By notice served November 30, 1981, the hearing date of December 1, 1981, was postponed to December 15, 1981. Both Docket Nos. 81-56 and 81-67 to be heard that date, December 15, 1981.

Under a covering letter dated December 10, 1981 (received December 14, 1981), the parties enclosed a Joint Motion for Approval of Settlement and for Dismissal of Proceeding, a Joint Affidavit, and a copy of Agreement of Settlement and Mutual Release as to Docket Nos. 81-56 and 81-67.

Set forth in full is the Joint Motion for Approval of Settlement and for Dismissal of Proceeding:

JOINT MOTION FOR APPROVAL OF SETTLEMENT AND FOR DISMISSAL OF PROCEEDING

Complainant, Belco Petroleum Corporation, by its attorneys Arsham & Keenan, and Respondent, Compania Peruana de Vapores, by its attorneys Haight, Gardner, Poor & Havens, hereby request that the Administrative Law Judge, and the Commission, approve a settlement entered into by the parties in these two complaint cases. In connection with this request we refer to the attached Agreement of Settlement and Mutual Release, and to the Joint Affidavit of the parties. For convenient reference, the principal agreed upon facts involved in these disputes are set forth below.

I. THE FACTS

1. Belco Petroleum Corporation ("Belco"), Complainant in these proceedings, is a corporation in the business of exploration and production of crude petroleum and natural gas.

2. Compania Peruana de Vapores ("CPV"), is a common carrier by water in the commerce of the United States, and participated in the trade in question as a member of the Atlantic & Gulf/West Coast of South America Conference ("the Conference").

3. At all times in question Belco was an industrial contract shipper with the Conference, under Contract No. 10361, in effect since September 9, 1965.

4. For the shipments subject of the disputes in these complaint cases (eight in Docket No. 81-56, six in Docket No. 81-67), Belco's freight forwarder prepared the documents for ocean carriage and, in particular, providing for shipment to Talara, Peru under Conference tariff item 1050 which provides an industrial contract rate schedule.

5. Belco's complaints allege that it was entitled to ship the cargoes subject of these proceedings at lower rates than those charged under tariff item 1050, pursuant to Conference tariff item 1036A, which states:

"Talara Oilwell and Production Project

Shipments of proprietary material and equipment to Talara or Paita will be assessed base rate of \$132.00 W/M plus all additional charges. Heavy lift charges as per tariff scale will be applicable on the weight basis (2,000 lbs.). Extra length charges will be applicable as per tariff scale W/M as cargo is freighted. Bills of lading shall be claused as set forth in Rule 50."*

6. For the shipments subject of Docket No. 81-56, Belco paid ocean freight of \$140,960.91. Balco alleges it should have paid only \$112,967.72 for these shipments, under item 1036A. (It is agreed by the parties that Bill of Lading No. 16 omitted rating of 49 cubic feet of cargo, so if item 1036A in fact applied, the freight would have been \$113,161.95 for these shipments).

7. For the shipments subject of Docket No. 81-67, Belco actually paid ocean freight of \$59,003.19. Belco alleges it should have paid only \$49,948.22 for these shipments, under item 1036A.

8. For further reference, the bills of lading subject of these Dockets are attached to the complaints.

* Rule 50 states:

"In order to identify the cargo which is covered by this tariff rule, it is understood and agreed shipper will arrange to have the following notation placed on each Bill of Lading: 'The Shipper shown in this Bill of Lading certifies that the cargo described hereon is forwarded pursuant to the terms and conditions of tariff item No. — and that he is aware that the Shipping Act of 1916 declared it to be a violation of law, punishable by a penalty, for a shipper to utilize an unfair device or means to obtain transportation at less than the applicable rates.'

Further, it is understood and agreed that the shipper shall submit a freight copy of all such Bills of Lading or Bill of Lading and due bill to the Conference Chairman on a timely and confidential basis."

9. In consequence of the aforesaid, were Belco to satisfy its burden of proof as to the qualification of the cargo for the item 1036A rate, it would be entitled to reparation of \$27,798.96 in Docket No. 81-56, and \$9,054.97 in Docket No. 81-67, for a total of \$36,853.93.

10. But the point of genuine dispute between the parties, and the principal basis for CPV's denial of Belco's claim for reparations, concerns whether these shipments, nearly all of which were shipped over two years ago, in fact might have qualified for the lower rate at the date of shipment.

II. AUTHORITIES

In reparation cases, where the shipper or its freight forwarder misdescribes cargo, resulting in inadvertent overcharges, the shipper has the burden of proof to show that the cargo in fact qualified at the time of shipment for the lower rate. See e.g., *Abbott Laboratories v. Moore-McCormack*, 17 F.M.C. 191 (1973). The shipments subject of these proceedings are now all nearly over two years old. Under tariff item 1036A, Belco would have the heavy burden of proving that these old shipments consisted of "proprietary material and equipment" for use at Talara oilwell and production projects. Those are the facts critical to the resolution of these disputes.

The reasons for the parties entering into a settlement of these cases are fully stated in the parties' Joint Affidavit, but to summarize: saving of legal expense; avoidance of impairing good commercial relations; saving the expense of finding proof, and furnishing witnesses, on the merits of the dispute; and saving the expense and avoiding the difficulty of ascertaining the evidence as to these shipments.

In *Organic Chemicals v. Atlantraffic Express*, 18 S.R.R. 1536a, 1539-40 (FMC, 1979), the Commission laid down the rule for permitting settlements of these kinds of cases:

- "1. A signed agreement is submitted to the Commission;
2. The parties file with the settlement agreement an affidavit setting forth the reasons for the settlement and attesting that the settlement is a *bona fide* attempt by the parties to terminate their controversy and not a device to obtain transportation at other than the applicable rates and charges or otherwise circumvent the requirements of the Shipping Act, 1916, or of the Intercoastal Shipping Act, 1933, as amended, as the case may be;
3. The complaint on its face presents a genuine dispute and the facts critical to the resolution of the dispute are not reasonably ascertainable."

As a general matter the law favors settlements, and under the Commission's guidelines the settlement of the parties is fully justified and should be approved, especially so because of the fact that the evidence and witnesses necessary to resolve the dispute as to the qualifications of

these shipments for the item 1036A rate are not reasonably ascertainable.

The settlement of the \$36,853.93 claimed by Belco for \$30,404.49, or for 82-1/2% of the amount claimed, is justified by comparison to other settlements approved by the Commission, and is most reasonable, especially so when the likely legal costs, man-power costs and executive time, and risks of litigation are considered. See e.g., *Forte International v. Seatrain*, 23 F.M.C. 27 (1980), 60% settlement; *Ellenville v. FESCO*, 23 F.M.C. 707 (1981), 80% settlement; *Terfloth v. APL*, 22 F.M.C. 81 (1979), 64% settlement; *Del Monte v. Matson*, 23 F.M.C. 364 (1979), 62% settlement.

CONCLUSION

Belco and CPV request approval of the proposed settlement, and that Docket Nos. 81-56 and 81-67 be dismissed with prejudice.

RESPECTFULLY SUBMITTED,
ARSHAM & KEENAN
Attorneys for Complainant

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HAIGHT, GARDNER, POOR & HAVENS
Attorneys for Respondent

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NEW YORK, NY 10004
(212) 344-6800

Set forth in full is the Joint Affidavit:

JOINT AFFIDAVIT

We, the undersigned Alejandro Moreno, New York Representative of Compania Peruana de Vapores, and Vincent A. Merola, Controller of Belco Petroleum Corporation, each first severally sworn, depose and say for and on behalf of our respective corporations:

(1) The parties have entered into a settlement of the claims subject of FMC Docket Nos. 81-56 and 81-67 to terminate these disputes. The amicable settlement of these cases will avoid the substantial costs of further litigation which, based upon the estimates of our attorneys, could total about \$20-25,000, and perhaps even more; the parties desire to continue to maintain the good commercial relations which exist between them, and to avoid the disruptions inevitably caused by litigation; further litigation, including searches for documents and information, and the attendance of witnesses for both sides would be disruptive to the normal commercial affairs of the parties, and would be a non-productive use of expensive manpower and the valuable time of our

executive and managerial personnel; and, in view of the uncertainties of litigating and the difficulties of obtaining evidence as to the shipments subject of these disputes, the settlement of these genuine disputes between the parties is most desirable.

(2) This settlement is a bona fide attempt by the parties to terminate this controversy and is not a device to obtain transportation at other than the applicable rates and charges or otherwise circumvent the requirements of the Shipping Act, 1916.

Sworn to before me this
10th day of December, 1981

(S) ALEJANDRO MORENO
ALEJANDRO MORENO, NEW YORK
REPRESENTATIVE

(S) Joseph S. Labell
Notary Public
Sworn to before me this
9th day of December, 1981

(S) VINCENT A. MEROLA
VINCENT A. MEROLA,
CONTROLLER

(S) Mary Haig
Notary Public

The parties submitted the following Agreement of Settlement and Mutual Release:

AGREEMENT OF SETTLEMENT AND MUTUAL RELEASE

IT IS HEREBY AGREED, by and between the undersigned, Belco Petroleum Corporation ("Belco"), Complainant in Federal Maritime Commission Dockets Nos. 81-56 and 81-67, and Compania Peruana de Vapores ("CPV"), Respondent in said Dockets, that said Dockets shall be terminated by mutual accord on the terms and conditions set forth herein and for the reasons set forth in the accompanying Joint Affidavit of the parties:

1. CPV shall pay to Belco the sum of Thirty Thousand, Four Hundred and Four Dollars and 49/100 cents (\$30,404.49).

2. Belco shall, in consideration of CPV's payment as provided in paragraph 1 above, withdraw its complaints in Federal Maritime Commission Dockets Nos. 81-56 and 81-67, with prejudice to further pursuing the claims subject of said Dockets.

3. Neither Belco nor CPV, nor any successor in interest of either such party, shall initiate any new claims against the other party arising in connection with the shipments subject of the complaints in these proceedings except for enforcement of any provision of this Agreement.

4. It is understood and agreed that this Agreement of Settlement and Mutual Release is in full accord and satisfaction of all disputed claims in said Dockets.

5. This Agreement shall be submitted for approval to the Federal Maritime Commission and shall become effective and binding upon the parties when final approval is obtained, at which time CPV shall pay to Belco the sum provided in paragraph 1.

6. It is further understood and agreed that this Agreement of Settlement and Mutual Release is in no sense to be understood as constituting any admission of liability by either party or of any admission of any violation of law by either party.

7. This Agreement of Settlement and Mutual Release, constitutes the entire Agreement between the parties.

Dated: New York, New York
December, 1981

BELCO PETROLEUM CORPORATION
BY S/S VINCENT A. MEROLA
CONTROLLER
COMPANIA PERUANA DE VAPORES
BY S/S ALEJANDRO MORENO
NEW YORK REPRESENTATIVE

DISCUSSION

Upon consideration of the above and the record herein, the Presiding Administrative Law Judge *finds* and *concludes* that the parties have made out a proper case for settlement in each of these Dockets Nos. 81-56 and 81-67 and that the settlements should be approved;

Wherefore, it is ordered, subject to approval by the Commission, as provided in its Rules of Practice and Procedure:

(A) The settlements are approved.

(B) Respondent Compania Peruana de Vapores (Peruvian State Line) shall pay to the complainant Belco Petroleum Corporation a total of Thirty Thousand, Four Hundred and Four Dollars and 49/100 cents, (\$30,404.49) according to the Agreement of Settlement and Mutual Release signed by the parties and set forth above.

(C) Upon respondent's payment as provided in the settlement agreement, the complainant shall notify the Commission and the complainant will also withdraw complaints in Docket Nos. 81-56 and 81-67 herein, with prejudice, whereupon the proceedings in said dockets shall be discontinued.

(S) WILLIAM BEASLEY HARRIS
Administrative Law Judge

FEDERAL MARITIME COMMISSION

DOCKET NO. 81-47

LEASE AGREEMENT NO. T-3753 BETWEEN MARYLAND
PORT ADMINISTRATION AND ATLANTIC & GULF
STEVEDORES, INC.

ORDER ON RECONSIDERATION

February 26, 1982

This proceeding is before the Commission upon receipt of Maryland Port Administration's (*MPA*) Petition for Reconsideration of the Commission's December 2, 1981 Order¹ denying *MPA's* Petition for Declaratory Order regarding a dispute over a lease agreement with Atlantic & Gulf Stevedores, Inc. (*A&G*). The Commission declined to issue an interpretation of the term "cargo" as used in the lease, and instead deferred to the Circuit Court of Baltimore City, where litigation had also been initiated. *A&G* has filed a Reply to *MPA's* Petition.

POSITIONS OF THE PARTIES

MPA alleges that the Commission granted a similar petition for declaratory order in *Virginia Port Authority v. Portsmouth Terminals, Inc.*, 24 F.M.C. 415 (1981). *MPA* argues that the Commission's failure to afford *MPA's* petition the "same treatment" as the Virginia Port Authority's (*VPA*) petition violated *MPA's* "basic due process rights." *MPA* also questions the propriety of the Commission's having considered *MPA's* petition at an open Sunshine meeting, while it considered *VPA's* petition in closed session.² The material changes of fact in this proceeding which require reconsideration are alleged to be that the lease controversy has still not been resolved by the Maryland state court or settled out of court, and that the Commission's December 2, 1981 Order "seems to indicate a change of philosophy by the Commission."³

In its Reply, *A&G* contends that *MPA* has failed to meet the criteria for petitions for reconsideration set forth in Rule 261 of the Commis-

¹ 24 F.M.C. 500 (1981).

² *MPA* states:

A cloud hangs over one of the most important leases in the Port of Baltimore and over the Commission when it handles one lease controversy at a Sunshine meeting and another behind closed doors. Petition, at 8.

³ The "change of philosophy" apparently refers again to the fact that a petition for a declaratory order was granted in the *VPA* case but denied in the instant proceeding.

sion's Rules of Practice and Procedure.⁴ A&G also distinguishes the *VPA* and *MPA* cases, pointing out that, unlike the instant proceeding, there was no state court suit pending in the *VPA* case to which the Commission could have deferred, and no relief was sought in *VPA* which would ultimately have to be enforced by a court of law. Moreover, A&G submits that the dispute in *VPA* required the Commission's expertise in interpreting a provision of the Shipping Act (*i.e.*, section 15's prohibition of retroactive Commission approval of agreements)⁵ and also involved the Commission's intent in approving the *VPA* lease.

DISCUSSION

The Commission agrees with A&G's argument that *MPA's* petition fails to meet the strict requirements of Rule 261. However, in order to clarify the matters raised in *MPA's* petition and to dispel that party's apparent confusion on several issues, the Commission will waive Rule 261 and address the merits of *MPA's* argument.

The Commission's disposition of *Virginia Port Authority* was premised on the particular issues raised by *VPA's* petition. It did not reflect what *MPA* apparently perceives to have been a Commission policy of issuing rulings on every dispute that arises out of a Commission-approved lease agreement, regardless of the particulars of the dispute.

In *VPA*, the Commission decided whether a Commission approved rental formula in a lease agreement could be retroactively applied. At issue was the Commission's understanding, when it approved the agreement, regarding whether the formula used in determining rental payments should be applied to cargo handled prior to the date of the Commission's order. Only the Commission itself could make this determination of its previous intent. Moreover, a technical problem arose in that proceeding involving section 15's prohibition against retroactive approval of agreements. It would have been inappropriate for the Commission to defer resolution of that Shipping Act issue to a court of general jurisdiction. And as pointed out by A&G, no state court suit was pending in the *VPA* case to which the Commission could have deferred.

In the instant proceeding, the dispute involves the definition of the term "cargo" as used in the lease. Although the lease agreement was approved by the Commission, whether "cargo" includes the weight of a container was not a factor or issue in that approval, nor do any Shipping Act issues or considerations appear to be involved. Definition

⁴ Rule 261 states that a petition for reconsideration will be summarily rejected unless it: (1) specifies a subsequent change in material fact or law; (2) identifies a substantive error in material fact; or (3) addresses a matter upon which the party had not previously had the opportunity to comment. 46 C.F.R. 502.261. A&G argues that *MPA's* Petition failed to meet any of these requirements.

⁵ 46 U.S.C. §814.

of the word "cargo" is not an issue requiring maritime expertise or exercise of Shipping Act jurisdiction, but rather a semantic matter requiring an equitable interpretation of the language of this particular lease and the mutual accord of its parties. An appropriate forum for ascertaining its meaning is, therefore, a court of general jurisdiction, particularly when the matter is already pending before that court. In this context, the Commission's expertise does not appear to be required, does not appear to produce any particular benefit, and, as noted in the Commission's December 2, 1981 Order, would be a potential source of administrative delay, as the Circuit Court of Baltimore City would remain the only entity capable of awarding damages to an aggrieved party.

Furthermore, it is not clear whether MPA is arguing that the Commission's consideration of the *VPA* proceeding should have been handled in open session, or whether *MPA's* petition should have been considered in closed session. At any rate, whether to close an agency meeting when it is statutorily permissible to do so is a matter of agency discretion involving consideration of the public interest.⁶ The Commission does not believe that exercise of its discretion in making this determination somehow gives rise to "due process" arguments, particularly where no specific allegation has been made whether and how any harm or prejudice attached to the litigants in either the *MPA* or *VPA* proceeding.

THEREFORE, IT IS ORDERED, That the Maryland Port Administration's Petition for Reconsideration is denied; and

IT IS FURTHER ORDERED, That this proceeding is discontinued.

By the Commission.

(S) FRANCIS C. HURNEY
Secretary

⁶ It is clear that discussion of both the *VPA* and *MPA* cases could have been closed, for they involved disposition of particular cases of formal agency adjudication. 5 U.S.C. §552b(c)(10); 46 C.F.R. 503.73(j).

FEDERAL MARITIME COMMISSION

[46 C.F.R. PART 524]

[GENERAL ORDER 23, REVISED: DOCKET 81-18]

EXEMPTION OF CERTAIN AGREEMENTS FROM THE REQUIREMENTS OF SECTION 15, SHIPPING ACT, 1916

March 3, 1982

ACTION: Final Rule

SUMMARY: This exempts agreements which provide for the collection, compilation and exchange of credit experience information from the filing and approval requirements of section 15 of the Shipping Act, 1916 (16 U.S.C. 811). The Commission has determined that this exemption will not substantially impair effective regulation of common carrier practices, result in unjust discrimination or be detrimental to commerce.

DATE: Effective April 9, 1982.

SUPPLEMENTARY INFORMATION:

Section 35 of the Shipping Act, 1916 (the Act) (46 U.S.C. 833a) allows the Commission to exempt any class of agreements between persons subject to the Act from any requirement of the Act where it finds that such exemption will not substantially impair effective regulation by the Commission, be unjustly discriminatory, or be detrimental to commerce. Under this authority the Commission previously announced (46 *Fed. Reg.* 13243) that it proposed to amend 46 C.F.R. 524 (Commission General Order 23) to exempt from the filing and approval requirements of section 15 of the Act, agreements which provide for the collection, compilation, and exchange of credit information.

Comments on the proposed rule were due by April 21, 1981 and were received from the (1) Baltimore Marine Terminal Association, (2) New York Credit and Financial Management Association, (3) Puerto Rico Maritime Shipping Authority (PRMSA), (4) North European Conferences (NEC), (5) Atlantic and Gulf American-Flag Berth Operators (AGAFBO) and (6) ten conference and rate agreements (Group of Ten).

On June 18, 1981, the Department of Justice (DOJ) filed a motion seeking leave to file reply comments to NEC's arguments concerning

antitrust immunity for the exempted agreements.¹ This motion was granted by the Commission on July 8, 1981. On August 5, 1981 the Commission, in response to a motion from NEC, denied NEC's request for oral argument but permitted NEC to file a reply to DOJ's comments. On August 24, 1981, the Associated Latin American Freight Conferences (ALAF) filed a Petition for Intervention in response to the Commission's Order dated August 5, 1981, on the question "whether agreements exempted by Commission rule from section 15 requirements are excepted from the provisions of the antitrust laws." The ALAF Petition is hereby accepted.

The Baltimore Marine Terminal Association and the New York Credit and Financial Management Association support the rule as proposed. The New York Association of 3200 members note that the exchange of credit information among competitors has long been recognized in law and by the courts as proper business activity.

PRMSA supports the proposed rulemaking and asks that the Commission address specific questions so as to allow for a better understanding of how the exemption can and cannot be utilized by carriers. The Commission offers the following in response to the four specific questions raised by PRMSA:

(a) The final rule does not allow carriers to discuss or agree to credit policies and practices such as concern the period of time for which credit is to be extended or the procedures to be utilized if payment is not received within a certain period. These activities fall within the scope of credit rule enabling authority found in conference or ratemaking agreements which is excluded by the rule. By way of clarification, the final rule limits approved activity under the exemption to that which pertains to the collection, compilation and exchange of credit experience information only. Agreement on any credit matter which is required to be published in a tariff on file with the Commission is prohibited.

(b) The rule would allow carriers to exchange credit experience information such as providing each other with the names of shippers who have not paid freight charges within the period called for by a carrier's tariff rules.

(c) The rule would allow agreement parties to form or employ an entity to collect, compile and distribute credit experience information.

(d) The rule provides only for collecting, compiling and exchanging credit experience information and does not allow carriers to discuss or agree upon a common "credit history report" form which is to be completed by shippers prior to their being granted credit privileges.

¹ The supplementary information in the Notice of Proposed Rulemaking 46 *Fed. Reg.* 13243 provided that: "The proposed exemption would not confer antitrust immunity." NEC's comments took exception to this statement.

However, if such a credit history report form is already required by individual members of an agreement, the information in that report could be distributed to the other members.

The Group of Ten comments that the agreements proposed to be exempted are purely administrative agreements serving no competitive purpose and that such agreements allow each carrier to exercise individual judgment in determining whether to extend credit or require cash from any given shipper. Consequently, although the conferences do not believe this type of agreement is subject to the filing and approval requirements of section 15, they support the proposal noting that those who wish to obtain antitrust immunity may file for section 15 approval.² This commentator also asks that credit rule enabling authority, which is specifically excluded in the proposal, be clarified and that the Commission affirm its past holding that separate section 15 approval is not required for credit rule enabling authority in ratemaking agreements. The Commission notes that credit rule enabling authority has been clarified in the final rule and that such activity is specifically prohibited activity only as to the types of credit information agreements exempted under this rule.

NEC and AGAFBO generally support the proposed Rule. However, they and the ALAFC take exception to the statement appearing in the supplementary information that the proposed exemption will not confer antitrust immunity. In general, these parties argue that exempted agreements are lawful for Shipping Act purposes and are, therefore, entitled to the antitrust immunity which section 15 affords "lawful agreements." They submit that section 35 does not preclude the grant of antitrust immunity and that the Commission may, in considering a proposed exemption, properly determine that a class of agreements satisfies the standards for antitrust immunity set forth in section 15. Regarding the class of agreements subject to this proceeding, these parties submit that there are no competitive considerations that would preclude approval and antitrust immunity. The Department of Justice opposes the contention that an exemption under section 35 can have the effect of granting immunity from the antitrust laws.

As NEC indicated in its comments, the Commission has previously determined that antitrust immunity does not attach to agreements exempted pursuant to section 35. *Exemption of Non-Exclusive Transshipment Agreements*, 10 S.R.R. 148 (1968). In fact, both the Commission and the Supreme Court have indicated that the limited antitrust immunity afforded by section 15 is only conferred by an affirmative act of approval pursuant to section 15. *FMC v. Svenska Amerika Linien*, 390 U.S. 234, 242 (1968); *Volkswagenwerk v. FMC*, 390 U.S. 261, 273 (1968).

² Optional section 15 approval is available under 46 C.F.R. 524.7.

In our view, agreements awarded a section 35 exemption from the filing and approval requirements of section 15 enable parties to elect not to file such agreements without fear that they will violate those requirements. Relief from the filing and approval requirements cannot be construed or equated with approval and the concomitant finding that the agreement merits antitrust immunity. Should exempted agreements authorize concerted conduct which has antitrust implications, the parties operate under that agreement at their risk. Moreover, in the usual course, the Commission would not authorize section 35 exemptions to agreements which have significant antitrust implications. The Commission, as the public arbiter of competition in the shipping industry, has an affirmative duty to examine the potential anticompetitive consequences of each agreement, as well as the circumstances surrounding it, before granting approval and the limited antitrust immunity afforded by such approval. Accordingly, the Commission rejects the NEC, AGAFBO, and the ALAFC positions regarding antitrust immunity in the Final Rule.

Section 35 also provides that the Commission may attach conditions to any exemption and may, by order, revoke any such exemption. The Commission has provided that these agreements, although exempted, must be kept by the parties and available for inspection by the Commission during the term of the agreement and two years thereafter.

Pursuant to the Regulatory Flexibility Act (5 U.S.C. 601 *et seq.*), the Commission certifies that the rulemaking will not have a significant economic impact on a substantial number of small entities. The exemption will not impose any reporting or record keeping requirements which might result in a compliance or reporting burden on small entities. The exemption will primarily benefit carriers. The shipping public, some of whom undoubtedly are small entities may enjoy a secondary benefit from this exemption but it is not foreseen that this benefit will amount to a "significant economic impact," within the meaning of 5 U.S.C. 605(b).

Accordingly, under sections 15, 35 and 43 of the Shipping Act, 1916 (46 U.S.C. 814, 833a and 841a) and 5 U.S.C. 553, the Federal Maritime Commission amends 46 C.F.R. Part 524 as follows:

1. A new paragraph (e) is added to section 524.2, *Definitions*, which reads:

524.2(e) A credit information agreement is an agreement between common carriers by water or their duly appointed representatives which provides only for the collection, compilation and exchange of credit experience information. Under such an agreement, the parties cannot discuss or agree on any matter which is required to be published in a tariff pursuant to the Shipping Act, 1916 or any rule published pursuant thereto.

EXEMPTION OF CERTAIN AGREEMENTS FROM
REQUIRMENTS OF SECTION 15

799

2. A sentence is added to section 524.3, *Exemption of agreements* which reads:

524.3 Agreements as defined in paragraph 524.2(e) shall be kept by the parties and shall be available for inspection by the Commission during the term of the agreement and two years thereafter.

By the Commission

(S) FRANCIS C. HURNEY
Secretary

FEDERAL MARITIME COMMISSION

DOCKET NO. 82-2

AGREEMENT NO. 10416 - TRAILER MARINE TRANSPORT
CORPORATION AND PUERTO RICO MARITIME SHIPPING
AUTHORITY

JOINT MOTION TO DISCONTINUE PROCEEDING IS
SUBMITTED TO THE COMMISSION FOR DETERMINATION
OF
IF AND HOW COMMISSION WISHES TO PROCEED

Finalized March 4, 1982

This proceeding was initiated by Order of Investigation and Hearing served January 7, 1982 (published in the *Federal Register*, Vol. 47, No. 8, Wednesday January 13, 1982, pp. 1418-1420), to determine whether Agreement No 10416 should be approved, disapproved or modified in accordance with the provisions of section 15 of the Shipping Act, 1916.

Notice of the Assignment of the Presiding Administrative Law Judge was served January 11, 1982.

On Friday, January 15, 1982, the Secretary of the Commission, by telephone, informed the Presiding Administrative Law Judge that the parties in this proceeding are in the process of withdrawing the Agreement. A copy of the Notice of Withdrawal of Agreement and Joint Motion to Discontinue filed in the Office of the Secretary, January 15, 1982, was received in the Office of Administrative Law Judges on January 18, 1982. Following is the full text of the:

NOTICE OF WITHDRAWAL OF AGREEMENT AND JOINT MOTION TO DISCONTINUE

Proponents Trailer Marine Transport Corporation and Puerto Rico Maritime Shipping Authority, the only parties to Agreement No. 10416, hereby withdraw Agreement No. 10416, and move that the Commission discontinue this proceeding.

Proponents no longer desire Commission approval of Agreement No. 10416. Since the only issue before the Commission is whether the agreement should be approved, disapproved, or modified, withdrawal of the agreement renders the proceeding moot, and it is appropriate that the proceeding be discontinued. See, *Agreement No. 10294*, (Docket No. 77-23) Order of Discontinuance, mimeo decision served September 17, 1980.

Combined Protestants Government of the Virgin Islands and Puerto Rico Manufacturers Association have authorized us to state they have no objection to granting the motion.

RESPECTFULLY SUBMITTED,
(S) WILLIAM H. FORT
WILLIAM H. FORT
KOMINERS, FORT, SCHLEFER
& BOYER
1776 F STREET, N.W.
WASHINGTON, D.C. 20006
*Attorney for Trailer Marine
Transport Corporation*

(S) MORRIS R. GARFINKLE
MORRIS R. GARFINKLE
GALLAND, KHARASCH, CALKINS
& SHORT, P.C.
1054 THIRTY-FIRST STREET, N.W.
WASHINGTON, D.C. 20007
*Attorney for Puerto Rico Maritime
Shipping Authority*

January 15, 1982

Hearing Counsel in its January 19, 1982, reply to proponents' joint motion to discontinue, states, among other things: "In that the subject matter of the Commission's investigation has been eliminated, it is Hearing Counsel's position that no valid regulatory purpose would be served by continuing this investigation. Therefore, Hearing Counsel support Proponent's motion and urge the presiding Administrative Law Judge to discontinue the present proceeding."

DISCUSSION

In the Order of Investigation and Hearing in this proceeding, the Commission pointed out at p. 3 thereof (next to bottom line), ". . . Proponents argue that their affidavits submitted in support of Agreement No. 10416 constitute substantial evidence of widespread malpractices in the Trades. Proponents further emphasize the Commission's discussion of such malpractices in *Agreements Nos. DC-38 And DC-38-1 Association, Puerto Rico Trades—1968, supra*, and suggest that the problems discussed therein still plague the Trades." And the Order of Investigation and Hearing continues p. 5 (last paragraph): "It is possible that malpractices in the Trades and the instability such malpractices can occasion might require some form of remedial action."

Because this is a Commission-instituted investigation rather than a complaint proceeding and because of the above-noted observations contained in the Order of Investigation and Hearing, and the withdrawal of

AGREEMENT NO. 10416 - TRAILER MARINE TRANSPORT 803
& PRMSA

the Agreement, the Presiding Administrative Law Judge, under such circumstances, deems it is the responsibility of the Federal Maritime Commission to determine if and how it wishes to proceed.

Thus, the matter is submitted.

(S) WILLIAM BEASLEY HARRIS
Administrative Law Judge

FEDERAL MARITIME COMMISSION

DOCKET NO. 80-57
COSMOS SHIPPING CO., INC.
INDEPENDENT OCEAN FREIGHT FORWARDER
LICENSE NO. 722

NOTICE

March 5, 1982

Notice is given that no exceptions have been filed to the January 29, 1982 initial decision in this proceeding and the time within which the Commission could determine to review that decision has expired. No such determination has been made and, accordingly, that decision has become administratively final.

(S) FRANCIS C. HURNEY
Secretary

FEDERAL MARITIME COMMISSION

DOCKET NO. 80-57

COSMOS SHIPPING CO., INC.

INDEPENDENT OCEAN FREIGHT FORWARDER

LICENSE NO. 722

Settlement jointly proposed by the Bureau of Hearings and Field Operations and by the respondent Cosmos Shipping Co., Inc., approved; conditions of settlement include, among others, payment of \$117,103 by Cosmos to compromise all civil penalty claims pursuant to section 32(e) of the Shipping Act, 1916, 46 U.S.C. section 831(e).

Compensation paid Cosmos in excess of that specified in ocean carriers' tariffs was not passed through to Cosmos' shipper principals and did not affect Cosmos' performance of its duties as an independent ocean freight forwarder; revocation of freight forwarder license not warranted.

Gerald H. Ullman for respondent.

John Robert Ewers, Joseph B. Slunt, Aaron W. Reese and Stuart James as Hearing Counsel.

REVIEW OF PROPOSED SETTLEMENT AND OF RECOMMENDATION FOR A FINDING OF FITNESS AND INITIAL DECISION ¹ OF CHARLES E. MORGAN, ADMINISTRATIVE LAW JUDGE

Finalized March 5, 1982

This proceeding is an investigation, pursuant to sections 15, 16, 22, 32 and 44 of the Shipping Act, 1916 (the Act), and pursuant to section 510.9 of General Order 4 (46 C.F.R. 510.9), to determine:

- (1) Whether Cosmos Shipping Co., Inc. (Cosmos), a licensed independent ocean freight forwarder, violated section 15 of the Act by entering into and carrying out without Commission approval any agreement subject to the terms of section 15 providing for the receipt of payments from ocean carriers in excess of the amount of ocean freight forwarder compensation specified in the ocean carrier's applicable tariff;
- (2) Whether Cosmos violated section 16, Initial Paragraph, by directly or indirectly passing on any portion of monies received by it or its officers from ocean carriers in excess of authorized freight forwarder compensation to its shipper principals, thus obtaining ocean

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

transportation on behalf of its principals at less than the applicable rates or charges;

- (3) Whether Cosmos violated section 16, Initial Paragraph, even if it did not pass any or all monies received by it or its officers from ocean carriers in excess of authorized ocean freight forwarder compensation to its shipper principals, by obtaining transportation by water at less than the applicable rates and charges.
- (4) Whether civil penalties should be assessed against Cosmos pursuant to section 32(e) of the Act for violations of the Act; and/or the Commission's Rules and Regulations, and if so the amount of such penalty which should be imposed taking into consideration possible mitigation of such a penalty; and
- (5) Whether Cosmos' independent ocean freight forwarder license should be suspended or revoked pursuant to section 44(d) of the Act, for: (a) willful violations of the Act, and (b) such conduct as may be found to render Cosmos unfit to carry on the business of forwarding in accordance with section 510.9(e) of General Order 4.

Before hearing was noticed, Cosmos filed a motion requesting dismissal for lack of jurisdiction of that portion of this proceeding which alleged violation of section 15. Cosmos argued that the Commission had no jurisdiction to determine the level of freight forwarder brokerage commission. It was determined that the Commission does have jurisdiction over agreements between ocean carriers and forwarders without regulating the exact measure of brokerage.

Cosmos also moved for summary judgment regarding the alleged violation of section 16, Initial Paragraph, as to the passing of monies received by it or its officers on to its shipper principals in excess of authorized freight forwarder compensation, as per ordering paragraph 2 above. Ruling in this contention was withheld pending development of evidence.

Cosmos argued regarding ordering paragraph 3 above in effect that only the shipper can obtain transportation at less than the applicable rates and charges. The ruling denying the motion to dismiss pointed out that section 16 makes it unlawful for any shipper, consignee, *forwarder*, broker, or other person, etc., to obtain or attempt to obtain transportation by water for property at less than the rates or charges which would otherwise be applicable. The ocean carrier who pays excess brokerage is offering transportation at a net charge less than the rate or charge which would be applicable otherwise. The freight forwarder accepting excess brokerage is obtaining transportation at rates or charges less than would be applicable otherwise.

In lieu of a scheduled oral hearing, in order to avoid protracted litigation, the parties in this proceeding agreed upon a settlement.

The formal record herein includes the following documents, submitted by Hearing Counsel on September 15, 1981:

1. Stipulation (that the affidavit of Morton Bycoffe, President of Cosmos, shall constitute the record in this proceeding).
2. Affidavit of Morton Bycoffe.
3. Proposed Settlement of Civil Penalties, and a Promissory Note executed by Morton Bycoffe.

Also, Hearing Counsel and Cosmos filed memoranda in support of the proposed settlement.

The order of investigation alleged that in the period from August 25, 1975, through November 5, 1976, Cosmos received about \$17,030 in payments from steamship lines in excess of the ocean freight forwarder compensation specified in the carriers' tariffs.

In fact, Cosmos admits that it received excess compensation from five named ocean carriers, totaling \$335,513.

Cosmos did not pass on any portion of the non-tariff compensation received by it, either directly or indirectly to its principals, either the exporters or consignees of the shipments. At the time it negotiated a forwarding fee with a principal, Cosmos did not know whether any excess compensation would be received from an ocean carrier.

The principals of Cosmos suffered no loss or diminution of services in any manner by reason of Cosmos' receipt of non-tariffed compensation from ocean carriers. At no time was the dispatch of a shipment delayed in order to move it aboard a vessel of a carrier paying excess compensation.

Except for a small amount of excess compensation received from one ocean carrier, all revenue of this type was received by check from the ocean carriers or their agents, and was entered on the books of Cosmos as income, on which taxes were paid.

A substantial bonus was paid by check to one of the employees of Cosmos who had performed considerable services in this area, leaving the remaining revenue as net income to Cosmos, for use for regular corporate purposes.

On March 10, 1980, the Managing Director of the Commission sent a circular letter to all ocean carriers, in part, advising that payment of compensation to forwarders in excess of rates specified in tariffs is unlawful. Forwarders were also advised on April 2, 1980, not to accept such excess compensation. These documents were distributed long after the events involved in the present proceeding.

At no time during the period in which Cosmos was receiving nontariffed compensation was it ever called to the attention of Cosmos or of other forwarders, so far as Bycoffe recalls, that the practice of receiving excess compensation from ocean carriers was unlawful.

Cosmos and its predecessor have been in business since 1919, and Cosmos always has made a conscientious effort to comply with pertinent laws and regulations.

For the year 1980, the net worth of Cosmos is about \$194,300. Cosmos has agreed to pay a civil penalty of \$117,103, or about 60 percent of its net worth.

When this penalty is paid, plus interest at 12 percent, and considering other factors such as taxes, legal fees and other costs, it is apparent that Cosmos will not benefit financially from the excess compensation which it received.

Cosmos has not profited in recent years, having lost \$13,000 in fiscal 1978, \$11,000 in 1979, and \$20,000 in 1980.

Cosmos fully cooperated with the staff of the Commission. It voluntarily disclosed that it received untariffed compensation from five named ocean carriers. Also there is considerable doubt of any *willful* failure by Cosmos to comply with provisions of the Act.

No good reason has been shown to revoke the independent ocean freight forwarder license of Cosmos.

The settlement proposed herein requires Cosmos to pay a total of \$117,103, plus interest at 12 percent. The penalty is to be paid in nine installments, the first \$13,011.48 payable 30 days following Commission approval of the proposed settlement, and the other eight installments of \$13,011.44 each every six months following approval of settlement, with the last installment payable four years following approval.

Cosmos agrees to preserve certain records, to take measures to prevent the receipt by it of non-tariff compensation, to give certain notice of the settlement agreement to its directors, officers and field office managers, and if Cosmos were to breach the agreement, Cosmos will not interpose the statute of limitations as a bar or a defense in certain proceedings.

The agreement also provides that it is not to be construed as an admission by Cosmos of the violations alleged in the order of investigation and hearing.

It is concluded and found that the proposed settlement agreement both serves the public interest and is fair to Cosmos. Said settlement agreement hereby is approved.

It further is concluded and found that the compensation paid Cosmos in excess of that specified in ocean carriers' tariffs was not passed through to Cosmos' shipper principals, and did not affect Cosmos' performance of its duties as an independent ocean freight forwarder.

And it further is concluded and found that revocation of Cosmos' ocean freight forwarder license is not warranted.

(S) CHARLES E. MORGAN
Administrative Law Judge

FEDERAL MARITIME COMMISSION

DOCKET NO. 81-60

EASTERN CEMENT CORPORATION

v.

PORT OF PALM BEACH DISTRICT

NOTICE

March 5, 1982

Notice is given that no appeal has been taken to the January 28, 1982 dismissal of the complaint in this proceeding and that the time within which the Commission could determine to review has expired. No such determination has been made and, accordingly, the dismissal has become administratively final.

(S) FRANCIS C. HURNEY
Secretary

FEDERAL MARITIME COMMISSION

DOCKET NO. 81-60

EASTERN CEMENT CORPORATION

v.

PORT OF PALM BEACH DISTRICT

MOTION TO DISMISS COMPLAINT GRANTED

Finalized March 5, 1982

A complaint was filed by Eastern Cement Corporation against Port of Palm Beach District (Port) which was served on September 30, 1980. The Complainant alleges, among other things, that respondent has subjected it to payment of rates for storage facilities in violation of 46 U.S.C. 814, 815 and 816. Basically, the complainant seeks damages on the basis of "overcharges" and "unjustly discriminatory and unfair rental charges" and claims damages in excess of \$25,000.00.

Respondent Port filed a motion to dismiss the complaint to which complainant filed its reply. Pursuant to notice served December 10, 1981, a prehearing conference was held before this Judge on January 5, 1982. After extensive discussion concerning the matters relating to the motion, this Judge denied the motion and Ordered a procedural schedule for the future conduct of this proceeding with the concurrence of both parties. (See: Prehearing Conference Report and Order served January 6, 1982.) During the prehearing conference a discussion was held concerning an existing civil suit currently pending in the Circuit Court of the Fifteenth Judicial Circuit, in and for Palm Beach County, Florida.¹ On the basis of representations made by counsel for complainant, the Judge did not stay this proceeding because of the stated differences between that case and this proceeding. (See: Prehearing Conference Transcript, pp. 4-8.)

Complainant has now filed a Motion to Dismiss served January 19, 1982, indicating that the parties have entered into a stipulation of settlement in the Circuit Court case, "which necessarily encompasses and resolves a dispute between Eastern Cement Corporation and the Port of Palm Beach District which is currently before the Federal Maritime Commission." The motion attached the Stipulation² and re-

¹ *Port of Palm Beach District, Etc. v. Eastern Cement Co., Etc.*, Case No. 80-2910 CA (L) OIE.

² Paragraphs 4 and 5 of the Stipulation provide that:

Continued

quests dismissal of this docket "with prejudice with both parties to bear their respective costs and attorney's fee."

This Commission has approved a wide variety of settlements and discontinued numerous complaint proceedings arising under the various provisions of the Shipping Act, 1916. *Del Monte Corp. v. Matson Navigation Co.*, 22 F.M.C. 364, 368-369 (1979). Furthermore, it is well settled that legislative, judicial and Commission policy foster the settlement of administrative proceedings. *Del Monte Corp.*, p. 367. The terms of the Stipulation submitted to the Court reveal that the parties have resolved their differences and embrace obligations which apparently are satisfactory to Complainant to seek a dismissal of this proceeding. Counsel for the Port has indicated that he joins in the motion.

Accordingly, the Motion to Dismiss is granted.

It is Ordered, That the complaint is hereby dismissed with prejudice;
It is Further Ordered, That the proceeding is discontinued.

(S) PAUL J. FITZPATRICK
Administrative Law Judge

4. EASTERN shall, simultaneously with the execution of this Stipulation, execute its Voluntary Dismissal with Prejudice, of all claims and issues raised and pending in that certain action before the Federal Maritime Commission entitled *Eastern Cement Corporation v. Port of Palm Beach District*, Docket No. 81-60. Such voluntary dismissal shall be immediately filed by EASTERN with the Federal Maritime Commission and EASTERN shall take such steps as are necessary to obtain that Commission's approval of the dismissal.

5. The parties shall, simultaneously with the execution of this Stipulation, execute their Joint Stipulation for Dismissal, with prejudice, of all claims, counterclaims, and defenses pending in this litigation. Said Joint Stipulation for Dismissal shall be submitted by the parties to the above-referenced court for its approval and filing immediately following the approval of EASTERN's dismissal of its FMC Complaint by the Federal Maritime Commission.

The Court by Order Approving Stipulation, signed by Circuit Court Judge Jack H. Cook on January 18, 1982, in effect, approved the Stipulation as to all of its terms and conditions and the parties were directed to comply with those terms.

FEDERAL MARITIME COMMISSION

TITLE 46 - SHIPPING

CHAPTER IV - FEDERAL MARITIME COMMISSION

SUBCHAPTER B - REGULATIONS AFFECTING MARITIME CARRIERS AND RELATED ACTIVITIES

PART 530 - INTERPRETATIONS AND STATEMENTS OF POLICY

(DOCKET NO. 80-70)

STATUS OF BULK COMMODITIES WITH RESPECT TO THE TARIFF FILING REQUIREMENTS OF SECTION 18(b)(1) OF THE SHIPPING ACT, 1916

March 8, 1982

- AGENCY:** Federal Maritime Commission
- ACTION:** Final Interpretative Rule
- SUMMARY:** This makes the transportation of bulk commodities loaded and carried in containers, trailers, rail cars, or similar intermodal equipment (with the exception of LASH or Seabee barges) moving in the foreign commerce of the United States subject to the tariff filing requirements of the Shipping Act, 1916.
- DATE:** Effective date of this interpretation is stayed until further order.*

SUPPLEMENTARY INFORMATION:

On October 14, 1980, the Commission issued a proposed interpretative rule (45 F.R. 67711), making bulk type cargo loaded in containers, trailers, rail cars, LASH or Seabee barges or similar types of intermodal equipment subject to the tariff filing requirements of section 18(b) of the Shipping Act, 1916, (46 U.S.C. § 817), because, once so loaded, such cargo is carried with mark or count.

Several persons commented on the proposed rule. While most agreed with the rule to the extent that it is applied to bulk commodities loaded and carried in containers, trailers, rail cars or similar intermodal equipment, some objected to its application to LASH or Seabee barges. The objections were based upon the contention that such barges are "vessels" as provided by section 1 of the Shipping Act (46 U.S.C. § 801)

*Effective June 27, 1983, pursuant to notice appearing in the *Federal Register* on April 28, 1983 (47 FR 10851).

and not some form of intermodal equipment. Consequently, it was suggested that bulk type cargo transported in such vessels is "cargo loaded and carried in bulk without mark or count" and is therefore exempt from the tariff filing requirements of section 18(b)(1). The Commission agrees with this contention and thus finds that the exclusion of LASH/Seabee barges from its proposed interpretative rule is warranted.

The Commission therefore concludes that bulk type cargo loaded in containers, trailers, rail cars, or similar types of intermodal equipment (with the exception of LASH or Seabee barges) is subject to being loaded and carried with mark or count, and is, therefore, subject to the tariff filing requirements of section 18(b) of the Shipping Act, 1916.

Other commenting parties opposed the proposed rule on the ground that carriers of bulk commodities need complete flexibility in the quotation of freight rates and that bringing such cargo under the Commission's tariff filing regulations could result in higher costs to shippers. They therefore argued that all bulk cargo carried in intermodal equipment should be exempt from the tariff filing requirements regardless of the type of equipment employed.

The Commission agrees that there may be some merit to exempting certain types of bulk commodities from the tariff filing requirements of section 18(b)(1). However, such an exemption is beyond the scope of this proceeding. Therefore, by separate Notice issued this date, the Commission is instituting a rulemaking proceeding to consider the exemption of certain bulk commodities under section 35 of the Shipping Act, 1916 (46 U.S.C. § 833a). Pending completion of this new rulemaking and to avoid potentially unnecessary tariff filings, the Commission is staying the effective date of the Interpretative Rule issued in this proceeding.

Therefore, Part 530 of the Code of Federal Regulations is amended by the addition of the following:

530.15 Further interpretation of the Shipping Act.

Section 18(b)(1) of the Shipping Act, 1916, provides, in part, that:

" . . . every common carrier by water in foreign commerce and every conference of such carriers shall file with the Commission and keep open to public inspection tariffs showing all the rates and charges of such carrier or conference of carriers for transportation to and from United States ports and foreign ports between all points on its own route and on any through route which has been established The requirements of this section shall not be applicable to cargo loaded and carried in bulk without mark or count"

The Federal Maritime Commission interprets this provision to mean that bulk cargo which is loaded in containers, trailers, rail cars, or similar types of intermodal equipment is subject to being loaded and

carried with mark or count and is therefore subject to the tariff filing requirements of section 18(b)(1) of the Shipping Act, 1916. This interpretation does not apply to bulk cargo loaded and carried in LASH or Seabee barges. For the purposes of this section "bulk cargo" means those commodities which are in a loose, unpackaged form and have homogeneous characteristics.

By the Commission.

(S) FRANCIS C. HURNEY
Secretary

FEDERAL MARITIME COMMISSION

DOCKET NO. 81-27
AGREEMENT NOS. 10355 AND 10402

NOTICE

March 8, 1982

Notice is given that no exceptions have been filed to the February 1, 1982 initial decision in this proceeding and the time within which the Commission could determine to review that decision has expired. No such determination has been made and, accordingly, that decision has become administratively final.

(S) FRANCIS C. HURNEY
Secretary

FEDERAL MARITIME COMMISSION

DOCKET NO. 81-27

AGREEMENT NOS. 10355 AND 10402

Held:

1. Where two Agreements (Agreement Nos. 10355 and 10402, as modified), respectively, provide for a joint service that has the effect of improving the existing irregular service in a Trade, (a) by establishing a regular service permitting more frequent sailings, (b) by combining cargoes and rationalizing service so as to eliminate costly cargoless "ballast" legs, (c) by insuring the availability of ship capacity for the Trade; and there are no protesting intervenors and disapproval of the Agreements would cause each of the parties to the Agreements to operate separately so that the Trade would be overtonnaged and less efficient; such Agreements are in the public interest and satisfy the requirements of the holding in *Federal Maritime Commission v. Aktiebolaget Svenska Amerika Linien*, 390 U.S. 238 (1968), in that the Agreements are required by a serious transportation need, necessary in order to secure important public benefits, and are in furtherance of a valid regulatory purpose.
2. Where a joint service agreement is entered into by a private commercial carrier and a carrier owned by a government, and the agreement provides that the parties are acting as a single common carrier, the joint service has one vote when participating in any conference or similar organization. The fact that the governmental carrier may have "major functions and responsibilities beyond those which are purely commercial" and "has important defence, political and political/economic responsibilities" does not overcome the effect of the Commission's holding in *In Re Agreement No. 9973-3—Johnston Scanstar Service Voting Provision*, Report and Order, served 8/15/78, 21 F.M.C. 218 (1978).

Elmer C. Maddy and Walter H. Lion for The Bank & Savill Line Ltd., The Bank Line Limited and The Shaw Savill & Albion Co. Ltd.

Sanford C. Miller and Bert I. Weinstein for The Shipping Corporation of New Zealand, Ltd.

John Robert Ewers, Joseph B. Slunt, Polly Haight Frawley and Stuart James as Hearing Counsel.

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

Finalized March 8, 1982

This proceeding was instituted pursuant to Commission Order ² which was issued to determine whether or not, under section 15 of the Shipping Act of 1916, Agreements No. 10402 and No. 10355, respectively, should be approved, disapproved, or modified. There are no

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

² See Order of Investigation and Hearing and *Pendente Lite* Approval served April 14, 1981.

intervenor in this proceeding, the only parties being the Proponents, Bank & Savill Line Ltd. (BSL); the Shipping Corporation of New Zealand Ltd. (SCNZ); the Bank Line Ltd. (Bank Line), the Shaw Savill & Albion Co. Ltd. (Shaw Savill), and the Commission's Bureau of Investigation and Enforcement (BIE).

FINDINGS OF FACT

The parties to this proceeding have submitted a proposed stipulation of facts which is both precise and complete. The facts contained in it are supported by the attached exhibits X-1 through X-16. The proposed stipulation and the accompanying exhibits are hereby adopted and the facts involved therein are so found as set forth below:

I. *Background*

Agreement 10355 is a cooperative working arrangement between the Bank & Savill Line Ltd., and the Shipping Corporation of New Zealand Limited, providing for a joint service in the trade "between ports of Australasia and the Pacific Islands and Gulf ports of the United States and between ports in Australasia, the Pacific Islands and ports in the Caribbean" (hereinafter "the Trade"). X-1 at 1. The Caribbean trading area includes ports in the Caribbean Islands, and along the coasts of Central and South America. Among the ports served by Bank & Savill are Sydney and Melbourne in Australia; Auckland, New Plymouth and Lyttelton in New Zealand; Houston and New Orleans in the United States Gulf Coast. and Callao, Guayaquil, Panama City, Curacao, La Guaira, Kingston, Veracruz, Acajutla, Port of Spain, Bridgetown, Fort de France, and Santo Domingo in the Caribbean. X-8 at 5.

2. Agreement 10355 was initially filed with the FMC for approval on October 17, 1978. The Agreement was subsequently amended on February 28, 1979 and July 25, 1979 to take into account the objections of Sealand Service Inc. and Farrell Lines, Inc. The limitations on the number and size of vessels as stated in Article 4 of Agreement 10355 were instituted in the Agreement, as amended on July 25, 1979, in response to Farrell Lines' objections. As a result of such amendments, all objections to the Agreement were dropped and there are no complainants or intervenors in this proceeding. No carrier or shipper has presented testimony concerning or opposed to Agreements 10355 and 10402 as amended. X-1; X-8 at 2; X-14 at 4.

3. Agreement 10402 is an agreement between the Bank Line Ltd., and Shaw Savill & Albion Co. Ltd., providing authority for the Bank & Savill Line, Ltd., to operate as a common carrier in the Trade. Bank & Savill is a corporation, formed under British law in October 1977, which began operations in the Trade in January of 1978. Agreement 10402 was given Pendente Lite approval by an Order of the Federal Maritime Commission, served April 14, 1981. The service has been

operating under terms in the Agreement which expressly limit service capacity to up to three container vessels of up to 800 TEU's and up to 4 composite breakbulk vessels or the equivalent in single voyage charter tonnage, each vessel having an average overall capacity of up to 750,000 cubic feet bale space included in which up to 400 TEU's can be accommodated. X-8 at 2-4, 10-15.

4. The Bank Line Ltd., and the Shaw Savill & Albion Co. Ltd., are corporations formed under British law, both of whom had a long history of service in portions of the Trade prior to the formation of Bank & Savill. X-8 at 2, 6-10.

5. The Governments of the United Kingdom and of New Zealand have expressed a governmental interest in approval of the subject agreements by Aides Memoire issued by the New Zealand Government on June 10, 1980 and September 3, 1981, and by the British Government on September 10, 1981. X-4; X-5; X-6.

6. An initial dispute concerning whether a section 15 agreement was required to authorize the formation of Bank & Savill has been resolved by the filing of Agreement 10402 and by the settlement of a Claim for Civil Penalty which had been initiated by the Federal Maritime Commission General Counsel against Bank & Savill. The settlement agreement conclusively resolves any issue of prior section 15 violations, without admission of fault by Bank & Savill, and any such violations are no longer an issue in this proceeding. X-7; X-8 at 35.

II. *Interest of SCNZ*

7. During the period of interim approval of Agreement 10402, Bank & Savill has operated a three-vessel container service. Although SCNZ has chartered a vessel to the service, SCNZ has not been able to participate in the service as a carrier. X-8 at 12-15.

8. Raymond Peter Shea, Deputy General Manager of the SCNZ, testified that New Zealand is probably more dependent upon shipping than any other developed country and this is compounded by its geographic location such that the freight content of all import and export transactions is particularly significant in the commerce of the country. X-9 at 1.

9. The capital intensity and current low financial return from shipping makes it unattractive, if not impossible, for New Zealand private sector interests to invest substantially in this area and thus the national strategic requirements to obtain some presence in the shipping sector is, of necessity, at this time forced into the public sector. SCNZ is wholly owned by the Government of New Zealand. SCNZ participation in Agreement 10355 represents SCNZ's first entry as a common carrier in the trades between New Zealand and the United States. The Corporation was incorporated in 1974 under the provisions of the Companies

Act 1955 and in accordance with the Shipping Corporation of New Zealand Act 1973. X-9 at 1-2.

10. New Zealand's economy is heavily dependent on its overseas trade. For most of its history, New Zealand's major trade routes have been dominated by overseas shipping operators. The acceptability of allowing overseas interests to set freight rates and levels of service which in turn determine the competitiveness (or lack thereof) of the country's overseas trade is a matter of concern to New Zealand. Establishment of a New Zealand National Line provides an alternative to, and a means of influence in, the various shipping bodies and organizations serving the New Zealand trade. In addition, a New Zealand National Line also provides a means of improving shipping/trade knowledge through participation in shipping markets which can be used for the benefit of all New Zealand traders. x-9 at 3.

11. Mr. Shea testified that SCNZ concluded that, given that the United States is one of New Zealand's major trades, it follows from the basic objectives of SCNZ as New Zealand's National Line, that as a matter of basic policy, SCNZ must have a presence as a common carrier in New Zealand/United States liner trades. The decision to accomplish this objective through participation in Agreement 10355 resulted from a number of reasons viz;

- (a) SCNZ, both from its own knowledge and from consultation with others knowledgeable in the trade, concluded that a one-vessel service is economically impossible. With only one vessel on this long trade route, a carrier cannot offer the frequency of service required by shippers. Its provision of valuable container equipment would have to be more than doubled at very high cost. Many of its facilities, including its marketing and operational needs, would have to be maintained at a fixed level, regardless whether for one vessel or for three vessels. These fixed costs would be so disproportionately high as to make the operation of a one vessel service uneconomic even if contrary to a reasonable expectation, any support would be attracted to a one-vessel service.
- (b) Based on the experience of existing operations in the trade it was established that the minimum acceptable service frequency to induce a level of cargo support consistent with economic operation was a monthly service. This required that SCNZ would need to operate within a service framework of three vessels. A further requirement of the trade was that the service should incorporate the most modern and efficient equipment suitable to the needs of this particular trade. To meet these criteria requires a container service with refrigerated container capacity, as well as having a breakbulk and heavy lift capacity together with supplemental breakbulk vessels. Having regard to SCNZ's limited capital re-

sources, it was deemed most appropriate that a one-vessel SCNZ participation in a three-vessel joint service would permit SCNZ to have an important presence but a presence in keeping with its capital strength and other commitments, as well as the overall needs of the trade.

- (c) A service operated in conjunction with the Bank and Savill Line providing two other similar modern vessels enables the marketing, terminaling and other facilities, and operational functions, to be supported on an economic basis, which, of course, yields cost efficiencies.
- (d) The economic considerations for a three-vessel service, as well as SCNZ's appraisal of the needs of this trade, the shippers and receivers in New Zealand as well as in the United States, compels SCNZ to conclude that the framework of Agreement 10355 is the only reasonable mechanism for operation in this trade. SCNZ did not in the planning stage actively investigate, nor has it since investigated, other alternatives. However, the delay in obtaining approval of this agreement, as well as the need to appraise the future, has forced SCNZ to review its original analysis of the situation. As a matter of policy, SCNZ must have a presence as a common carrier in the New Zealand/U.S. trades. If it should develop, however, that Agreement 10355 is not permitted to go forward, SCNZ would then have to consider as the only remaining alternative, establishing a three-ship service.
- (e) A service at a level lower than three-vessels is not one which can be economically considered under any standard. A three-vessel service would present an unnecessary and unwarranted strain on the resources of SCNZ. In addition, taking the larger viewpoint, a three-vessel service by SCNZ added to a service maintained by Bank & Savill, presumably also with three vessels or even more than three vessels if Bank & Savill, are not permitted to operate as a single service by the Commission, would impose on the trade excessive and unneeded capacity, with consequent upward pressure on freight rates. X-9 at 10-12.

III. *History and Nature of the Trade*

12. New Zealand exports to the United States and to the Caribbean consist largely of primary agricultural products, especially meat (beef, veal and lamb) and dairy products (mainly cheese and casein), which by value represented approximately 77% of its exports to the United States in the year ending June 1980. X-8 at 6-7; X-9 at 8.

13. Traditional [New Zealand] imports from the U.S. include petroleum products, rice, tobacco, fruit and nuts, synthetic rubber, lumber, chemicals (including fertilizers and insecticides), pharmaceutical compounds, cotton, metal, edible and vegetable oils, internal combustion

engines, motors, power generating machinery, agricultural machinery, automatic data processors, food processing machinery and plastics. X-9 at 9.

14. Cargoes from Australia and New Zealand are generally similar, but in the meat trade Australia tends to be a more important beef exporter. In addition, Australia is exporting increasing quantities of manufactured goods such as automobiles and agricultural machinery to the Caribbean and the surrounding region. X-8 at 7.

15. The northbound liner trade from Australia and New Zealand to the United States is highly concentrated in refrigerated commodities. The southbound trade primarily requires dry containerizable cargo and bulk cargo capacity. In 1979, the U.S. Gulf Coast imported 45,000 long tons of dry cargo from Australasia, but exported 184,000 long tons. In that same year the Gulf Coast imported 31,000 long tons of refrigerated cargo but did not export any refrigerated cargo. Since not all dry cargoes can be carried in refrigerated containers, capacity utilization tends to be less than if all containers could be used on both ends of the Trade. X-8 at 6-7; X-10 at 7, 20.

16. The northbound trade is directed primarily to the United States North Atlantic and Pacific coasts. As the U.S. Gulf Coast is in close proximity to major United States meat and dairy product producing regions, northbound trade from Australia/New Zealand to the Gulf region is relatively minimal. X-8 at 7-9; X-10 at 14-22; X-11 at 9-10, Graphs 1-2.

17. Gulf Coast liner exports to Australia/New Zealand have been consistently greater than liner imports in both value and volume terms. Since 1969, on a value basis, Gulf Coast liner exports have increased at a compound annual rate of 10.8%, but on a volume basis have decreased at a rate of 1.6%. Gulf Coast liner imports have increased at a compound annual rate of 21% in value terms and 9.1% in volume terms. X-11 at 9. Economists have testified that the U.S./Australasia Trade is likely to grow. X-10 at 4; X-11 at 11. In long tons, U.S. exports have increased by 31% over the 1970-1980 decade or at a compound annual rate of 2.7%. Imports grew by 55% over the same ten year interval, or 4.5% per year. X-10 at 12.

18. The inbound and outbound Trades from the United States Gulf to Australia and New Zealand are, therefore, imbalanced, in both direction (more so than trade from any other U.S. coast to Australia and New Zealand) and type of capacity required. As a result, service difficulties arise for any line serving only the United States Gulf Coast from Australia and New Zealand. X-8 at 7-10.

19. For approximately 60 years prior to the formation of Bank & Savill, the Bank Line had operated a service from the United States Gulf coast to Australia and New Zealand, with its vessels returning to

the Gulf via either the charter market or Europe, when possible. X-8 at 9.

20. Shaw Savill, on the other hand, had operated a service from New Zealand to the Caribbean and Central and South America. The Shaw Savill vessels generally returned to New Zealand without cargo, prior to joining the United States Atlantic and Gulf/Australia—New Zealand Conference in 1975. After 1975, Shaw Savill vessels attempted to carry cargoes from the U.S. Gulf to Australia and New Zealand, but the service was commercially unsuccessful because extended trips and loading delays in Australia compromised the quality of the New Zealand Caribbean service. X-8 at 7-9.

21. Without the intrusion of Australian cargoes, however, the Shaw Savill service was unable to obtain sufficient southbound New Zealand cargo to balance its northbound carryings. X-8 at 8-9.

22. During the 1970's, the economics of the shipping industry was altered by the increase in world oil prices. As a result, the inclusion of an unladen "ballast leg" in the Australia—New Zealand/U.S. Gulf Trade became increasingly uneconomical for Bank Line as well as Shaw Savill. X-8 at 10; X-10 at 41-42.

23. At the same time, the emergence of new container technology made possible increasing efficiency in cargo handling, but required enormous capital investment in order to replace existing vessels and equipment. The expense is even greater in a trade where substantial refrigerated container capacity is required. By 1974, however, 70% of the liner cargo from the Atlantic and Gulf coasts to Australasia and the Pacific Islands was containerized. X-8 at 16; X-10 at 42.

24. Bank & Savill Line Ltd. began operation as a joint service on January 1, 1978. Initially, various conventional vessels were chartered from Shaw Savill and Bank Line for use in the Bank and Savill service. At about the time of the formation of Bank and Savill, it was decided by both Bank Line and Shaw Savill to separately finance the construction of two new, modern containerships to be chartered to Bank & Savill for use in the U.S. Gulf, Australasia, Caribbean trade. A third container vessel was commissioned at this time by the Shipping Corporation of New Zealand in connection with Agreement 10355. These three container vessels, the WILLOWBANK, DUNEDIN, and NEW ZEALAND CARIBBEAN, were delivered in 1980, and are currently in service in the Trade. All three vessels are chartered to Bank & Savill by their owners. They range in capacity from 766 to 852 TEU's when non-cellular spaces are used for containers and have bale space for 3,681 to 4,227 CBM's if the non-cellular spaces are not filled by containers. X-3 at 11-13.

25. Since 1975, average southbound breakbulk utilization (for Bank Line prior to 1978 and Bank and Savill after 1978) has not been greater than 55% in any year. Bank & Savill's southbound utilization rate for

TEU's averaged 55% in 1978, 71% in 1979, and 73% for the first half of 1981. X-8 at 20. During the second half of 1980, Bank and Savill's average southbound TEU utilization, including breakbulk tonnage which was converted to TEU's, was 67%. X-11 Table 8. The average southbound vessel utilization of breakbulk space during the same period of time was 33%. During the first half of 1981, the utilization of the breakbulk space southbound was 39%. X-12 at 13. The only breakbulk cargo carried on the containership is large overgauge single lift cargo which the container terminals are willing to accommodate.

26. The Trade is also served by carriers trading with the United States North Atlantic and South Atlantic coasts. Currently, Columbus Lines and Farrell Lines stop at U.S. Gulf ports while en route from Australia and New Zealand to the United States Atlantic Coast, but only Bank & Savill offers a service exclusively from the United States Gulf coast to Australia and New Zealand. The combined annual TEU capacity for Farrell and Columbus for both coasts in 1980 was approximately 69,000 TEU's. At present, all of the carriers serving the Trade on a regular liner basis are operating with containerized services. X-8 at 5-6; X-10 at 30-41.

27. All of the operating Atlantic and Gulf services operate with at least three ships and on at least a monthly basis. A service with less than three vessels could not provide a monthly service because of the great distance between the U.S. Gulf and Australasia, as most carriers average from 70-90 days per round trip voyage. Carriers have found that a less than monthly service is insufficient to attract regular shippers. X-9 at 11-12; X-10 at 67-68.

28. As a result of the oil price increases of recent years, most services are operating their vessels at a lower speed than the design speed of the vessels. Of the services to the United States Gulf coast, Bank & Savill operates at the highest ratio of actual to design speed, a ratio of approximately 100%. Thus, the service is efficient in terms of resource usage. The Bank & Savill service also differs from the other carriers serving the U.S. Gulf/Australasia trade in that it alone has a breakbulk/heavy-lift capability in its container vessels. X-8 at 13-14; X-10 at 51, 59-61.

29. An alternative to the liner carriers directly serving the United States Gulf/Australasia trade are minibridge carriers, via the Pacific coast, including Karlander—Kangaroo Lines and until recently, Seapac and Farrell Lines. There is, however, no advantage in resource use by minibridge over all-water routes in trade with Australasia. In economic terms, the minibridge route requires a greater allocation of resources. Thus, the all-water route from the Gulf to Australia and New Zealand is superior so long as the service is efficient, regular and sufficiently frequent. X-8 at 6; X-10 at 45-59; X-14 at 2-3.

30. United States Gulf ports benefit from continuing availability of a high quality all-water liner service to Australia and New Zealand, since the availability of such a service reduces the loss of cargoes due to diversion via minibridge. Moreover, the Bank & Savill service presently offers shippers a transit time equivalent to or faster than the speediest minibridge alternatives. X-10 at 45-49.

IV. Operations and Anticipated Effects of Agreements

31. The number of ships employed in the Bank & Savill service has been reduced as the three modern containerships came into service in 1980. Although bulk cargoes, bulk liquids and project cargoes to Australian outports were dropped, shipper complaints resulting from the change in service characteristics have been few and Bank & Savill continues to carry some breakbulk cargo. X-8 at 14-15; X-12 at 7. The three modern containerships operated by Bank & Savill also offer a regular and frequent service, having a frequency of approximately one voyage per month.

32. The Bank & Savill service includes the northbound traffic from Australasia to the Caribbean, thereby balancing its southbound carryings from the United States Gulf coast to Australasia and resulting in more efficient vessel usage. For the Caribbean countries, the efficiency of liner service is a major benefit since these less developed countries are highly sensitive to price increases in primary products. X-8 at 18.

33. The current Bank & Savill service does not result in a general increase of overall capacity in the Trade, although it does reflect a shift from breakbulk to container carriage. Annually, assuming monthly sailings, the current service offers 10,331 TEU's or 9,464 TEU's and 50,000 CBM's if bale space is not used for containers. In 1978, Bank & Savill offered 6,570 TEU's and 350,000 CBM's; in 1979 7,100 TEU's and 240,000 CBM's; and in 1980 8,600 TEU's and 60,000 CBM's. In the northbound leg of the Trade 100% of the cargo is potentially containerizable, while in the southbound leg it would be possible to containerize 85 to 90% of the cargoes. There is no evidence that operation of the Bank & Savill joint service has resulted in an increased market share for the members. X-8 at 14, 29-32; X-11 at 33.

34. There are recent developments, however, which show an increase in shipper demand for the introduction of a breakbulk service into the Trade. The developments concern certain cargoes originating in the U.S. Gulf/southbound Australasia Trade which are not economically containerizable. For instance, substantial quantities of milk carton stock and wood pulp (neo-bulk cargoes) are exported from the United States Gulf area to Australasia. This cargo is generally not containerized because its poor containerized stowage characteristics would result in an effectively higher freight rate for the shipper. Prior to the introduc-

tion of the Bank & Savill containership service, portions of these cargoes were carried on Bank & Savill conventional vessels. X14 at 2.

35. Since the introduction of the Bank & Savill containerships, wood pulp and milk carton stock cargo has largely moved on tramp vessels or been shipped via the United States West Coast on LASH vessels operated by Farrell Lines, Inc. Although the Bank & Savill containerships do have breakbulk capacity, Bank & Savill has been unable to cover this cargo because the container vessels use container facilities in Australasia where normal breakbulk cargo cannot be handled. The only breakbulk cargo carried on the containerships is large over-gauge single life cargo which the container terminals are willing to accommodate. Moreover, the demand has been insufficient to justify the use of breakbulk liner ships out of U.S. Gulf ports so long as this cargo was covered by Farrell Lines. X-14 at 2-3.

36. In recent weeks, however, it has been announced that Farrell Lines, Inc. is withdrawing its LASH vessels from the West Coast service, leaving these cargoes uncovered. The shippers involved, which include International Paper and Georgia-Pacific, have made temporary arrangements by chartering vessels out of the U.S. Gulf in their own right. This was made possible by the currently weak charter market, but represents no long-term solution to the problem. X-14 at 3.

37. Accordingly, a Bank & Savill breakbulk liner service could benefit shippers by covering these cargoes, as well as other residual bulk cargoes which are available at Gulf Ports. The best estimate of the amounts of milk carton stock and wood-pulp cargo available is 35,000 cubic bale meters per year. Mr. Greenwood on behalf of Bank & Savill stated that in order to provide an adequate service to cover this cargo and the various parcels of bulk cargoes which are readily available in the U.S. Gulf, it would be necessary to provide at least six conventional sailings per year. A voyage for a breakbulk ship takes approximately 120 days. X-12 at 5; X-14 at 3.

38. Not a single liner competitor in the Trade operates breakbulk tonnage or has objected to Bank & Savill's possible introduction of such tonnage. Farrell Lines withdrew its objections to Agreement 10355 when that Agreement was amended in July of 1979 to restrict the service to three container and four conventional vessels of the sizes specified in the Agreements. X-14 at 4.

39. If Agreements 10355 and 10402 are not approved, then the parties to the Agreements have stated that neither Bank Line nor Shaw Savill would be likely to withdraw from the Trade, but each would be required to add additional tonnage so as to provide a regular service. X-8 at 17.

40. Although during past years there has been no evidence, report or complaint of malpractices in the Trade, and rates have remained relatively stable, there is a reasonable possibility that the expansion of

capacity which would result from disapproval of Agreements 10355 and 10402 would result in an atmosphere where malpractices are more likely to occur. Overtonnaging is recognized as a cause of malpractices among ocean liner operators. X-8 at 6; X-11 at 36-37.

41. Upon approval of Agreement 10355 it is the intent of the parties to the Agreements to operate only under the Bank & Savill/Shipping Corporation of New Zealand joint service, and that Bank & Savill will not operate a separate service in this Trade. Although Agreement 10402 will be inactive so long as Agreement 10355 is in operation, Agreement 10402 provides a necessary basis for the structure of Agreement 10355. Presently, neither Shaw Savill, Bank Line, Bank & Savill nor SCNZ operate or participate in a common carrier service in the Trade other than in the capacity specified in the proposed Agreements. X-8 at 15, 34; X-12 at 12; X-9 at 5.

42. Although the Agreements include the Pacific Islands within their scope, these Islands are not part of the planned itinerary. The parties are prepared to make inducement stops, however, and have done so in the past. None of the Pacific Islands included in the Agreements, however, are U.S. trust territories. X-12 at 14.

43. The parties to Agreement 10355 propose to initially share revenues and expenses on a basis of $\frac{2}{3}$ to Bank & Savill and $\frac{1}{3}$ to the SCNZ. Although the parties are responsible for the financing and operation of the vessels on an ownership basis, the parties will operate on a daily standard allowance for each party for each day its vessel is operated. The financial arrangement could be amended accordingly among the parties if the make-up of the vessels in the service should change. X-8 at 15.

44. Operating expenses which will be shared include terminal expenses, marketing expenses, agency expenses and stevedoring expenses, but not lost/damaged cargo claims. X-12 at 3.

45. Normally, for commercial purposes, the service will be advertised jointly with the programs of all vessels being shown. However, each party may wish to undertake corporate advertising in which case either party may wish to show its interest in this service together with its other service interests. X-12 at 4.

46. Neither Agreement can be terminated at will prior to the completion of the initial approval period of five years, and termination thereafter requires twelve months prior notice by all parties. The five year initial approval period is required because of the magnitude of initial investment required from each of the parties in the new containerhips and in purchases of container equipment. X-8 at 16; X-12 at 8.

47. SCNZ does function in large part on a commercial basis. In many ways, the legal framework under which the Corporation operates is no different from an incorporated company. The main objectives and internal regulations are set out in the Memorandum and Articles of Associa-

tion and policy and operations are controlled by a Board of Directors within this framework. This enables the Corporation to meet changing commercial circumstances on the same footing as its competitors and has allowed an operational control to be established without the development of undue bureaucratic procedures. X-9 at 2. The Corporation is constituted in such a way that it trades as a commercial entity with a requirement that it pay tax and dividends to its shareholder, the New Zealand Government. X-9 at 4. The Corporation does not receive any subsidies from the New Zealand Government other than a special arrangement in respect of a service to the Cook Islands and Niue. It does not receive financial advantage by virtue of the fact it is owned by the New Zealand government in that it does not receive loans at lower interest rates nor is it taxed at a lower rate than a privately owned company. X-13 at 7.

48. Mr. Shea testified, however, that as the National Line of New Zealand, SCNZ has major functions and responsibilities beyond those which are purely commercial. SCNZ is charged with additional economic responsibilities including, most importantly, the requirement of ensuring that cost effective trade development opportunities are provided and that New Zealand's proper interests as a trading national are protected within the conference framework. Moreover, SCNZ has important defence, political and political/economic responsibilities. In SCNZ's view, these are functions and responsibilities which are unique to SCNZ, as distinguished from the interests of Bank & Savill, the other parties to Agreement 10355, whose interests are solely commercial. In order to enable SCNZ to carry out these unique responsibilities, it is SCNZ's position that a separate vote is essential. X-13 at 12.

49. The New Zealand Government's Aide Memoire states:

The New Zealand Government notes that the Corporation is seeking a separate vote within the United States Atlantic and Gulf/Australia—New Zealand Conference. It regards the provision of such a separate vote to the Corporation as being consistent with the Corporation's position as a Government-owned national flag carrier. X-5.

50. The Proponents have no objection to the modification to Agreements 10355 and 10402 proposed by Hearing Counsel in Stipulated Exhibits 15 and 16. X-15 and X-16.

ULTIMATE FINDINGS OF FACT

51. The effect of the operation of either of the joint services contemplated by Agreement Nos. 10355 and 10402, respectively, as modified by the parties, is to improve the existing service by establishing a regular service permitting more frequent sailings, by eliminating costly cargoless "ballast" legs, and by insuring the availability of ship capacity

for the Trade. The Agreements are, therefore, in the public interest and satisfy the *Svenska* test.

52. If Agreement Nos. 10355 and 10402, respectively were disapproved, each of the parties to the Agreements would operate separately rather than jointly with the result that the Trade would be overtonnaged and less efficient.

53. The evidence of record asserting that a separate vote is needed by SCNZ is inconclusive and insufficient to overcome the rule followed by the Commission in *Johnson Scanstar, supra*.

DISCUSSION AND CONCLUSIONS

Section 15 of the Shipping Act, 1916, provides, in pertinent part:

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

In its Order of Investigation, the Commission gave more explicit direction regarding possible violation of section 15. It stated:

Both agreements are subject to the *Svenska* doctrine and must be justified to receive approval . . . This investigation will include an examination of the present operating conditions in the trade, the nature and extent of the breakbulk and container cargo markets, the exact activities covered by the Agreements, and any transportation needs, public benefits, or regulatory purposes which Proponents believe would result from Agreements Nos. 10355 and 10402.³

In *Federal Maritime Commission v. Aktiebolaget Svenska Amerika Linien*, 390 U.S. 328 (1968), the Court established that the question of whether or not an agreement was in the public interest turns on if they are "required by a serious transportation need, necessary in order to secure important public benefits or in furtherance of a valid regulatory purpose of the Shipping Act." *United States Lines v. Federal Maritime Commission*, 584 F.2d 519 (D.C. Cir. 1978). In the final analysis, the determining factors are the circumstances and conditions existing in the

³ While Agreement 10402 now provides it will be inactive so long as Agreement 10355 is in operation, and paragraph 41 of the findings of fact is to the same effect, it is nevertheless appropriate to consider Agreement 10402 under section 15 and *Svenska* since it does provide for a division of profits between Bank & Savill, and since it may become fully operative in the future.

particular trade involved. *Agreements Nos. DC 38 and DC 38-1*, 17 FMC 251 (1974).

The facts as found in this case amply support approval of the Agreements involved. They are well documented and will not be repeated in this portion of the decision except where necessary to emphasize the legal conclusions being made. First of all, it should be noted that Agreement Nos. 10355 and 10402 offer the same service except that SCNZ is to operate as a common carrier in 10355, thereby creating a new joint service. As to the service itself and the Trade it serves, perhaps it is best to look at what has transpired to date. The Bank & Savill joint service has been operating in the Trade with conventional vessels since 1978, and with the three containerships since 1980. This means the parties have the benefit of being able to analyze exactly how the joint service has affected the Trade rather than estimating or anticipating what the effect will be.

Prior to the formation of Bank & Savill, Bank Line operated a service from the U.S. Gulf Coast to Australia and New Zealand, but did not offer a northbound service out of Australia/New Zealand to the U.S. Gulf or the Caribbean. Bank Line vessels returned to the Gulf via either the charter market or Europe. (FF 19.) The reason no northbound service existed is because exports from Australasia consist largely of primary agricultural products which are directed to the U.S. Atlantic and Pacific Coasts; the Gulf Coast is close to the United States' own meat and dairy producing region and thus does not have as great a need to import these products. (FF 12, 14 and 16.) Similarly, Shaw Savill operated a service from New Zealand to the Caribbean and Central and South America, but had difficulty incorporating a southbound service from the Gulf to Australia because the additional time required to include the Gulf and Australia compromised the quality of the New Zealand-Caribbean service. (FF 20.) In the three years prior to the formation of Bank & Savill, the carryings of each line, in revenue tons, was as follows:

	1975	1976	1977
Northbound			
Bank Line	0	0	0
Shaw Savill	45,537	61,217	82,034
Southbound			
Bank Line	167,902	186,505	179,570
Shaw Savill	6,424	13,806	16,000

(X-8 at 9.)

By combining into one service, Bank & Savill are now able to offer a round-trip service from the U.S. Gulf southbound to Australia and New Zealand returning via South and Central America and the Caribbean area to the U.S. Gulf. (FF 32; X-8 at 12.) Carriage in revenue tons during the first three years of the joint service was as follows:

	1978	1979	1980
Northbound	79,584	89,056	98,650
Southbound (X-8 at 11.)	158,452	157,389	96,900

By carrying cargo on both the northbound and southbound voyages, ships in the Trade are being used more efficiently.

The three containerships which Bank & Savill introduced into the Trade in 1980 appear to be ideally suited to the Trade's needs. These containerships have the average capacity of 800 TEU's each, of which, on the average, 364 can be refrigerated containers. (FF 24; X-10 at Table 9a.) These statistics assume that non-cellular spaces are used to hold containers, but if the non-cellular spaces are not used for containers, the ships have bale space for between 3,681 to 4,227 cubic bale meters (CBM) of breakbulk cargo. (FF 24.) The ships specifically meet the Trade's needs because while the northbound trade consists mostly of agricultural products requiring refrigeration, the southbound trade primarily requires dry containers and breakbulk space. (FF 15.) Because the voyage is so long (70-90 days), each ship is able to make approximately four sailings a year for a total of 12 sailings, or a monthly service, for the three containership service. (FF 27.)

In combining their operations and initiating a basically containerized service, Bank & Savill has not had a significant anticompetitive impact on the Trade. The service does reflect a shift to containerized cargo from breakbulk cargo, but there is no evidence that its market share has changed substantially. In 1978 Bank & Savill offered capacity for 6,750 TEU's and 350,000 CBM's; in 1979, 7,100 TEU's and 245,000 CBM's; and in 1980, 8,600 TEU's and 60,000 CBM's.⁴ Its current three containership service, with sailings scheduled approximately once a month, has an annual capacity of 10,331 TEU's or 9,464 TEU's and 60,000 CBM's if bale space is not used for containers. (FF 33.) Therefore, although container capacity has gone up, breakbulk capacity has decreased.

⁴ Data for 1980 is not necessarily representative because that year Bank & Savill used both conventional vessels and containerships. The second half of the year, however, was a totally containerized service. (X-8 at 28.)

In terms of overall market share, Bank & Savill is the only service in the Trade which exclusively serves the Gulf, and the only service from the Gulf which offers breakbulk capacity. Columbus and Farrell Lines independently serve both the Atlantic and Gulf Coast-Australasia Trade with a combined capacity of approximately 69,000 TEU's.⁵ (FF 26.) By strengthening the service to the Gulf, Bank & Savill is offering a competitive alternative to Columbus and Farrell Lines' Atlantic and Gulf Coast services, as well as to carriers who serve Australasia from the Atlantic Coast. In addition to Farrell and Columbus Lines, Pacific America Container Express (a joint service) and Atlanttrafik Express Service serve the Atlantic Coast-Australasia Trade. Zim Container Service also offers a feeder service but the amount of cargo carried is minimal. In 1980, Bank & Savill provided between 7% and 11% of the total annual TEU capacity in the Atlantic and Gulf Coast-Australasia Trade. (X-10 at 30; X-11 at Table 6.)⁶

Although the containership service of Bank & Savill increases the containership capacity which is offered in the Trade, there is no evidence of overtonnaging. During the second half of 1980, Bank & Savill's average TEU utilization, southbound, including breakbulk tonnage which was converted to TEU's averaged 67% or 3,460 TEU's.⁷ Southbound utilization of TEU space, not including breakbulk space, prior to the introduction of the containership vessels averaged 55% in 1978 (3,713 TEU's), 71% in 1979 (5,041 TEU's), and 73% in the first half of 1980. (FF 25.) the southbound breakbulk utilization rate averaged 50% in 1978 (175,000 CBM's), 55% in 1979 (134,750 CBM's), and 42% in the first half of 1980.⁸ (FF 25; X-8 at 27 and 28.) Although these utilization figures appear to be a little low, it should be noted that because the Trade requires dry containers southbound and refrigerated containers northbound, and because not all dry commodities can be carried in refrigerated containers, the Trade requires the carriage of some empty containers. (FF 15.)

Although the Trade is not overtonnaged now, if the Commission disapproves the Agreement. involved here, there is a possibility that overtonnaging would occur. Bank Line and Shaw Savill have both been in the Trade for a substantial period of time and have established

⁵ The amount of this capacity which is allocated to the Gulf Coast cannot be determined because both coasts are part of a single service.

⁶ A range of numbers is provided here as Dr. Nadel found Bank & Savill's share to be 10.33% (X-10 at 30) and the Commission's economists found it to be 7% (X-11 at Table 6).

⁷ This figure is derived by taking 67% of half the annual combined TEU and breakbulk capacity of the three containerships (10,331/2).

⁸ The TEU's and CBM's carried for the first half of 1980 are not provided because the capacity for this portion of the year is not known. The northbound utilization data was not provided by Bank & Savill who stated that northbound cargo is mostly directed to the Caribbean and Central and South America and that carriage to the U.S. Gulf is minimal. (X-8 at 26.)

their businesses with shippers.⁹ Therefore, if the Commission disapproved the joint service, each carrier would give serious consideration to entering the Trade independently. In order to establish a regular service, Bank Line and Shaw Savill would each have to offer approximately monthly sailings which would substantially increase the capacity offered in the Trade.

As filed, Agreement No. 10402 and 10355 sought authority to add four breakbulk vessels, each vessel having an average overall capacity of up to 750,000 cubic feet in which up to 400 TEU's can be accommodated. (X-2 and 3.) The Commission's staff economists testified that there was not a sufficient need in the Trade for the additional breakbulk vessels. (X-11 at 37-41.) Since the submission of that testimony, Bank & Savill submitted additional testimony introducing new and additional facts to justify a breakbulk service. (X-14.) Based on the additional information, Hearing Counsel agreed that two additional breakbulk vessels are justified. Proponents have no objection to this modification.

A voyage for a breakbulk vessel takes approximately 120 days and therefore each ship could make 3 sailings a year. (FF 37.) Thus, the authority for two breakbulk ships of the size specified would permit approximately 6 sailings or increase Bank & Savill's annual capacity by approximately 2,400 TEU's and 127,428 CBM's to 12,731 TEU's and 177,428 CBM's.¹⁰

The conclusion of the Commission's economists that additional breakbulk capacity was not required was based upon the low utilization rates for the breakbulk space on the three containerships (33% southbound for the second half of 1980 and 39% southbound for the first half of 1981) (FF 25); the fact that 85% to 90% of all southbound cargo was containerizable (FF 33); and that although exports to Australasia from the United States have increased overall, exports from the U.S. Gulf have decreased. (FF 17, 35; X-11 at 38.)¹¹ The economists concluded that authorizing four breakbulk vessels for Bank & Savill when there was insufficient demand for such a service and the possibility of a growth in such a demand was speculative, could result in overtonnaging and create a barrier to entry to a new firm which wished to enter the Trade. (X-11 at 39.)

⁹ Although the record does not state how long Shaw Savill has been in the Trade, it does state that it has served portions of the Trade since 1975. (X-8 at 9.) Bank Line has operated in the U.S. Gulf/Australia Trade for at least sixty years. (FF 19.)

¹⁰ These figures represent maximum capacities. The TEU capacity would be lower if the breakbulk space was filled with breakbulk cargo and the breakbulk capacity would be lower if breakbulk space was filled with containers. The additional annual capacity was derived by multiplying 400 TEU's and 21,238 cubic bale meters (750,000 cubic bale feet) by 6. (See X-11 at 19.)

¹¹ Only southbound data is examined here because the greatest amount of breakbulk cargo which moves in the Trade moves in the south-bound direction. (F. 15.)

In its supplemental affidavit, Bank & Savill produced new information which shows that a demand for a breakbulk service is not speculative, but currently exists. (X-14.) The affidavit states that Farrell Lines has withdrawn its LASH vessels from its Pacific Coast-Australasia service. (X-14 at 5.) *The Journal of Commerce*, November 4, 1981, at 1, confirms that Farrell has leased two of its three vessels in the LASH service which it operated in the West Coast-Australia/New Zealand trade to the Military Sealift Command and on November 5, 1981, at 1, it was reported that its entire service in the trade has been temporarily suspended. The reason Farrell's reduction in service is significant is that Farrell carried bulk cargoes which originated out of the Gulf and which Bank & Savill carried on its conventional ships prior to the introduction of its containerships. These commodities are milk carton stock and wood pulp which are not economically containerizable. (FF 34.) Bank & Savill estimates that the amount of annual cargo provided by these two commodities is 35,000 CBM's. (FF 37.)

The amount of annual breakbulk space available if Bank & Savill or Savill/SCNZ are limited to the three containerships is 50,000 CBM's. While this space would be sufficient to carry the milk carton stock and wood pulp, it would not enable Bank & Savill or Savill/SCNZ to carry these commodities in addition to the breakbulk cargo it is currently handling. Bank & Savill stated that in the first half of 1981, its southbound breakbulk utilization rate was 39%. (FF-25.) However, the additional 31,000 CBM's constitutes 70% of the annual breakbulk capacity on the containerships.

In addition, the supplemental affidavit states that Bank & Savill is not currently carrying normal breakbulk cargo in the breakbulk space on its containerships because the container vessels use container facilities in Australasia where normal breakbulk cargo cannot be handled. It states that the only breakbulk cargo Bank & Savill carries on its containerships is large over-gauge single lift cargo. (FF 35.) Prior to the introduction of the containership service, the Bank & Savill conventional service carried significant amounts of breakbulk cargo. In 1979, when its total breakbulk capacity was 240,000 CBM's its southbound utilization rate was 55%. (FF 25.) Therefore, it can be assumed that Bank & Savill carried approximately 132,000 CBM's in the southbound trade that year. The Commission's economists had assumed that most of this cargo could be carried by Bank & Savill's containerships because 85%-90% of the southbound trade is containerizable. (FF 33.) Although the cargo may be containerizable, if it is not economically carried in containers, there is a need for a breakbulk service. Bank & Savill or Savill/SCNZ would be the only carrier offering breakbulk service from the Gulf. (FF 37.)

As we have noted, the service to be offered under Agreement No. 10355 is identical to that offered under Agreement No. 10402, except

that SCNZ is to operate as a common carrier in the joint service under 10355. The testimony of Raymond Peter Shea, Deputy General Manager of SCNZ, states that the New Zealand Government has determined that it must have a presence as a common carrier in this Trade (FF 11.) The interest of the government is also expressed in its two Aide Memoires. (FF 5.) If SCNZ does not enter the Trade as a participant in the joint service, it is possible that it will come into the Trade on its own, and thereby create a risk of an overtonnaged trade as was discussed if Bank Line and Shaw Savill operated in the Trade independently. The length of the voyage would require the introduction of several vessels in order to be able to offer a regular service. Considering the outlay of capital which would be required for such an undertaking, it would be a waste of resources given the amount of cargo in the Trade. Furthermore, if SCNZ entered the Trade independently, it would obviously withdraw the NEW ZEALAND CARIBBEAN from the Bank & Savill service thereby destroying that service's ability to offer a frequent, regular service without the addition of more ships. If all three Proponents operate together, they are able to offer a better service than each, or even two, could offer separately. As for the anticompetitive impact, as noted above, Columbus and Farrell Lines serve the Atlantic and Gulf Coast-Australasia Trade and therefore do provide competition to the joint service.

Finally, with respect to the specific provisions of the Agreements themselves, it should be noted that certain modifications have been made in the original Agreements, which modifications have been agreed to by both parties.¹² The modifications do not change the substance of the Agreements but serve to clarify their terms. Actually, the only issue remaining on which the parties disagree is whether or not each party to Agreement No. 10355 should have a separate vote. Hearing Counsel argue that since the Agreement provides for a single competitive entity,¹³ that entity should be entitled to only one conference vote. On the other hand, the Proponents argue that independent voting rights are necessary for SCNZ. In support of their position they cite the Aide Memoire¹⁴ submitted by the Government of New Zealand and the testimony of Mr. Shea who stated:

Agreement 10355 provides for a separate voting right for SCNZ. In SCNZ's view, this is regarded as essential. SCNZ does function in large part on a commercial basis. However, as the National Line of New Zealand, SCNZ has major functions and responsibilities beyond those which are purely commer-

¹² Compare the original agreements (X-1, X-2 and X-3) with those which have been amended (X-15 and X-16).

¹³ The Agreement states, "[T]he Parties agree either to belong to or operate independently from any conference as a group so as to ensure uniformity of rates for the service." (X-3, Art. 1.)

¹⁴ FF, par. 49 (X-5).

cial. SCNZ is charged with additional economic responsibilities including, most importantly, the requirement of ensuring that cost effective trade development opportunities are provided and that New Zealand's proper interests as a trading nation are protected within the conference framework. Moreover, SCNZ has important defence, political and political/economic responsibilities. It is not intended to suggest in any way that these additional functions and responsibilities are in any way inconsistent with the proper functioning of the Shipping Act, 1916, as administered by the Federal Maritime Commission. Rather, SCNZ wishes to emphasize that these are functions and responsibilities which are unique to SCNZ, as distinguished from the interests of Bank & Savill, the other parties to Agreement 10355, whose interests are solely commercial. In order to enable SCNZ to carry out these unique responsibilities, a separate vote is essential. X-9 at 12.

In Re Agreement No. 9973-3—Johnson Scanstar Service Voting Provision, Docket No. 77-5, Report and Order, 21 F.M.C. 218 (1978), the Commission held that a joint service which acts as a single carrier is only entitled to a single conference vote. It also held that whether joint service members have formed a single carrier in trades covered by conferences so that the joint service would be restricted to one vote upon joining the conferences depends on many factors and then proceeds to enumerate fifteen (15) separate factors. The Commission recently followed *Johnson Scanstar, supra*, in its Order of Conditional Approval of the Pacific America Container Express Service, dated October 29, 1981, where it conditioned approval of an extension of an agreement on deletion of a separate voting provision. The Proponents of the Agreements here argue that *Johnson Scanstar* is distinguishable from the instant case because the decision "did not consider the effect of the important Government and National interests which affect SCNZ, as the Government-owned carrier of a Nation with which the United States has close and friendly relations." They cite the testimony of Mr. Shea and the Aide Memoire submitted by New Zealand in support of their argument and point out that none of the other carriers in the Trade, upon whom the adverse effects of a single vote for SCNZ would fall have complained.

We believe that given the facts and argument on the question of the conference voting right of the joint service in Agreement No. 10355, the joint service is entitled to one vote under the ambit of the decision in *Johnson Scanstar, supra*. When considered in light of the modifications agreed to by the parties, Agreement No. 10355 satisfies twelve (12) of the fifteen criteria set forth in *Johnson Scanstar* regarding whether or not the parties are acting as a single carrier. The parties to the Agreement have agreed as follows:

1. *Coordination of sailings*: Article 6 of the Agreement provides that the parties shall schedule containership sailings at regular intervals, supplemented by conventional sailings as from time to time considered necessary by the parties.

2. *Pooling or other mutual allocation of costs, revenues or profits*: Articles 5 and 9 provide that each party is to be paid a daily standard allowance for its vessel(s) for each day it is operated in the trade and that the service will pay the parties their respective expenses attributable to the operation and provision of their vessel or vessels. However, Articles 9 and 10 of the Agreement, as modified, reflect that initially, the parties will share terminal, marketing, agency and stevedoring expenses as well as net revenues and deficiencies on a basis of two-thirds for Bank & Savill and one-third for SCNZ. Claims for lost and/or damaged cargo will be borne by each party separately. Although the parties have contributed vessels to the trade on a $\frac{2}{3}$ - $\frac{1}{3}$ basis, they have not keyed the division of the joint expenses and revenues to this factor, but have created a pooling arrangement.

3. *Covenants not to compete with the joint venture*: Proponents have stipulated that "upon approval of Agreement 10355 it is the intent of the parties to operate only under the Bank and Savill/Shipping Corporation of New Zealand joint service, and that Bank and Savill will not operate a separate service in this Trade." (FF 41.) The parties have agreed to modify Agreement No. 10402 to reflect that Bank and Savill will not independently operate under it as long as Agreement No. 10355 is in existence. (X-15 at Art. 13.) Therefore, although Agreement No. 10355 does not contain an express covenant not to compete, such an understanding does in fact exist. In its order conditionally extending Agreement No. 9925-3, the Commission stated that "although Agreement No. 9925-3 contains no express covenant not to compete, the actions of the Proponents since 1971 may indicate that such an understanding exists on a *de facto* basis." (Order at 5, nt. 6.)

4. *Limitations of tonnage used in the joint venture*: Article 4 of Agreement No. 10355 limits the parties in the size and number of vessels that can be employed in the service. Because the voyages are so long (approximately 70-90 days), with three container vessels, the parties are somewhat limited to a monthly container service which in turn limits the amount of tonnage they can carry. (FF 27 and 31.) The length of the voyage of the breakbulk vessels (approximately 120 days) would similarly limit the breakbulk service. (FF 37.)

5. *Common offices or direction by a jointly owned corporation*: The Agreement does not provide for common offices or a jointly owned corporation.

6. *Common agents*: Article 8 provides that the Proponents will have a common agent.

7. *Common tariff*: Article 2(a) provides for a common tariff in the event the service does not join a conference and utilize the conference tariff.

8. *Common bill of lading*: The Agreement contemplates a common bill of lading. Article 14 states "copies of bills of lading of the service shall be furnished promptly to the Commission" (emphasis supplied).

9. *Common name for combined service*: The preamble of the modified agreement provides that the service will be known under the common name "The Bank and Savill Line/Shipping Corporation of New Zealand Joint Service." Although both names of the Proponents are reflected in the name of the joint service, the name indicates that the parties are operating jointly.

10. *Common vessel identification*: Each of the three container vessels is separately owned: Bank Line owns the WILLOWBANK; Shaw Savill owns the DUNEDIN; and SCNZ owns the NEW ZEALAND CARIBBEAN. (X-8 at 12 and FF 24.) Article 3 of Agreement No. 10355 provides that each party shall have sole responsibility for the procurement, management and financing of its own ships and equipment.

11. *Common arrangements with terminals, stevedores and other parties*: Article 2(b) states that the Agreement extends to arrangements between the parties with other modes of transportation. Article 9 provides for the sharing of terminal, marketing, agency and stevedoring expenses and therefore envisions common arrangements with these entities.

12. *Joint advertising and/or solicitation*: Article 15 states that the service will be advertised jointly although the full corporate and/or trade name of each party shall be shown in a manner which reflects their separate interests. The parties have stipulated that normally, for commercial purposes, the service will be advertised jointly with the programs of all vessels being shown. (FF 45.)

13. *Lack of significant individual interests in the trade outside the joint venture*: Presently, neither Shaw Savill, Bank Line, Bank and Savill nor SCNZ operate or participate in a common carrier service in the Trade other than in the capacity specified in the proposed Agreements. (FF 41.) Arguably, SCNZ has an interest in the Trade outside the joint venture by virtue of the fact that it is owned by the government of New Zealand and has governmental responsibilities. However, as a common carrier, on a commercial basis, it does not have an interest in the Trade outside of the joint venture.

14. *Duration of the joint venture*: As originally filed, the parties sought to have the Commission approve the Agreement for an indefinite term, indicating that the parties intended to fully commit themselves to establishing a joint service in the Trade. (X-2 and 3.) As amended, the Agreement seeks Commission approval for a term of five (5) years. (X-15 and 16.)

15. *Limitation, if any, on the type of cargo carried by the service:* The Agreement does not limit the service to the carriage of particular cargo types.

From the above, we hold that the parties to Agreement No. 10355 are holding themselves out as a single carrier through joint advertising, common agents, tariffs and bills of lading, and common arrangements with other entities. Further, they are operating as a single carrier by pooling revenues and deficiencies and coordinating sailings. The argument advanced by the Proponents that this proceeding is materially distinguishable from the holding in *Johnson Scanstar* must be rejected. While the testimony of Mr. Shea and the Aide Memoire of New Zealand asserts generally that "SCNZ has major functions and responsibilities beyond those which are purely commercial," and "has important defence, political and political/economic responsibilities," nowhere is it explained how these "responsibilities" are manifested in commercial terms. What specifically are those responsibilities? Indeed, is it possible that they may outweigh commercial considerations, which are the Commission's concern, so that a separate vote may be cast on a basis that contravenes the provisions of the Shipping Act? The answer to these questions and more are not contained in the record and, in effect, we are asked to approve a separate vote for SCNZ simply because it believes it needs it. While we believe some weight must be given to the views of foreign governments, their views, standing alone, should not be allowed to outweigh the basic unfairness of allowing a single joint service to cast two votes on most conference questions. Put another way, when a foreign government seeks to obviate the Commission's holding in *Johnson Scanstar*, it is not enough to generally allude to "other governmental responsibilities," without describing how the exercise of those responsibilities might require a separate vote and without some assurance in the agreement that a vote so cast could or would not violate shipping laws and regulations.

In view of the above facts and discussion, it is held that Agreement Nos. 10355 and 10402, respectively, are in the public interest and are required by a serious transportation need, necessary in order to secure important public benefits and are in furtherance of a valid regulatory purpose, subject to the following modifications and conditions:

(1) That both Agreement Nos. 10355 and 10402, respectively, be modified in accordance with the agreement of the parties as set forth in exhibits X-15 and X-16.

(2) That in addition in Agreement No. 10355, Article 1 be deleted and the following language be substituted:

The joint service may become a member of, and may resign or withdraw from, any lawful conference, rate agreement, pooling arrangement or other agreement subject to the Shipping Act, 1916, that may operate in the whole or any portion of the

trades covered by this Agreement. The parties agree either to belong to or operate independently from any such conference as a group. When participating in any conference or similar organization, the joint service shall act as a single member and shall be entitled to no more votes than any other single member.

(S) JOSEPH N. INGOLIA
Administrative Law Judge

FEDERAL MARITIME COMMISSION

DOCKET NO. 80-77

FAILURE OF VESSEL OPERATING COMMON CARRIERS IN THE FOREIGN COMMERCE OF THE UNITED STATES TO COMPLY WITH THE CERTIFICATION FILING REQUIREMENTS OF SECTION 21(b) OF THE SHIPPING ACT, 1916

ORDER

March 10, 1982

By Order served October 24, 1980, the Commission directed the carriers listed in Appendix A (Respondents) to show cause why they should not be found in violation of section 21(b) of the Shipping Act, 1916 (46 U.S.C. § 820(b)) and Commission General Order No. 43 (46 C.F.R. § 552, *et seq.*) for failure to file a proper antirebating certificate. In addition, the Order directed those Respondents not currently offering an active common carrier service to show cause why their tariffs should not be cancelled. The majority of Respondents filed responses to the Order. The Commission's Bureau of Hearings and Field Operations (Hearing Counsel) filed a Memorandum in Reply and a Supplemental Memorandum. This latter memorandum divides the respondent carriers into 16 categories and recommends a variety of actions depending upon the category. Twelve Respondents filed replies to Hearing Counsel's Supplemental Memorandum, generally alleging errors of classification.¹

DISCUSSION

Section 21(b) directs the Commission to require the chief executive officer of every vessel operating common carrier by water in the U.S. foreign commerce to file a periodic, written certification, under oath, attesting to: (1) a policy prohibiting the payment, solicitation or receipt of any rebate which is unlawful under the Shipping Act; (2) the fact that such policy has been promulgated recently to each owner, officer, employee, and agent of the company; (3) the details of efforts made within the company or otherwise to prevent or correct illegal rebating; and (4) full cooperation with the Commission in any action concerning illegal rebating. 46 U.S.C. § 820(b).² Pursuant to this mandate, the

¹ Neither Hearing Counsel's Supplemental Memorandum nor the replies thereto were contemplated by the procedural schedule set forth in the Order to Show Cause. However, both serve to clarify the record and they will therefore be considered by the Commission.

² Failure to file any such certification could result in a civil penalty of not more than \$5,000 for each day such violation continues.

Commission promulgated regulations requiring the filing of anti-rebating certificates and prescribing their form and content. General Order No. 43, 46 C.F.R. § 552, *et seq.* The initial certifications of vessel operating common carriers were due May 15, 1980, with subsequent certifications due on or before May 15 of each succeeding year. This proceeding arose because many carriers failed to respond to this directive, while the responses of others were inadequate.

After having thoroughly reviewed the responses submitted to the Commission's October 24 Order to Show Cause, the Commission has decided to resolve this proceeding in the manner recommended in Hearing Counsel's Supplemental Memorandum, subject to a few minor modifications. The Commission will therefore take the following action against the carriers included in each of the categories enumerated below, as set forth in Appendices B through P.³

The Commission will dismiss proceedings against those Respondents listed in Appendices B, C, D, E, F, O, and P. Because Appendix B carriers are not actively participating as common carriers in the foreign commerce of the United States, they are not subject to G.O. 43. However, carriers not actively carrying cargo or clearly committed to commence carrying cargo between ports named in a tariff at the rates stated therein are not common carriers by water within the meaning of section 18(b) and their tariffs in such unserved trades are subject to cancellation. *See Publication of Inactive Tariffs*, 20 F.M.C. 433 (1978). The Commission will, therefore, cancel the tariffs of the Appendix B carriers as contrary to section 18(b) and the Commission's tariff filing regulations (46 C.F.R. Part 536), but will take no further action against them. The carriers in Appendices C, D, and E cancelled their own tariffs at some time prior to the initial brief of Hearing Counsel. No further action regarding these Respondents is necessary or warranted. Appendix F carriers filed timely and acceptable certificates and should not have been included in this proceeding in the first instance. Appendix P carriers were inadvertently included in the October 24 Order. They are either exempt from the Commission's tariff filing requirements or beyond the Commission's jurisdiction. Appendix O carriers initially filed unacceptable certificates, but after their deficiencies were pointed out in Hearing Counsel's initial brief, they rectified the errors and now fully comply with G.O. 43. Because they originally made good faith efforts to achieve compliance and subsequently did so, they will be dismissed from this proceeding.

Several Respondents are in technical violation of section 21(b) as implemented by G.O. 43, but, because of the nature of their conduct, no further action will be taken against them. The carriers in Appendices G

³ By separate Order served February 4, 1982, the Commission denied the request of China Ocean Shipping Company for oral argument in this proceeding.

and M filed acceptable certifications, but did so only after the issuance of the October 24 Order. Those in Appendix L cancelled their tariffs, but only after Hearing Counsel's initial brief. In either case, there appears no reason to pursue civil penalties for these technical violations, especially because there appears to have been some initial confusion concerning this relatively new reporting requirement.

The carriers listed in Appendices I and J failed to respond to the October 24 Order and have never filed an acceptable anti-rebating certificate.⁴ The Commission must assume, therefore, that these Respondents are also not offering an active common carrier service in any United States trade. Their published tariffs will likewise be cancelled on the same basis as those of the carriers in Appendix B, above. Again, civil penalties will not be pursued.

Carriers listed in Appendix H responded to the October 24 Order but never filed an anti-rebating certificate. They are also in violation of section 21(b) as implemented by G.O. 43. Because their responses indicate that they are actively involved in the U.S. foreign commerce, the Commission will allow these Respondents an additional 30 days from the date of this Order to file an acceptable certificate. If they fail to do so, the Commission will consider the institution of civil assessment proceedings pursuant to section 32 of the Shipping Act (46 U.S.C. § 831) and the cancellation of their tariffs.

Carriers listed in Appendices K and N filed certifications which are in some way formally defective. They are also in technical violation of section 21 as implemented by G.O. 43. However, the Commission will give these Respondents 30 days to cure their defects.

The primary defect concerns what has been termed "clause 3" - the requirement that the certification set forth "the details of measures instituted within the filing company or otherwise to eliminate or prevent the payment of illegal rebates" 46 C.F.R. § 552.2(b). This requires a *detailed* description of the *actual* measures taken within a specific company. Many of the responses were vaguely worded and general in nature.⁵ These clearly do not comply with the third paragraph of the model certification appended to G.O. 43.

The Commission has noted the specific defects in each submission in parentheses after the carrier's name. If these defects are not rectified within the time provided, further proceedings may be instituted under section 32.

⁴ Though the carriers in Appendix J were not served through the U.S. Postal Service, they received valid constructive notice by *Federal Register* publication of the October 24 Order.

⁵ The Commission is particularly concerned about the number of responses which contained almost identically worded sections. This would appear to reflect the fact that some carrier agent is preparing certifications for several carriers without regard to the particular operations of the individual carriers.

THEREFORE, IT IS ORDERED, That Respondents listed in Appendices B, C, D, E, F, O, and P are dismissed from this proceeding; and

IT IS FURTHER ORDERED, That Respondents listed in Appendices G, H, I, K, L, M, and N are found in violation of section 21(b) of the Shipping Act, 1916 as implemented by General Order 43 (46 C.F.R. § 522.2); and

IT IS FURTHER ORDERED, That those Respondents listed in Appendices H, K, and N have 30 days from the date of this Order to file corrected anti-rebating certificates with the Secretary of the Commission which fully comply with the requirements of G.O. 43; and

IT IS FURTHER ORDERED, That the tariffs of those Respondents listed in Appendices I and J are cancelled effective immediately; Provided, however, that this cancellation is without prejudice to said carriers filing new tariffs covering the subject trades at such time as they file appropriate anti-rebating certificates and actually commence common carrier service in those trades.

By the Commission.

(S) FRANCIS C. HURNEY
Secretary

APPENDIX A

ACADIAN OCEAN FREIGHT LTD.	CARIBE LINE, LTD.
ACHILLE LAURO	CARIGULF LINES
AGROMAR LINE	CONTAINER LINE
ALFA LINE LTD.	CHAR CHING MARINE COMPANY LTD.
ALIANCA LINE	CHINA OCEAN SHIPPING COMPANY
AMERICA INDUSTRIAL CARRIERS, INC.	CHRISTENSEN CANADIAN AFRICAN LINES
AMERICAN SHIPPING COMPANY INC. S.A.	CLEMWOOD SHIPPING COMPANY
AMERICAS SHIPPING LINES, INC., THE	COATES, PETERSON STEAMSHIP CO.
ANGLO EUROPEAN CONTAINER LINE	COBELFRET LINES
ARMADA LINES	COMMONWEALTH MARITIME COMPANY
ARMASAL LINE	COMPAGNIE TAHITIENNE MARITIME
ARROW LINE	COMPAGNIE MARITIME BELGE
ASIA AMERICA LINE	CONSORCIO PANAMENO DE NAVEGACION
ATLANTIC CARIBE LTD.	CRUSADER SWIRE CONTAINER SERVICE, LTD.
ATLANTIC TRANSPORT CO. LTD.	CUNARD-BROCKLEBANK, LTD.
B.F.I. WEST AFRICA LINES, LTD.	CYLANCO, S.A.
BAHAMA ADVENTURE SHIPPING LTD.	DAFRA LINES
BARBARA LINE	DEVONIA LINES
BELFRANLINE	DIVI-DIVI LINE, LTD.
BIFROST, LTD.	DONACA LINE
BOOTH-LAMPORT (J/S)	EDWARD SHIPPING & MERCANTILE, S.A.
BRIDGE LINE (BLL), LTD.	EMPACADORA DEL NORTE, S.A.
C R LINE	EMPRESA MARITIMA DEL ESTADO
CACENA LINE LTD.	EURO-FREIGHT LINES, LTD.
CALIFORNIA INTERNATIONAL FREIGHT CORP.	EUROBRIDGE LINES
CARGO DISPATCH, INC.	EUROHOLD LINE
CARIB TRANSPORT, INC.	EUROPE CANADA LAKES LINE
CARIBBEAN EXPRESS LINE	
CARIBBEAN LINE	
CARIBBEAN LINES CORPORATION	
CARIBBEAN STEAMSHIP CORP.	

FAIRPLAY CARIBE LIMITED
 FLONAC LINE
 FREIGHT & CHARTERING
 CO., LTD.
 FRENCH AMERICAN
 SERVICE TRANSPORT
 LINE
 FROTA AMAZONICA S.A.
 FURNESS WITHY
 (CHARTERING) LTD.
 GALLEON SHIPPING
 CORPORATION
 GEORGIA-AZTEC LINES (J/S)
 GULF WEST AFRICA LINE
 HAIGA BRIDGE SHIPPING
 S.A.
 HONG KONG GUAM
 CARRIER S.A.
 HYUNDAI INTERNATIONAL,
 INC.
 ICELAND STEAMSHIP CO.
 INCA LINES
 INCAN SUPERIOR, LTD.
 INTERCOASTAL SHIPPING
 AGENCY
 INTERCONTINENTAL
 MARITIMA, S.A.
 IRAQI STATE ENTERPRISE
 FOR MARITIME
 TRANSPORT
 ISLANDER FREIGHT &
 SUPPLY, LTD.
 JAPAN SHIPPING CO., LTD.
 JOHNSON LINE
 KINGSTON SHIPPING S.A.
 KOCTUG LINE
 L & W LINE
 LAGO LINE S.A.
 LIBRA SHIPPING AND
 TRADING CORPORATION,
 LTD.
 LINEA ISLENA LTD.
 LINEAS MARITIMAS DE
 GUATEMALA, S.A.
 LTL INTERNATIONAL
 LIMITED
 MAJESTIC LINES INC.
 MAMMOTH BULK CARRIERS,
 LTD.
 MAPLE LEAF SHIPPING CO.,
 LTD.
 MAR AZUL MOTORSHIPS,
 INC.
 MAR SHIPPING LINE, INC.
 MARCA LINE
 MARCELLA SHIPPING
 COMPANY, LTD.
 MARINE AGENCY, INC.
 MARINE AUTOCRUISIERS OF
 PANAMA, INC.
 MARINE BULK CARRIERS
 MARINE EXPRESS LINE, S.A.
 MARITIMAS DEL CARIBE,
 CO. S. DE R.L.
 MARITIMA SAN ANDRES
 LTD.
 MARITIME AMERICAS LTD.
 MARSH HARBOUR SHIPPING
 CO. LTD.
 MAZOA LINE CORP. S.A.
 MERCANDIA REDERIEENNE
 MEXICO EXPRESS LINE
 MIAMI-CAICOS SHIPPING
 LIMITED
 MID-OCEAN LINES, INC.
 NAURU PACIFIC SHIPPING
 LINES
 NAUTILIUS CHARTERING
 INC. S.A.
 NAVIERA BUQUES CENTRO
 AMERILANO, S.A.
 NAVIERA CENTRAL, C.A.
 NAVIERA MARFRIGO, S.A.
 NAVIERAS CARIBE, LTD.
 NAVIMERCA LINE
 NERVION LINES
 NIGERIAN STAR LINE
 NOSAC LINE
 OCEAN TRANSPORT
 AGENCY INC.
 OCEANIA LINE, INC.
 OLYMPIC STEAMSHIP, INC.

OMEGA DE NAVEGACION,
S.A.
PACIFIC FORUM LINE
PACIFIC NAVIGATION OF
TONGA, LTD.
PACIFIC RIM CONTAINER
SERVICE INC.
PHOENIX SHIPPING
COMPANY, INC.
PORTUGUESE LINE
R.C.D. SHIPPING SERVICES
(J/S)
RAINBOW LINE
REGENT LINE
RETLA STEAMSHIP CO.
RUTLAND MARITIME
MANAGEMENT CORP.
SAGUENAY SHIPPING CO.
SAIMAA PACIFIC LINE
SAIPAN SHIPPING CO.
SALSOLA SHIPPING LINES
S.A.
SAN ANDRES SHIPPING
LINE LTD.
SAUSE BROS OCEAN
TOWING CO., INC.
SCANDINAVIAN
CONTINENTAL LINE AB
SEALARK SHIPPING
COMPANY S.A.
SEASPAN INTERNATIONAL
LTD.
SEASPEED SERVICES
SEASTAR SHIPPING CO.,
LTD.
SEATRADERS, LTD.
SERVICIOS MARITIMOS DEL
ECUADOR, S.A.
SIBONEY SHIPPING CO. S.A.
SIDRUSS SHIPPING CO., LTD.
SOCIETE IVOIRIENNE DE
TRANSPORT MARITIME
SOCIETE NATIONALE
MARITIME
SPRINGBOK LINE
SPRINGBOK SHIPPING CO.,
LTD.
STRAUM STEAMSHIP CO.
LTD.
SUN COAST LINES INC.
T. TAINERS SYSTEMS
TARGET NAVIGATION AND
TRANSPORTATION
TAYLOR CORPORATION,
LTD.
TEC LINES LTD.
TIMBER LINE LTD.
TMT LINE
TOKYO SHIPPING CO.
TRAGHETTI
MEDITERRANEO S.P.A.
TRANATI LINES
TRANS AIR MARINE S.A.
TRANS-CARIBBEAN LINES
TRANSOCEANIC
NAVIGATION CORP.
TRANSYTUR LINE
UITERWYK LINES (FAR
EAST)
UITERWYK LINES (MEXICO)
UNI-PACIFIC CONTAINER
LINES, LTD.
UNION STEAMSHIP CO. OF
N.Z. LTD.
UNITED REEFER LINES, INC.
UNIVERSAL ALCO LTD.
VAASA LINE, O/Y
VALMAR DE NAVEGACION,
S.A.
VENEBUQUES, S.A.
VICTORIA LINE
WARNER PACIFIC LINE
WEST INDIES SHIPPING
CORP.
WESTFAL-LARSEN LINE
WHITE PASS TRANS LTD.
YULSAN SHIPPING CO., LTD.

APPENDIX B

Achille Lauro	Rainbow Line
Bridgeline Ltd.	VAASA Line O.Y.
Caribbean Line	Warner Pacific Line
Compagnie Tahitienne Maritime, S.A.	
Islamic Republic of Iran Shipping Lines (I.R.I.S.L.) (member of R.C.D. Shipping Services J/S)	

APPENDIX C

B.F.I. West Africa Lines, Ltd.	Gulf West Africa Line
Belfranline	Saimaa Pacific Line
Cobelfret Lines S.P.R.L.	TMT Line
Compagnie Maritime Des Chargeurs Reunis, S.A. (CR Line)	Tokyo Shipping Co.
Flora Naviera Nacional Interoceanica S.A. (d/b/a Flonac Line)	Traghetti Mediterraneo S.P.A.
	Westfal-Larsen & Co., A/S (Westfal- Larsen Line)

APPENDIX D

Sealark Shipping Company, S.A.	Siboney Shipping C.S.A.
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APPENDIX E

Booth Lamport Joint Service	Maple Leaf Shipping Co. Ltd.
Caribe Line Ltd.	Marca Line
Cartainer Line N.V.	Mid-Ocean Lines, Inc.
Christensen Canadian African Line	Nautilus Chartering, Inc., S.A.
Cunard Brocklebank Ltd.	Naviera Buques Centro Americano, SA
Dafra Lines	Pacific Navigation of Tonga, Ltd.
Haiga Bridge Shipping S.A.	Retla Steamship Co.
Hyundai International Inc.	Rutland Maritime Management Corp.
Iraqi State Enterprise for Maritime Transport	T. Tainers System
Johnson Line	Uiterwyk Lines (Far East) Ltd.
Kingston Shipping S.A.	Uiterwyk Lines (Mexico)

APPENDIX F

R.C.D. Shipping Services J/S (except Islamic Republic of Iran Shipping Lines (I.R.I.S.L.)) (see App. B)	Seaspeed Services, Inc.
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APPENDIX G

American Industrial Carriers Caribbean Lines Corporation Crusader Swire Container Service, Ltd. Galleon Shipping Corp. Georgia Aztec Line (J/S) Koctug Line Mar Azul Motorships, Inc. Marine Bulk Carriers, Inc. Naviera Central, C.A.	Pacific Rim Container Service, Inc. Sause Bros., Ocean Towing Scandinavian Continental Line AB Seaspan International Ltd. Tec Lines Ltd. Timber Line, Ltd. Universal Alco Ltd. Victoria Line White Pass Transportation Ltd.
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APPENDIX H

Maritimas Del Caribe Co. S. De R.L.	Navimerca Line
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APPENDIX I

Anglo European Container Line Corporation Armadora Maritime Salvadorena, S.A. (Armasal Line) Asia America Line Barbara Line Bifrost, Ltd. Caribbean Express Line Clemwood Shipping Co. Coates, Peterson Steamship Co., Inc. Commonwealth Maritime Company Compania Maritime Del Nervion (Nervion Line) Conсорcio Panameno De Navegacion S.A. Edward Shipping and Mercantile, S.A. Empresa Maritima Del Estado-Chile Euro-Freight Lines Eurobridge Lines Europe Canada Lakes Line Fairplay Caribe Ltd. Freight & Chartering Co., Ltd. Furness Withy (Chartering) Ltd. Inca Lines	Intercoastal Shipping Agency Intercontinental Maritima S.A. Japan Shipping Co., Ltd. L & W Line Marine Express Line SA Maritime Americas Ltd. Mercandia Rederienne Navieras Caribe, Ltd. Oceania Line, Inc. Phoenix Shipping Co., Inc. Regent Lines San Andres Shipping Line, Ltd. Sidruss Shipping Co., Ltd. Societe Nationale Maritime Sun Coast Lines Target Navigation & Transportation Inc. Transportes Navieros Muaco C.A. (d/b/a Tranati Lines) Trans Air Marine S.A. Uni-Pacific Container Lines Ltd. United Reefer Lines, Inc. Venebuques, S.A. Yulsan Shipping Co., Ltd.
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APPENDIX J

The Americas Shipping Lines, Inc.	Libra Shipping and Trading Corp., Ltd.
Arrow Line	Linea Islena Ltd.
Atlantic Caribe Ltd.	Mar Shipping Line, Inc.
Cacena Line, Ltd.	Marine Autocruisers of Panama, Inc.
Caribbean Steamship Corp.	Mazoa Line Corp. S.A.
Cargo Dispatch, Inc.	Ocean Transport Agency, Inc.
Devonia Lines	Omega de Navegacion S.A., Inc.
Eurohold Line	Salsola Shipping Lines S.A.
French American Service Transport Lines	Seatraders, Ltd.
Hong Kong Guam Carrier	Straum Steamship Co., Ltd.
Islander Freight and Supply, Ltd.	Transoceanic Navigation Co.

APPENDIX K

Acadian Ocean Freight Ltd. (clause 3)	Maritima San Andres Ltd. (clause 3)
Empresa De Navegacao Alianca S.A. (Alianca) (clause 3; not notarized)	Nauru Pacific Line (clause 3)
Cylanco, S.A. (clause 3)	Naviera Marfrigo, S.A. (clause 3)
Lago Line S.A. (clause 3)	Portuguese Line C.T.M. (clause 3)
	Taylor Corporation Ltd. (clause 3)

APPENDIX L

Compagnie Maritime Belge, S.A.	Union Steamship Company of New Zealand Ltd.
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APPENDIX M

Alfa Line Ltd.	Marcella Shipping Co., Ltd.
American Shipping Co., S.A.	Marine Agency, Inc.
Armada Lines	Mexico Express Line
California International Freight Corp.	Nosac Line (Nopal Specialized Auto Carriers A/S)
Carib Transport Ltd.	Pacific Forum Line
Carigulf Lines	Saguenay Shipping Co.
Char Ching Marine Company Limited (C.C. Line)	Seastar Shipping Co., Ltd.
Divi-Divi Line, Ltd.	Springbok Line
Donaca Line	Springbok Shipping Co., Ltd.
Iceland Steamship Co., Ltd.	Transytur Line
Majestic Line, Inc.	

APPENDIX N

Cia. Agropecuaria Y Maritima Santa	Olympic Steamship, Inc.
Rose Ltd. (Agromar Line) (clause 3)	Societe Ivorienne De Transport
Lineas Maritimas De Guatemala, S.A.	Maritime (SITRAM) (preamble,
(clause 3)	clauses 2 and 4)

APPENDIX O

Atlantic Transport Co., Ltd.	Nigerian Star Line
Bahama Adventure Shipping Ltd.	Saipan Shipping Co.
China Ocean Shipping Company	Servicios Maritimos Del Ecuador, S.A.
Empacadora De Norte, S.A.	Trans-Caribbean Lines, Inc.
Frota Amazonica S.A.	Valmar De Navegacion, S.A.
Marsh Harbour Shipping Co., Ltd.	West Indies Shipping Corp.
Miami-Caicos Shipping Ltd.	

APPENDIX P

Incan Superior Limited	Mammoth Bulk Carriers, Ltd.
LTL International Ltd.	

FEDERAL MARITIME COMMISSION

SPECIAL DOCKET NO. 835

APPLICATION OF SOUTH ATLANTIC AND GULF - PANAMA AND COSTA RICA RATE AGREEMENT 10045 SEA-LAND SERVICE, INC. FOR THE BENEFIT OF H.E. SCHURIG & CO., INC. AGENT FOR POLYMER UNITED

A newly filed commodity rate may become immediately effective under 46 C.F.R. 536.10(a)(4), where a preexisting higher-rated "Cargo, N.O.S." rate would be otherwise applicable.

Applicant for a refund of freight charges has met the requirements of section 18(b)(3) of the Shipping Act, 1916. The Initial Decision is reversed and the refund application is granted.

F. J. O'Donnell and Frank A. Fleischer for Applicant.

REPORT AND ORDER

March 12, 1978

BY THE COMMISSION: (ALAN GREEN, JR., *Chairman*; THOMAS F. MOAKLEY, *Vice Chairman*; JAMES JOSEPH CAREY, RICHARD J. DASCHBACH, AND JAMES V. DAY, *Commissioners*)

This proceeding is before the Commission upon Exceptions from Sea-Land Service, Inc. to Administrative Law Judge William Beasley Harris' Initial Decision, served November 5, 1981. That Decision denied Sea-Land's application for refund of freight charges for failure to meet the requirements of section 18(b)(3) of the Shipping Act, 1916 (46 U.S.C. 817(b)(3))¹, and Rule 92 of the Commission's Rules of Practice and Procedure (46 C.F.R. 502.92).²

BACKGROUND

On March 21, 1981, a shipment of "Gummed Paper" was transported by Sea-Land from Houston, Texas to Puerto Limon, Costa Rica, and rated at \$243.00 W/M as "Cargo N.O.S.: Not dangerous." Sea-Land now seeks to apply the rate for "Paper, Viz: Gummed," at \$140.50 W/M, which was filed by telex on April 14, 1981, effective that date, and

¹ Section 18(b)(3) provides that the Commission may permit a waiver or refund of freight charges when there has been a clerical or administrative error in the tariff or an inadvertent error in failing to file a new tariff, provided, *inter alia*, that the carrier or conference has, prior to filing its application, filed a new tariff with the Commission setting forth the rate on which the refund or waiver would be based.

² Rule 92 generally parallels section 18(b)(3), but specifies that the Commission must have received an "effective tariff" setting forth the corrected rate.

published in its tariff on April 24, 1981. The commodity rate had been inadvertently omitted from the initial publication of the applicable tariff (which became effective March 9, 1981), because of the failure of the Sea-Land Agreement representative to bring forward the Gummed Paper provision from the previously existing tariff.

In denying the application, the Presiding Officer determined that Sea-Land had failed to file the required effective tariff setting forth the rate on which the refund would be based. He found that the rate on which Sea-Land based its refund application required 30 days' advance notice to become effective pursuant to section 536.10(a)(2) of the Commission's tariff filing regulations,³ but that the tariff filed by Sea-Land provided only 10 days. Thus, he apparently concluded that the tariff was never effective, and denied the application.

In its Exceptions, Sea-Land contends that a "Cargo N.O.S." rate was in effect at the time of the shipment and that it was a higher rate than the alleged intended rate. Sea-Land points out that section 536.10(a)(4) provides that where a "Cargo N.O.S." rate is in effect and a new lower commodity rate is filed, this new rate may become effective immediately. Sea-Land argues that section 536.10(a)(4) is controlling here, that it therefore had filed an effective tariff, and that the Presiding Officer's conclusion to the contrary was incorrect.

DISCUSSION

This proceeding involves the same general factual situation and misinterpretation of law as that found in Special Docket No. 844, *Application of Sea-Land Service, Inc. for the Benefit of Aquatech Marketing Inc.*, 24 F.M.C. 855 (1982), decided this date.⁴ Section 536.10(a)(4) allows a new commodity item to become effective immediately if a higher-rated "Cargo N.O.S." rate is otherwise applicable. The record indicates that this is the case here, and Sea-Land's Exceptions are therefore well-founded.⁵

Upon review of the record, the Commission is satisfied that an inadvertent error as contemplated in section 18(b)(3) had occurred, and

³ That section provides in part:

Amendments which provide for new or initial rates . . . shall be published and filed to become effective not earlier than 30 days after the date of publication and filing, unless special permission to become effective on less than said 30 days' notice has been granted by the Commission

46 C.F.R. 536.10(a)(2).

⁴ Unlike the situation that existed in Special Docket No. 844, however, there was no intervening general rate increase in this proceeding.

⁵ The Presiding Officer's reliance on the Commission's decision in *Application of Lykes Bros. Steamship Co., Inc. for the Benefit of Texas Turbo Jet, Inc.*, 24 F.M.C. 408 (1981), is misplaced. In the instant proceeding, section 536.10(a)(4) applies because, in addition to the corrective tariff, there is a higher-rated cargo N.O.S. rate which is otherwise applicable. In *Texas Turbo Jet*, there was no otherwise applicable rate, and the 30-day requirement of section 18(b)(2) of the Act and section 536.10(a)(2) therefore applied.

that an appropriate corrective tariff has been timely filed. The requirements for a refund of freight charges have therefore been met.

THEREFORE, IT IS ORDERED, That the Exceptions of Sea-Land, Service, Inc. are granted and the Initial Decision reversed; and

IT IS FURTHER ORDERED, That Sea-Land Service, Inc. is granted permission to refund to H. E. Schurig & Co., Inc. as agent for Polymer United, freight charges in the amount of \$2,234.04; and

IT IS FURTHER ORDERED, That Sea-Land Service, Inc. cause to have published the following notice in an appropriate place in its tariff:

Notice is hereby given, as required by the decision of the Federal Maritime Commission in Special Docket No. 835, that effective March 21, 1981, and continuing through April 14, 1981, inclusive, the rate on Paper, viz: Gummed, is \$140.50 W/M subject to Note as published in Tariff FMC-6, page 251-A, and subject to all applicable rules, regulations, terms and conditions of this tariff. This Notice is effective for purposes of refund or waiver of freight charges on any shipments of the goods described which may have been shipped during the specified time.

and

IT IS FURTHER ORDERED, That this proceeding is discontinued.

(S) FRANCIS C. HURNEY
Secretary

FEDERAL MARITIME COMMISSION

SPECIAL DOCKET NO. 844

APPLICATION OF SEA-LAND SERVICE, INC.

FOR THE BENEFIT OF AQUATECH MARKETING, LTD.

A newly filed commodity rate may become immediately effective under 46 C.F.R. 536.10(a)(4), where a preexisting higher-rated "Cargo, N.O.S." rate would be otherwise applicable.

A corrective tariff reflecting an intervening rate increase meets the tariff filing requirements of section 18(b)(3) of the Shipping Act, 1916, where the commodity was transported after the rate increase became effective.

Applicant for a waiver of freight charges has met the requirements of section 18(b)(3). The Initial Decision is reversed and the waiver application is granted.

Frank A. Fleischer for Applicant.

REPORT AND ORDER

March 12, 1982

BY THE COMMISSION: (ALAN GREEN, JR., *Chairman*; THOMAS F. MOAKLEY, *Vice Chairman*; JAMES JOSEPH CAREY, RICHARD J. DASCHBACH, AND JAMES V. DAY, *Commissioners*)

This proceeding is before the Commission upon Sea-Land Service, Inc.'s Exceptions to Administrative Law Judge William Beasley Harris' Initial Decision, which denied Sea-Land's application for waiver of freight charges for failure to meet the requirements of section 18(b)(3) of the Shipping Act, 1916 (46 U.S.C. 817(b)(3))¹ and Rule 92 of the Commission's Rules of Practice and Procedure (46 C.F.R. 502.92).²

BACKGROUND

On April 12, 1981, an intermodal shipment of "Whirlpool baths, Jacuzzi Tubs" was transported by Sea-Land from Tampa, Florida to Felixstowe, England and rated at \$97.00M as "Sauna Spas, Fiberglass." Sea-Land now seeks to apply the rate for "Baths, Whirlpool or Jacuzzi Tubs", at \$50.00M, which was filed April 21, 1981, to become effective the following day. The \$50.00 rate reflects an April 1, 1981 7% general

¹ Section 18(b)(3) provides that the Commission may permit a waiver or refund of freight charges when there has been a clerical or administrative error in the tariff or an inadvertent error in failing to file a new tariff, provided, *inter alia*, that the carrier or conference has, prior to filing its application, filed a new tariff with the Commission setting forth the rate on which the refund or waiver would be based.

² Rule 92 generally parallels section 18(b)(3), but specifies that the Commission must have received an "effective tariff" setting forth the corrected rate.

rate increase from a \$46.50M rate which, through an inadvertent administrative error, was never published in Sea-Land's tariff.

The Presiding Officer denied Sea-Land's waiver application. Because the \$50.00 rate sought to be applied was an increase from the \$46.50 rate which had not been filed, he found that section 536.10(a)(2) of the Commission's tariff-filing regulations was applicable.³ Apparently determining that the \$50.00 rate was not effective because the tariff did not provide for 30 days' notice, he concluded that Sea-Land had failed to meet the requirements of Commission Rule 92.

Sea-Land alleges error in the Presiding Officer's conclusion that the \$50.00 rate constituted an increase from the previously effective rate. Sea-Land argues that the previous rate was *not* \$46.50, as stated by the Presiding Officer, because that rate was never filed. Because the previous effective rate was the higher-rated "Cargo N.O.S." rate, Sea-Land argues that the \$50.00 rate constituted a reduction in cost to the shipper,⁴ and could take effect immediately pursuant to section 536.10(a)(4). That section provides:

(4) An amendment containing a rate on a specific commodity not previously named in a tariff which is a reduction or no change in cost to the shipper may become effective upon publication and filing; *Provided, however,* That (i) the tariff contains a "cargo, n.o.s.," or similar general cargo rate which would otherwise be applicable to the specific commodity, and (ii) the specific commodity rate is equal to or lower than the previously applicable general cargo rate.

46 C.F.R. 536.10(a)(4).

Sea-Land concludes that as both conditions (i) and (ii) are met here, the less-than-30-day effective date for the \$50.00 rate was appropriate. Sea-Land therefore submits that the denial of its application on the ground that no "effective" tariff was on file within the meaning of Rule 92(a)(2) was erroneous.

DISCUSSION

Upon review of the record, the Commission finds erroneous the Presiding Officer's determination that the \$50.00 rate could only become effective 30 days after filing. Because the tariff did contain a higher-rated "Cargo N.O.S." rate, the newly-filed \$50.00 rate could have become effective immediately pursuant to section 536.10(a)(4).

³ 46 C.F.R. 536.10(a)(2) provides that tariff amendments providing for new or increased rates may not, absent special Commission permission, become effective until 30 days after the date of publication and filing.

⁴ Sea-Land alleges that it compounded its error by assessing the rate for Sauna Spas, Fiberglass to the shipment, rather than the Cargo, N.O.S. rate which was the properly applicable rate. Sea-Land states that it rated the shipment as Sauna Baths based on the description provided in the bill of lading prepared by the freight forwarder, and that the erroneous rating was not discovered until its present application was prepared.

SEA-LAND FOR THE BENEFIT OF AQUATECH MARKETING 857
LTD.

Moreover, even if the \$50.00 rate did need to be on file 30 days prior to becoming effective, it was not necessarily void almost 6 months later, when the special docket application was filed. Inadequate publication time may be ground for rejection of the tariff within the 30-day period, but unless it is actually rejected, the tariff is presumed to be lawful. Thus, the requirement that an "effective" tariff be submitted prior to the filing of the application appears to have been satisfied.

The issue arises, however, whether the \$50.00 rate is applicable here, as it reflects an intervening rate increase. A similar situation arose in *Application of Yamashita-Shinnihon Line for the Benefit of Nissho-Iwai American Corporation*, 19 S.R.R. 1407 (1980). There, the carrier filed a corrective tariff incorporating the previously, inadvertently omitted tariff item at a rate which took into account an intervening rate increase. The Commission found that because the commodity was transported *after* the rate increase became effective, the carrier had in fact filed a corrective tariff upon which a refund could be based. The same principle applies in the instant proceeding, as the shipment took place after the general rate increase went into effect.⁵

Upon review of the record, the Commission is satisfied that Sea-Land has established that an inadvertent error as contemplated in section 18(b)(3) had occurred, and that an appropriate corrective tariff has been timely filed. The requirements for a waiver of freight charges have therefore been met.

THEREFORE, IT IS ORDERED, That the Exceptions of Sea-Land Service, Inc. are granted and the Initial Decision is reversed; and

IT IS FURTHER ORDERED, That Sea-Land Service, Inc. is granted permission to waive for the benefit of Aquatech Marketing Ltd. a portion of freight charges in the amount of \$2,818.33; and

IT IS FURTHER ORDERED, That Sea-Land Service, Inc. publish the following notice in an appropriate place in its tariff:

Notice is hereby given, as required by the decision of the Federal Maritime Commission in Special Docket No. 844, that effective April 12, 1981, and continuing through April 22, 1981, inclusive, the rate on "Baths, Whirlpool or Jacuzzi Tubs: Minimum 50 CBM per house/house container" is \$50.00M, and subject to all applicable rules, regulations, terms and conditions of this tariff. This Notice is effective for purposes of refund or waiver of freight charges on any shipments of the

⁵ The Presiding Officer's reliance on the Commission's decision in *Application of Lykes Bros. Steamship Co., Inc. for the Benefit of Texas Turbo Jet, Inc.*, 24 F.M.C. 408 (1981), is misplaced. In the instant proceeding, section 536.10(a)(4) applies because, in addition to the corrective tariff, there is a higher-rated cargo N.O.S. rate which is otherwise applicable. In *Texas Turbo Jet*, there was no otherwise applicable rate, and the 30-day requirement of section 18(b)(2) of the Act and section 536.10(a)(2) therefore applied.

goods described which may have been shipped during the specified time.

and

IT IS FURTHER ORDERED, That this proceeding is discontinued.

By the Commission.

(S) FRANCIS C. HURNEY
Secretary

FEDERAL MARITIME COMMISSION

INFORMAL DOCKET NO. 728(1)

PPG INDUSTRIES, INC.

v.

ATLANTTRAFIK EXPRESS SERVICE

ORDER REFERRING PETITION FOR RECONSIDERATION TO THE OFFICE OF INFORMAL DOCKETS FOR FURTHER CONSIDERATION

March 15, 1982

PPG Industries, Inc. (PPG) initiated this proceeding by filing a complaint which alleges that it was overcharged by Atlantrafik Express Service (AES) on several shipments of fibre glass yarn, roving and strand in violation of section 18(b)(3) of the Shipping Act, 1916 (46 U.S.C. §817(b)(3)). Settlement Officer Edgar T. Cole issued a decision in which he held for PPG and ordered AES to pay reparations in the amount of \$2,994.93 plus interest. AES has now filed a Petition with the Commission requesting reconsideration of the Settlement Officer's decision.

Before a Petition for Reconsideration will be considered by the Commission, it must satisfy the requirements of Rule 261 of the Commission's Rules of Practice and Procedure (46 C.F.R. § 502.261). Although Rule 261 is unclear as to whether it applies to informal decisions,¹ the Commission believes that such an application would be inconsistent with the informal docket procedure in which the parties waive their right to file exceptions to the Settlement Officer's decision with the Commission. Therefore, the *Commission* will not consider the present petition but instead will refer it to the Office of Informal Dockets for its consideration and disposition.

¹ Measures are presently being undertaken to clarify this rule.

THEREFORE, IT IS ORDERED, That AES' Petition for Reconsideration of the Initial Decision in Informal Docket No. 728(I) is referred to the Office of Informal Dockets.

By the Commission.²

(S) FRANCIS C. HURNEY
Secretary

² Commissioner Daschbach did not participate and issues the following separate opinion:

I am not participating because I do not believe that the Commission should review the decisions of Settlement Officers in informal proceedings. Under Subpart S of the Commission's Rules of Practice and Procedure (46 C.F.R. §502.301), parties consent to waive the rights and obligations associated with normal adjudicatory proceedings for the express purpose of receiving prompt consideration of a small claim. Commission review precludes the inexpensive and expeditious handling of small claims which is the foundation of the informal docket process. The Settlement Officer's decisions in informal dockets do not have precedential value. Commission review therefore imposes unnecessary expense and delay in an arbitration process designed to settle minor commercial disputes in a prompt and responsive manner.

FEDERAL MARITIME COMMISSION

INFORMAL DOCKET NO. 858(1)
MINE SAFETY APPLIANCES COMPANY

v.

UNITED STATES LINES, INC.

ORDER REFERRING PETITION FOR RECONSIDERATION TO THE OFFICE OF INFORMAL DOCKETS FOR FURTHER CONSIDERATION

March 15, 1982

Mine Safety Appliances Company initiated this proceeding by filing a complaint which alleges that it was overcharged by United States Lines (USL) on a shipment of foam concentrate in violation of section 18(b)(3) of the Shipping Act, 1916 (46 U.S.C. §817(b)(3)). Settlement Officer Roland C. Murphy issued a decision in which he held for Mine Safety and ordered USL to pay reparations in the amount of \$334.00 plus interest. USL has now filed a Petition with the Commission requesting reconsideration of the Settlement Officer's decision.

Before a Petition for Reconsideration will be considered by the Commission, it must satisfy the requirements of Rule 261 of the Commission's Rules of Practice and Procedure (46 C.F.R. §502.261). Although Rule 261 is unclear as to whether it applies to informal decisions,¹ the Commission believes that such an application would be inconsistent with the informal docket procedure in which the parties waive their right to file exceptions to the Settlement Officer's decision with the Commission. Therefore, the *Commission* will not consider the present petition but instead will refer it to the Office of Informal Dockets for its consideration and disposition.

¹ Measures are presently being undertaken to clarify this rule.

THEREFORE, IT IS ORDERED, That USL's Petition for Reconsideration of the Initial Decision in Informal Docket No. 858(I) is referred to the Office of Informal Dockets.

By the Commission.²

(S) FRANCIS C. HURNEY
Secretary

² Commissioner Daschbach did not participate and issues the following separate opinion:

I am not participating because I do not believe that the Commission should review the decisions of Settlement Officers in informal proceedings. Under Subpart S of the Commission's Rules of Practice and Procedure (46 C.F.R. §502.301), parties consent to waive the rights and obligations associated with normal adjudicatory proceedings for the express purpose of receiving prompt consideration of a small claim. Commission review precludes the inexpensive and expeditious handling of small claims which is the foundation of the informal docket process. The Settlement Officer's decisions in informal dockets do not have precedential value. Commission review therefore imposes unnecessary expense and delay in an arbitration process designed to settle minor commercial disputes in a prompt and responsive manner.

FEDERAL MARITIME COMMISSION

DOCKET NO. 71-29

BATON ROUGE MARINE CONTRACTORS, INCORPORATED

v.

CARGILL, INCORPORATED

ORDER REMANDING PROCEEDING

March 18, 1982

This proceeding was instituted as a result of a complaint filed by Baton Rouge Marine Contractors, Inc. (BARMA) against Cargill, Inc. on March 29, 1971, alleging that: (1) Cargill conditioned the use of Cargill's grain elevator terminal facilities at Baton Rouge, La. upon the payment of a per ton usage charge; (2) it was forced to sign an agreement to pay such charges; and (3) Cargill refused to load vessels which utilized stevedores that had not signed such an agreement. BARMA alleged that this practice violated sections 15, 16 and 17 of the Shipping Act, 1916 (46 U.S.C. §§ 814, 815, 816). Cargill on the other hand maintained that the charge was lawful and based upon actual use of its services and facilities.

On January 7, 1975, the Commission issued its first decision in this proceeding holding that the charge did not violate sections 15 or 16 of the Act but was unlawful under section 17 of the Act. *Baton Rouge Marine Contractors v. Cargill, Inc.*, 18 F.M.C. 140 (1975) ("Cargill I"). The Commission found that Cargill had failed to establish a reasonable relationship between the benefits obtained by the use of its facilities by stevedores and the level of the charge imposed on them. The proceeding was, accordingly, remanded to the Administrative Law Judge for further hearings and a determination of what would constitute a "proper allocation of services and facilities benefits to stevedores." This decision was affirmed by the United States Court of Appeals for the District of Columbia Circuit as based on a reasonable interpretation of section 17 under the *Volkswagenwerk* standard.¹

¹ *Volkswagenwerk v. FMC*, 390 U.S. 261 (1968). *Cargill, Inc. v. F.M.C.*, 530 F.2d 1062 (D.C. Cir. 1976). On remand from the Commission in "Cargill I", the Administrative Law Judge held that Cargill had failed to justify the charge and that the proper level of charge could not be determined on the record before him. 17 S.R.R. 1407. On exception, the Commission again remanded the proceeding with instructions to arrive at a proper charge based upon an allocation of relative benefits derived from the use of the facilities by stevedores. *Baton Rouge Marine Contractors, Inc. v. Cargill, Inc.*, 20 F.M.C. 570 (1978) ("Cargill II"). On remand from the Commission in "Cargill II", the Administrative

Continued

The "Cargill III" decision was reversed by the United States Court of Appeals for the District of Columbia on May 4, 1981. *Baton Rouge Marine Contractors, Inc. v. F.M.C.*, 655 F.2d 1210 (D.C. Cir. 1981). The Court held that the record failed to support the determination that a reasonable costs/benefits relationship existed. It noted that the Commission had particularly failed to adequately explain the general decline in the profits of stevedores after the advent of automation at the terminal facility. The Court explained that under the *Volkswagenwerk* standards the Commission may not allow a charge on stevedores in disproportion to costs allocated to others who reap equal or greater benefits from such automation. The Court also determined that the so-called "prevailing practices" standard of reasonableness utilized by the Commission departed from the standards of *Volkswagenwerk*, that the Commission had not justified such departure from past standards under the Shipping Act and, that in any event, the Commission had insufficient evidence before it upon which to base a determination of operative free market forces.² The proceeding was remanded to the Commission for further proceedings consistent with the Court's opinion.

On November 18, 1981, the Commission issued an Order requesting BARMA and Cargill to submit comments on how they wished to proceed in light of the Court's decision. Both parties have responded.

POSITIONS OF THE PARTIES

BARMA urges the Commission to find that Cargill's charge is an unreasonable practice under section 17 of the Shipping Act, 1916 and to prohibit its collection. It submits that Cargill has repeatedly failed to justify the charge and that the charge cannot be justified by the "prevailing practices" at unregulated elevators.

Cargill believes the matter should be referred to an administrative law judge for further hearings in order to allow it to produce the evidence of record found absent by the Court. Cargill also seeks an opportunity to explain how the Baton Rouge elevator is distinguishable from those addressed in prior Commission cases under the *Volkswagenwerk* standard.

DISCUSSION

In light of the recent decision of the Court of Appeals vacating the Commission's last Order in this proceeding, further hearings on remand

Law Judge found that Cargill had failed to justify the charge. 18 S.R.R. 435. On exception to that decision, the Commission reversed and concluded that Cargill's charge had been justified under section 17. The Commission found that both a reasonable costs/benefits allocation had been established under *Volkswagenwerk* and that Cargill had shown that the level of the charge was the product of competitive market forces. *Baton Rouge Marine Contractors v. Cargill, Inc.*, 21 F.M.C. 968 (1979) ("Cargill III").

² The Commission was also found to have improperly relied upon an offer of proof in concluding that the charge on stevedores was a "prevailing practice" at competing grain elevators.

appear to be necessary. The question before the Commission at this juncture is what standard of reasonableness will be applied to the stevedore charge in question in the proceeding on remand. This determination will also clarify the evidentiary issues that will be the subject of any further hearing.

The traditional test of reasonableness of terminal charges has been whether the charge reflects a fair allocation of terminal costs based on the comparative benefits derived by the charged party's actual use of the terminal facility. *Pacific Northwest Tidewater Elevators Ass'n v. F.M.C.*, 11 F.M.C. 369 (1968). This test has been upheld as a reasonable interpretation of the ultimate standard of reasonableness under section 17, i.e., that the charge levied be reasonably related to the service rendered. *Volkswagenwerk v. F.M.C.*, *supra*. It is the standard which the Commission applied in "Cargill I" but deviated from in "Cargill III" in favor of a "prevailing practices" test. Because of the difficulties the Commission perceives in resolving the Court's requirements with respect to the "prevailing practices" test, the Commission has determined not to utilize that test in this proceeding, but rather to return to the traditional comparative costs/benefits standard of reasonableness enunciated in *Volkswagenwerk* and *Pacific Northwest Tidewater Elevators*.

In "Cargill I" the Commission determined that although some charge on stevedores was justified, Cargill had failed to establish the reasonableness of all the specific costs/benefits elements which it alleged supported the charge. 18 F.M.C. at 161-163. Therefore, in the remand hearing, Cargill must address this deficiency.³

The Commission has heretofore found in "Cargill I" that some charge was justified on the basis of certain benefit elements established by Cargill. This finding was not challenged by BARMA nor altered by the Court. The items found to be reasonably assessed against stevedores were the allocations of the costs of various utilities, overhead expenses and trimming machines. 18 F.M.C. at 163.⁴ Cargill need not relitigate these benefits and costs, and the burden of disproving the validity of these elements at this time will be on BARMA.

However, the validity of the other benefit items allegedly justifying the charge has not yet been adequately shown. Cargill must establish that stevedores receive some measurable benefit from its automated shipping gallery. Although the Commission recognized that stevedores might benefit from the grain dock and wharf and clean-up and liaison services, albeit not to the extent alleged by Cargill, the benefit derived

³ These evidentiary burdens must be borne by Cargill because the effect of the Court of Appeals decision vacating the Commission's "Cargill III" Order was to reinstate the "Cargill I" decision, wherein it was determined that Cargill's charge on stevedores violated section 17. Moreover, because *Volkswagenwerk* requires a cost-based justification of terminal charges, the party in possession of such data should produce such evidence and establish its reliability.

⁴ These may be reasonably adjusted for inflation in the remand hearing.

from the automated shipping gallery, if any, has yet to be adequately substantiated.

Cargill must also demonstrate that its allocation of related costs to any benefits established is reasonable. This must be accomplished by allocating the cost of each functional area of the terminal to each user thereof in a reasonable proportion to the relative benefits derived therefrom. This applies not only to the costs of the automated shipping gallery but to the grain dock and wharf, clean-up costs and liaison service costs as well. Cargill's existing evidence of record relating to those latter items is based upon either unreasonable or deficient benefit assessments. Cargill is not precluded from alleging additional cost/benefit elements but, of course, it bears the burden of establishing their existence.

THEREFORE, IT IS ORDERED, That this proceeding is reopened and remanded to the Chief Administrative Law Judge for further hearings consistent with this Order.

IT IS FURTHER ORDERED, That the following issues shall be addressed and resolved in the remanded proceeding:

1. Do stevedores receive a benefit from their use of the automated shipping gallery at the Cargill grain terminal facility at Baton Rouge?
2. If a benefit to stevedores resulting from their use of any functional area of Cargill's grain terminal facility is shown, is Cargill's allocation of the costs of each functional area reasonably related to such benefit, giving due consideration to the relative benefit that other users of such facilities receive?

IT IS FURTHER ORDERED, That the burden of proof as to the reasonableness of the charge on stevedores at the Baton Rouge terminal is upon Cargill in this remand proceeding.

IT IS FURTHER ORDERED, That Cargill shall be permitted to present any form of evidence which reasonably relates to the issues of this remand proceeding and the Administrative Law Judge shall liberally construe such issues so as to permit the maximum development of a record for decision in this proceeding.

By the Commission.

(S) FRANCIS C. HURNEY
Secretary

FEDERAL MARITIME COMMISSION

DOCKET NO. 81-49
AGREEMENT NO. 10387

NOTICE

March 22, 1982

Notice is given that no appeal has been taken to the February 11, 1982 Order of Discontinuance in this proceeding and that the time within which the Commission could determine to review has expired. No such determination has been made and, accordingly, the discontinuance has become administratively final.

(S) FRANCIS C. HURNEY
Secretary

FEDERAL MARITIME COMMISSION

DOCKET NO. 81-49
AGREEMENT NO. 10387

Ralph M. Pais of Graham & James for proponents of Agreement No. 10387.

Alan J. Jacobson, Stuart James, John Robert Ewers, Director, Bureau of Hearings and Field Operations, and *Joseph B. Slunt*, Chief, Office of Hearing Counsel, for Hearing Counsel.

NOTICE OF (1) PROPONENTS WITHDRAWAL OF AGREEMENT

NO. 10387 FROM COMMISSION CONSIDERATION
AND (2) DISCONTINUANCE OF PROCEEDING

Finalized March 22, 1982

On Thursday, February 4, 1982, counsel for proponents of Agreement No. 10387 telephoned the Presiding Administrative Law Judge to find out what ruling had been made of the motion of Hearing Counsel for the Presiding Administrative Law Judge to reconsider his denial on January 13, 1982, of the proponents' motion for modification of the procedural schedule. (The ruling denying the motion had been made February 1, 1982, and sent to the printing plant for duplication. However, inadvertently it was not served until February 8, 1982.) The Judge advised counsel of the ruling.

Hearing Counsel in a letter dated and received February 8, 1982, stated:

Dear Judge Harris:

Re: FMC No. 81-49—Status Report

On February 5, 1981, counsel for Proponents in the above referenced proceeding notified Hearing Counsel that Proponents had decided to withdraw Agreement No. 10387 from Commission consideration. In other words, they are no longer seeking Commission approval of Agreement No. 10387. Counsel for Proponents further advised Hearing Counsel that Proponents would seek discontinuance of this proceeding in light of their decision to withdraw the agreement. On February 8, 1982, counsel for Proponents advised Hearing Counsel that Proponents' withdrawal has been mailed to the Commission. Hearing Counsel concur with Proponents that upon withdrawal of Agreement No. 10387, this proceeding should be discontinued. As the only issued [sic] ordered by the Commission to be determined is whether the agreement should be approved,

disapproved or modified, withdrawal of the agreement eliminates the subject matter of this proceeding. Accordingly, Hearing Counsel urge the presiding Administrative Law Judge to discontinue this proceeding.

Respectfully submitted,
JOHN ROBERT EWERS, DIRECTOR
Bureau of Hearings and Field Operations
(S) JOSEPH B. SLUNT, CHIEF
Office of Hearing Counsel
(S) ALAN J. JACOBSON
Hearing Counsel
(S) STUART JAMES
Hearing Counsel

The following letter from counsel for proponents, dated February 5, 1982, was received February 9, 1982:

Dear Judge Harris:

This will advise that the members of the Pacific/Australia-New Zealand Conference at their February 4, 1982 Owners' Meeting determined that they do not wish to proceed further with the referenced matter and have elected to withdraw the subject Agreement from further consideration. We therefore believe it now appropriate to discontinue the formal proceedings in this docket and respectfully request that you enter an appropriate order.

We wish to thank you for your understanding and assistance, especially at the December 9 Prehearing Conference in which you greatly facilitated discussions with the Commission Hearing Counsel.

Respectfully submitted,
(S) RALPH M. PAIS
GRAHAM & JAMES

Upon consideration of the record herein, and the above, it is *ordered*,
(A) Agreement No. 10387, at the election of the proponents thereof, is withdrawn from further consideration.

(B) This proceeding is discontinued.

(S) WILLIAM BEASLEY HARRIS
Administrative Law Judge

FEDERAL MARITIME COMMISSION

DOCKET NO. 81-58

MAIZENA S.A.

v.

FLOTA MERCANTE GRANCOLOMBIANA, S.A.

NOTICE

March 22, 1982

Notice is given that no appeal has been taken to the February 11, 1982 dismissal of the complaint in this proceeding and that the time within which the Commission could determine to review has expired. No such determination has been made and, accordingly, the dismissal has become administratively final.

(S) FRANCIS C. HURNEY
Secretary

FEDERAL MARITIME COMMISSION

DOCKET NO. 81-58

MAIZENA S.A.

v.

FLOTA MERCANTE GRANCOLOMBIANA S.A.

Complainant alleged that respondent overcharged it on a shipment of food processing machinery with a separate measuring tank, described as a "deodorizer" with various incidental parts on the bill of lading, by assessing a higher Cargo NOS rate. Respondent denied improperly rating the shipment. However, in order to avoid difficult and costly litigation, the parties agreed to settle on the basis of a \$4,325.65 payment instead of the original claim of \$9,077.55.

The settlement agreement comports with both general principles of law applicable to settlements and to the specific requirements established by the Commission in cases arising under section 18(b)(3) of the Shipping Act, 1916. It represents the considered judgment of the parties as to the value of the claim and the risks and expenses of continued litigation and is shown to be a bona fide attempt to resolve a controversy rather than to evade tariff law in a case in which there is a genuine dispute of fact and critical facts necessary to resolve the dispute are not reasonably ascertainable.

Henry Martin for complainant.

Renato Giallorenzi for respondent.

SETTLEMENT APPROVED; COMPLAINT DISMISSED

Finalized March 22, 1982

NORMAN D. KLINE, Administrative Law Judge.

Complainant, Maizena S.A., and respondent, Flota Mercante Grancolombiana S.A., have filed a joint motion requesting approval of a settlement agreement and dismissal of the complaint. In support of their motion, the parties have attached the text of their settlement agreement, a joint affidavit attesting to the *bona fides* of the settlement, a detailed letter from complainant's representative explaining the reasons for the settlement, and a joint memorandum urging approval of the settlement on the basis of Commission precedent and established principles of law applicable to settlements. As more fully described below, I find that the settlement agreement comports with applicable standards of law and accordingly grant the motion.

The case began with the filing of a complaint which was served on September 24, 1981. Complainant, located in Cali, Colombia, is an affiliate of CPC International of Englewood Cliffs, New Jersey. Complainant alleged that respondent overcharged it on a shipment of food

processing machinery which included an empty iron or steel tank by assessing the shipment a higher Cargo NOS rate rather than the rates applicable to food processing machinery and to empty tanks, in violation of section 18(b)(3) of the Shipping Act, 1916. Because of this alleged overcharge, complainant sought reparation in the amount of \$9,077.55, the difference between total freight as calculated under the Cargo NOS rate and as calculated under the specific machinery and tank rates. The shipment allegedly consisted of three containers of these items which were carried under a bill of lading dated September 30, 1979, from Philadelphia, Pennsylvania, to Buenaventura, Colombia. Payment of the freight calculated under the Cargo NOS rate was made by complainant some time during October of 1979.

Respondent filed an answer denying most of the above allegations set forth in the complaint. However, respondent admitted that on the date specified it had carried a shipment of "1 used-semi-continuous girdler 3-tray deodorizer, including a dowtherm vaporizer, a measuring tank, shell drain tank, filter, aftercooler, charge pump, discharge pump with meters, control panel, instruments and controls, valves and fittings and anti-oxidant addition system." This description is essentially the description which had been entered on the bill of lading. According to complainant, respondent had relied upon that bill of lading description which, in respondent's opinion, required application of the Cargo NOS rate to the shipment.

Shortly after the filing of the answer, I was informed that the parties had decided to settle their controversy. The completion of the settlement and filing of the necessary documents were delayed for a while because of intervening illness. Ultimately, however, all necessary documents were filed on February 1, 1982.

THE NATURE OF THE SETTLEMENT

As described above, very simply, complainant had alleged that its shipment, which had been described on the bill of lading as a "used semi-continuous girdler 3-tray deodorizer" with various tanks, filters, pumps, etc., was in reality food processing machinery and also a steel measuring tank. Therefore, according to complainant, the shipment should have been rated under the specific commodity rates provided for food processing machinery¹ and for the steel measuring tank, which complainant believes should have been rated under the tariff rate

¹ Complainant claimed that the proper rate for the "deodorizer" was the rate shown in respondent's tariff for "Machinery or Machines, viz.: Food Canning or Processing," which takes a class rate amounting to \$190 per ton. (See Atlantic & Gulf/West Coast of South America Conference, Freight Tariff F.M.C. No. 2, Original Page 216 and Original Page 76.)

for high pressure cylinders.² Since the Cargo NOS rate was \$224 per 40 cu. feet as opposed to the machinery and cylinder rates of \$190 and \$108 per 40 cu. feet respectively, complainant was charged substantially higher freight by respondent, according to complainant, the sum of \$9,077.55.

Under the terms of the settlement agreement, complainant agrees to withdraw its complaint in return for a payment of \$4,325.65 by respondent.³ Respondent does not admit that it violated law. If the agreement is disapproved by the Commission or approved on conditions which are unacceptable to either party, the agreement, by its terms, becomes null and void. In addition to the settlement agreement which the parties furnished in support of their joint motion, the parties have sworn in a joint affidavit that theirs is a reasonable commercial settlement and is not a device to obtain transportation at other than proper rates and charges or otherwise circumvent the requirements of law and that it represents a resolution of factual disputes which could not otherwise be resolved without further lengthy and costly litigation. In further support of these statements, complainant has provided more detailed explanation of the basis of the settlement. Thus, complainant explains that originally it had claimed that the shipment ought to have been rated in separate portions, one portion consisting of food processing machinery, the other portion consisting of an iron or steel tank. If these allegations were proven, it would perhaps justify use of two different rates under respondent's tariff, the rate for the machinery and that for the tank. However, complainant concedes that there is a problem of proof regarding the question of whether the tank should be considered as part of the machinery or as a separate commodity. Since the relevant shipping documents do not separate the tank from the remainder of the machinery, and since other documents indicate that the tank was meant for use with the machinery, complainant recognizes that it might not be able to prove that the tank portion of the shipment was entitled to separate rating under the tank or cylinder rate. In order to avoid costly and difficult litigation, complainant and respondent have settled by applying the rate for the food processing machinery (\$190 per 40 cu. feet) to the entire shipment, in other words, by regarding the tank as a part of the machinery. On this basis, the amount of overcharge would be \$4,325.65. Complainant states furthermore that it con-

² Complainant claimed that the proper rate for the alleged separate tank was the rate shown for "Tanks, S.U., viz.: High Pressure, Iron or Steel (as Cylinders)" which is published as the rate for "Cylinders, Empty, Iron or Steel, viz.: High Pressure, empty, loose or packed." The rate for this latter item is published as \$108 per ton. (See tariff cited, Original Pages 316, 153, and 76.)

³ The settlement agreement contains an obvious typographical error, stating that "Flota will pay to Maizena the sum of Four Thousand Three Hundred and Thirty-Five [sic] dollars and Sixty-Five cents (\$4,325.65)." All other evidence and statements submitted, however, show that the amount of the settlement is \$4,325.65, not \$4,335.65.

siders this amount of settlement payment to be fair and reasonable, to be based upon an evaluation of the worth of the claim and a consideration of the risks of litigation. In a final memorandum submitted with their motion, the parties urge approval of their settlement agreement and rely upon the well-established principle of law which favors and encourages settlements that appear to be fair.

EVALUATION OF THE SETTLEMENT UNDER APPLICABLE PRINCIPLES OF LAW

It is well settled that both the law and Commission policy encourage settlements and engage in every presumption which favors a finding that they are fair, correct, and valid. See *Old Ben Coal Company v. Sea-Land Service, Inc.*, 21 F.M.C. 505 (1978) (I.D. adopted by the Commission, December 29, 1978), and the many cases cited therein. See also Commission Rules 91 and 94, 46 C.F.R. 502.91 and 502.94, and the Administrative Procedure Act on which Rule 91 is based, 5 U.S.C. 554(c)(1).⁴ The general policy favoring settlements is summarized in the following passage drawn from a recognized legal authority, which language was adopted by the Commission in the *Old Ben Coal Company* case, cited above, 21 F.M.C. at 512:

The law favors the resolution of controversies and uncertainties through compromise and settlement rather than through litigation, and it is the policy of the law to uphold and enforce such contracts if they are fairly made and are not in contravention of some law or public policy The courts have considered it their duty to encourage rather than to discourage parties in resorting to compromise as a mode of adjusting conflicting claims The desire to uphold compromises and settlements is based upon various advantages which they have over litigation. The resolution of controversies by means of compromise and settlement is generally faster and less expensive than litigation; it results in a saving of time for the parties, the lawyers, and the courts, and it is thus advantageous to judicial administration, and, in turn, to government as a whole. Moreover, the use of compromise and settlement is conducive to amicable and peaceful relations between the par-

⁴ The APA, 5 U.S.C. 554(c)(1) provides:

The agency shall give all interested parties opportunity for—

(1) The submission and consideration of facts, arguments, offers of settlement, or proposals of adjustment when time, the nature of the proceedings, and the public interest permit;

The courts view this provision and its legislative history "as being of the 'greatest importance' to the functioning of the administrative process." *Pennsylvania Gas & Water Co. v. Federal Power Commission*, 463 F.2d 1242, 1247 (D.C. Cir. 1972). Congress encouraged agencies to make use of settlements and wished to advise private parties that "they may legitimately attempt to dispose of cases at least in part through conferences, agreements, or stipulations." Senate Judiciary Committee, APA—Legislative History, S. Doc. No. 248, 79th Cong., 2d Sess., at 24.

ties to a controversy. 15A American Jurisprudence, 2d Edition, pp. 777-778 (1976). (Footnote citations omitted.)

Consistent with these policies, the Commission has in recent years approved a wide variety of settlements and discontinued numerous complaint cases under various provisions of the Shipping Act, 1916. See list and description of settled cases recited in *Del Monte Corporation v. Matson Navigation Company*, 22 F.M.C. 365, (1979). As those cases show, it is possible to settle cases without admissions of violations of law and for amounts of reparation less than those originally sought in the complaint. Moreover, although there had been some doubt at one time whether the Commission would permit settlements in cases involving alleged overcharges under section 18(b)(3) absent findings of violations of that law, the Commission has held that settlements in such cases are indeed permissible provided that there is a showing that the settlement is *bona fide* and not a device for rebating. See *Organic Chemicals v. Atlantrafik Express Service*, 18 SRR 1536a (1979); *Celanese Corporation, Inc. v. The Prudential Steamship Company*, 23 F.M.C. 1 (1980).

As explained in *Old Ben*, cited above, the Commission recognizes the advantages to settlements but exercises some judgment before approving them. Mainly the Commission is concerned that the settlement not contravene any law or public policy, for example, that it not be the result of fraud, duress, or mistake, that it not constitute a discriminatory device or consummate a desire to contravene tariff law embodied in section 18(b)(3) of the Shipping Act, 1916, and that if it falls under section 15, the settlement be filed for approval under that law and pertinent regulations. *Old Ben*, cited above, 21 F.M.C. at 513.

In considering settlements which parties submit with requests that their cases before the Commission be dismissed, the Commission has followed the traditional view that the settlement deserves approval if it avoids wasteful litigation and if it appears that the parties have correctly made an economical judgment that continued litigation would cost more to each side regardless of who ultimately prevailed on the merits than the amount of money which complainant had agreed to accept and respondent had agreed to pay in exchange for a release. *Old Ben*, cited above, 21 F.M.C. at 514. Since this is a settlement fashioned by the parties in a proceeding involving the tariff-adherence requirements of section 18(b)(3) of the Shipping Act, 1916, however, the Commission exercises special care to assure itself that the settlement is a legitimate attempt to avoid unnecessarily costly and wasteful litigation rather than a device to sanction rebating. To be assured of the *bona fides* of such cases, therefore, the Commission requires three things: (1) submission of the signed agreement; (2) an affidavit setting forth the reasons for the settlement and attesting to the fact that it is a *bona fide* attempt by the parties to terminate their controversy and not a device to circumvent

tariff law; and (3) a showing that the complaint on its face presents a genuine dispute and that the facts critical to the resolution of the dispute are not reasonably ascertainable. See *Organic Chemicals v. Atlantrafik Express Service*, cited above, 18 S.R.R. at 1539-1540; *Celanese Corporation, Inc. v. The Prudential Steamship Company*, cited above, 23 F.M.C. 1; *Tupperware Company v. Compania Sud-Americana de Vapores*, 24 F.M.C. 525 (1982). I find that the parties have shown that their settlement complies with both the general standards governing approvability of settlements as well as the particular conditions attached to settlements submitted in section 18(b)(3) cases.

The subject settlement appears to be reasonable and to represent the considered judgment of the parties. Complainant, although originally seeking \$9,077.55 in reparation, realizes the difficulty of proving the basis for such an award, since complainant would have to show that the shipment consisted of food processing machinery plus a separate tank rather than an integrated machine and its parts. Evidence submitted with the original complaint suggests that the commodity described as a "deodorizer" on the bill of lading was in fact a food processing machine. However, if the case went to trial, the letter of the shipper which indicates this fact would probably be replaced by oral testimony and cross-examination. Furthermore, as complainant has acknowledged, the shipping documents presently submitted do not indicate that the measuring tank was a separate commodity as complainant had originally alleged rather than part of the machine.⁵ It is readily apparent, therefore, that were this case to proceed to formal hearing, complainant would undoubtedly have to proffer oral testimony regarding the nature of the commodity which had been shipped more than two years ago before the date of the hearing and would, furthermore, have to prove whether the shipment did in fact partially consist of a separate tank which would be entitled to a different rate than that applicable to the food processing machinery, assuming complainant could prove that the so-called "deodorizer" with the various parts as described on the bill of lading was in fact a food processing machine. Since the shipping documents and packing list do not appear to show the tank separately from the rest of the alleged machinery, it is also obvious that evidence of the nature of this shipment is not readily available and that continuation of this litigation into trial and beyond would entail considerable expense to both parties. Under such circumstances, the agreement to settle upon \$4,325.65 instead of attempting to prove the validity of the original

⁵ Moreover, even if the tank were shown to be separate from the machinery, complainant would have to prove that it was a "high pressure" tank entitled to the rate on this type of tank which, under respondent's tariff, is shown as the rate for "Cylinders..." The problem here is that respondent's tariff also publishes rates for other types of "tanks," for example, "Iron or Steel, N.O.S. (other than stainless)...," "Iron or Steel, N.O.S. not Coated..." and "Stainless Steel, N.O.S."

claim of \$9,077.55 appears to be a reasoned judgment by the parties that it is more economical to receive and pay this amount than to be vindicated after costly hearings and subsequent phases of litigation. Moreover, since the initial evidence submitted with the complaint shows that the "deodorizer" might well have been food processing machinery, settlement on the basis that the entire shipment consisted of such machinery with parts included does not appear to be unfounded. Accordingly, I find that the settlement agreement passes muster under the general principles of law applicable to settlements described above and in *Old Ben Coal Company v. Sea-Land Service, Inc.*, cited above, 21 F.M.C. at 512-515.

The settlement agreement also appears to comport with the specific requirements established by the Commission in *Organic Chemicals v. Atlantrafik Express Service*, cited above, 18 SRR at 1539-1540, and such cases as *Celanese Corporation, Inc. v. The Prudential Steamship Company*, cited above, 23 F.M.C. 1; *Tupperware Company v. Compania Sud-Americana de Vapores*, cited above, 24 F.M.C. 525; and *Ellenville Handle Works, Inc. v. Far Eastern Shipping Company*, 23 F.M.C. 707 (1981). Thus, the parties have submitted their signed agreement, have filed an affidavit attesting that the settlement is a *bona fide* attempt by the parties to terminate their controversy and not a device to obtain transportation at other than applicable tariff rates in contravention of law, and have shown that the complaint on its face presents a genuine dispute and that the facts critical to the resolution of the dispute are not reasonably ascertainable. As I have discussed above, the dispute as to the nature of the shipment concerns whether the shipment, described as a "deodorizer" with various pumps, tanks, filters, etc., on the bill of lading, consisted of food processing machinery and furthermore, even if so, whether one of the parts was a so-called "high pressure" tank which was entitled to a separate rate for "cylinders." Resolution of these disputes could not be accomplished without difficult hearings and time-consuming cross-examination especially since it is not presently apparent that relevant shipping documents are probative as to the separate nature of the tank.

Accordingly, the settlement is approved and the complaint is dismissed. Within twenty (20) days after date of service of the Commission's Notice rendering this ruling administratively final, the parties shall effectuate the terms of the settlement agreement and file an affidavit with the Commission attesting to the effectuation of their settlement.

(S) NORMAN D. KLINE
Administrative Law Judge

FEDERAL MARITIME COMMISSION

DOCKET NO. 81-37
MELAMINE CHEMICALS, INC.

v.

ATLANTIC CARGO SERVICES, ET AL.

NOTICE

March 26, 1982

Notice is given that no appeal has been taken to the February 16, 1982 dismissal of the complaint in this proceeding and that the time within which the Commission could determine to review has expired. No such determination has been made and, accordingly, the dismissal has become administratively final.

(S) FRANCIS C. HURNEY
Secretary

FEDERAL MARITIME COMMISSION

DOCKET NO. 81-37

MELAMINE CHEMICALS, INC.

v.

ATLANTIC CARGO SERVICES, ET AL.

DISMISSAL OF PROCEEDING

Finalized March 26, 1982

By complaint Melamine Chemicals, Inc. charged respondents with violations of sections 15, 16, 17 and 18 of the Shipping Act because of the allegedly low inbound and high outbound rates on melamine which prevented complainant from competing with other producers of melamine both here and abroad.

Complainant now voluntarily dismisses (withdraws) its complaint against all respondents because of tariff adjustments made by them. Accordingly the proceeding is hereby dismissed.

(S) JOHN E. COGRAVE
Administrative Law Judge

FEDERAL MARITIME COMMISSION

DOCKET NO. 80-66

SOVEREIGN INTERNATIONAL CORP.

POSSIBLE VIOLATIONS OF SECTION 16, INITIAL
PARAGRAPH, SHIPPING ACT, 1916

NOTICE

March 29, 1982

Notice is given that no exceptions have been filed to the February 19, 1982 initial decision in this proceeding and the time within which the Commission could determine to review that decision has expired. No such determination has been made and, accordingly, that decision has become administratively final.

(S) FRANCIS C. HURNEY
Secretary

FEDERAL MARITIME COMMISSION

DOCKET NO. 80-66

SOVEREIGN INTERNATIONAL CORP.

POSSIBLE VIOLATIONS OF SECTION 16, INITIAL
PARAGRAPH, SHIPPING ACT, 1916

Respondent found to have violated section 16, initial paragraph of the Shipping Act, as amended, by obtaining or attempting to obtain, by unjust or unfair device or means, transportation by water for property at less than the rates and charges which would otherwise be applicable.

The record supports a finding that Respondent be assessed a civil penalty in the amount of \$3,000.

Joel S. Sankel for Respondent.

John Robert Ewers, Aaron W. Reese and Janet F. Katz for the Bureau of Hearings and Field Operations.

INITIAL DECISION ¹ OF PAUL J. FITZPATRICK,
ADMINISTRATIVE LAW JUDGE

Finalized March 29, 1982

This proceeding was initiated by the Commission's Order of Investigation and Hearing served September 26, 1980, to determine:

(1) Whether or not Respondent violated section 16, initial paragraph, by obtaining or attempting to obtain, by unjust or unfair device or means, transportation by water for property at less than the rates and charges which would otherwise be applicable; and (2) Whether penalties should be assessed against Respondent if found to have violated section 16, initial paragraph, and if so, the amount of such penalties.

Essentially, the Order recites that the Commission's General Counsel asserted a claim against Sovereign International Corp. (Sovereign) for receiving rebates from a common carrier by water in connection with the shipment of synthetic resin from New York to Iran during the period commencing on March 7, 1975, and continuing through December 19, 1975, and that Sovereign rejected the claim.

A prehearing conference was held on November 26, 1980, and various procedural orders were issued by this Judge. A hearing was held in New York City, New York, on April 16, 1981, and the Bureau of Hearings and Field Operations (Hearing Counsel) filed an Opening

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

Brief on June 8, Sovereign filed its brief on July 24, and Hearing Counsel filed its Reply Brief on August 10.² By way of summary, Hearing Counsel urges that Sovereign be found to have violated section 16, Initial Paragraph of the Shipping Act on eight occasions and that a civil penalty of \$40,000 should be assessed. Respondent concludes that "the complaint against [it] has not been sustained as a matter of law." As demonstrated below, this Judge finds that Sovereign violated the applicable provision of the Shipping Act on eight occasions but would reduce the assessment of a civil penalty as urged by Hearing Counsel to \$3,000.

FINDINGS OF FACT ³

1. Sovereign was the exporter on eight shipments transported by Waterman Steamship Company (Waterman) to Iran during the period of November and December 1975. In each instance of these shipments, F.L. Kraemer and Company (F.L. Kraemer) acted as the freight forwarder. (Exs. 1A-1FF and Tr. 22-23.)

2. These shipments involved the transportation of synthetic resins and machinery and all were connected with a particular project. (Tr. 24.)

3. Sovereign needed a lower rate than that contained in the published tariff in order to compete with other suppliers in Europe and Japan. (Tr. 62-63.)

4. Sovereign asked F.L. Kraemer about obtaining these lower rates. (Tr. 62.)

5. Mr. Nourollah Elghanayan is the vice president of Sovereign. (Tr. 61.)

6. Mr. Jacob Weisberg handled the Sovereign account at F.L. Kraemer. (Tr. 22.)

7. Both Mr. Weisberg and Mr. Elghanayan testified that sometime prior to 1974, they were present at a meeting at the offices of Sovereign at which Mr. Charles Boyle, a vice president of Waterman, was also present. (Tr. 23-24, 64.)

8. At this meeting, a lower rate was discussed for the items involved in the eight shipments. (Tr. 24, 64.)

9. Mr. Elghanayan and Mr. Boyle later had a discussion on the telephone concerning a lower rate for the movement of Sovereign's commodities. (Tr. 64.)

² The Office of Environmental Analysis has determined that section 547.4(a)(22) of the Commission's "Procedures for Environmental Policy Analysis" applies to this proceeding and that "No environmental analysis needs to be undertaken nor environmental documents prepared in connection with this docket." See memorandum to Secretary of the Commission dated September 30, 1980. No evidence or argument was raised concerning environmental impact consideration by the parties.

³ The findings of fact are substantially adopted from the opening brief of Hearing Counsel. Respondent's submissions in this area total 13 in number and are essentially contained in those of Hearing Counsel. The differences lie primarily in the interpretation of these facts and argument which is treated elsewhere in this decision.

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10. *Sovereign and Waterman agreed to a lower rate than that in the tariff and soon after Sovereign began to ship with Waterman. (Tr. 64.)*

11. Mr. Weisberg testified that all shipments handled by F.L. Kraemer were documented by a bill of lading. A clerk, whom he supervised, filled out the bill of lading. The bill was then sent to the carrier, Waterman, to be rated. (Tr. 25-26.)

12. Normally, a shipper pays the ocean freight charges within 15 days of receiving the invoice from F.L. Kraemer. (Tr. 55.)

13. The first shipment involved pumps as documented by a Waterman bill of lading dated December 10, 1975. The commodity was rated at \$146.75 including the imposition of an additional surcharge of 80 percent. The total ocean freight charges for the shipment was \$625.00. (Ex. 1-A, Tr. 26-27.)

14. The tariff rate for "Pumps, Power, N.O.S." is shown as \$146.75 per ton of 2,240 pounds or 40 cubic feet. (Ex. 1-B, Tr. 27-28.)

15. The invoice dated December 11, 1975 issued by F.L. Kraemer to Sovereign for the shipment shows the ocean freight to be \$625.00. (Ex. 1-C, Tr. 28.)

16. Sovereign did not pay when it received the invoice. (Tr. 66.)

17. F.L. Kraemer issued a "Corrected Bill" dated March 29, 1976, to Sovereign with ocean freight stated as \$531.25. (Ex. 1-D, Tr. 28-29.)

18. This was the agreed rate with Waterman for Sovereign's shipments. (Tr. 29.)

19. Sovereign paid the amount of this "Corrected Bill" or invoice which reflected the agreed to rate. (Tr. 29.)

20. Waterman issued a check to F.L. Kraemer for the difference between the correct ocean freight of \$652.00 and the \$531.25 that Sovereign paid. (Tr. 29.)

21. When F.L. Kraemer received the checks from both Waterman and Sovereign, it paid the full amount of ocean freight to Waterman. (Tr. 29.)

22. The second shipment involved synthetic resin as documented by a Waterman bill of lading dated December 9, 1975. The commodity was rated at \$120.75 including an additional surcharge of 80 percent. The total ocean freight charges was \$1,744.24. (Ex. 1-E, Tr. 29-30.)

23. The tariff rate for "Resin, Synthetic, to Khorramshahr only" shows \$120.75 per ton of 2,240 pounds or 40 cubic feet. (Ex. 1-F, Tr. 30-31.)

24. The invoice dated December 11, 1975 issued by F.L. Kraemer to Sovereign for the shipment reflected the ocean freight charges to be \$1,482.64. (Ex. 1-G.)

25. Mr. Weisberg testified that this might be a mistake. (Tr. 31-32.)

26. Sovereign neither paid nor questioned this invoice when it was received. (Tr. 32, 66.)

27. F.L. Kraemer issued a "Corrected Bill" dated February 6, 1976 to Sovereign with the ocean freight charges stated as \$963.00. (Ex. 1-H, Tr. 31.)

28. This was the agreed rate with Waterman for Sovereign's shipments. (Tr. 32.)

29. Sovereign paid the amount of this invoice which reflected the agreed to rate. (Tr. 32.)

30. Waterman issued a check to F.L. Kraemer for the difference between the correct ocean freight of \$1,744.24 and the \$963.00 that Sovereign paid. (Tr. 32.)

31. When F.L. Kraemer received the checks from both Waterman and Sovereign, it paid the full amount of ocean freight to Waterman. (Tr. 33.)

32. The third shipment involved synthetic resin as documented by a Waterman bill of lading dated December 9, 1975. The commodity was rated at \$120.75 including an additional surcharge of 80 percent. The total ocean freight charges were \$1,700.77. (Ex. 1-I, Tr. 33.)

33. The tariff rate for "Resin, Synthetic to Knorramashahr only," shows \$120.75 per ton of 2,240 pounds or 40 cubic feet. (Ex. 1-J, Tr. 34.)

34. The invoice dated December 10, 1975, issued by F.L. Kraemer to Sovereign for the shipment reflects the ocean freight charges as \$1,700.77. (Ex. 1-K.)

35. Sovereign did not pay when it received this invoice. (Tr. 66.)

36. F.L. Kraemer issued a "Corrected Bill" dated February 2, 1976, to Sovereign with ocean freight stated as \$939.00. (Ex. 1-L, Tr. 35.)

37. This was the agreed rate with Waterman for Sovereign's shipments. (Tr. 35.)

38. Sovereign paid the amount of this invoice which reflected the agreed to rate. (Tr. 35, 69.)

39. Waterman issued a check to F.L. Kraemer for the difference between the correct ocean freight charges of \$1,700.77 and the \$939.00 that Sovereign would pay. (Tr. 35.)

40. When F.L. Kraemer received the checks from Waterman and Sovereign, it paid the full amount of ocean freight to Waterman. (Tr. 35.)

41. The fourth shipment involved boxes of transition joints as documented by a Waterman bill of lading dated December 10, 1975. The commodity was rated at \$134.00 including an additional surcharge of 80 percent. The total ocean freight charges were assessed at \$307.53. (Ex. 1-M.)

42. The tariff rate for "Pipe Fittings, Boxed" shows \$134.00 per ton of 2,240 pounds or 40 cubic feet. (Ex. 1-N, Tr. 36.)

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43. The invoice dated December 11, 1975, issued by F.L. Kraemer to Sovereign for this shipment showed the ocean freight to be \$307.53. (Ex. 1-0.)

44. Sovereign did not pay when it received this invoice. (Tr. 66.)

45. F.L. Kraemer issued a "Corrected Bill" dated March 29, 1976, to Sovereign with ocean freight stated as \$261.41. (Ex. 1-P, Tr. 37.)

46. This was the agreed rate with Waterman for Sovereign's shipments. (Tr. 37.)

47. Sovereign paid the amount of this invoice which reflected the agreed to rate. (Tr. 37, 69.)

48. Waterman issued a check to F.L. Kraemer for the difference between the correct ocean freight of \$307.53 and the \$261.41 that Sovereign paid. (Tr. 37.)

49. When F.L. Kraemer received the checks from both Waterman and Sovereign, it paid the full amount of ocean freight to Waterman. (Tr. 37.)

50. The fifth shipment involved boxed solder wire as documented by a Waterman bill of lading dated December 9, 1975. The commodity was rated at \$135.75 including an additional surcharge of 80 percent. The total ocean freight charges assessed were \$61.09. (Ex. 1-Q, Tr. 37.)

51. The tariff rate for "Solder" shows \$135.75 per ton of 2,240 pounds or 40 cubic feet. (Ex. 1-R, Tr. 38.)

52. The invoice dated December 10, 1975, issued by F.L. Kraemer to Sovereign for this shipment showed the ocean freight to be \$61.09. (Ex. 1-S.)

53. Sovereign did not pay when it received this invoice. (Tr. 66.)

54. F.L. Kraemer issued a "Corrected Bill" dated March 29, 1976, to Sovereign with ocean freight stated as \$51.24. (Ex. 1-T, Tr. 38.)

55. This was the agreed to rate with Waterman for Sovereign's shipments. (Tr. 38.)

56. Sovereign paid the amount of this invoice which reflected the agreed rate. (Tr. 38, 69.)

57. Waterman issued a check to F.L. Kraemer for the difference between the correct ocean freight of \$61.09 and the \$51.24 that Sovereign paid. (Tr. 38.)

58. When F.L. Kraemer received the checks from both Waterman and Sovereign, it paid the full amount of ocean freight to Waterman. (Tr. 38.)

59. The sixth shipment involved cylinders—argon gas documented by a Waterman bill of lading dated November 19, 1975. This commodity was rated at \$175.00 with an additional surcharge of 80 percent. The total ocean freight was \$1,844.15. (Ex. 1-U, Tr. 39.)

60. The tariff rate for "Cargo, N.O.S.—Non-Hazardous, Item No. 215" shows \$175.00 per ton of 2,240 pounds or 40 cubic feet. (Ex. 1-V, Tr. 39.)

61. The invoice dated December 16, 1975, issued by F.L. Kraemer to Sovereign for this shipment showed the ocean freight to be \$1,844.15. (Ex. 1-W.)

62. Sovereign did not pay when it received this invoice. (Tr. 66.)

63. F.L. Kraemer issued a "Corrected Bill" dated March 29, 1976, to Sovereign with ocean freight stated as \$1,567.55. (Ex. 1-X, Tr. 40.)

64. This was the agreed rate with Waterman for Sovereign's shipments. (Tr. 40.)

65. Sovereign paid the amount of this invoice which reflected the agreed rate. (Tr. 69.)

66. Waterman issued a check to F.L. Kraemer for the difference between the correct ocean freight of \$1,844.15 and the \$1,567.55 that Sovereign paid. (Tr. 40.)

67. When F.L. Kraemer received the checks; from both Waterman and Sovereign, it paid the full amount of ocean freight to Waterman. (Tr. 40.)

68. The seventh shipment involved boxed machinery parts documented by a Waterman bill of lading dated December 9, 1975. The commodity was rated at \$156.25 with an additional surcharge of 80 percent. The total ocean freight was \$274.21. (Ex. 1-Y, Tr. 40-41.)

69. The tariff rate for "Machines and Machinery and Parts Thereof, N.O.S." shows \$156.25 per ton of 2,240 pounds or 40 cubic feet. (Ex. 1-2, Tr. 41.)

70. The invoice dated December 10, 1975, issued by F.L. Kraemer to Sovereign for this shipment shows the ocean freight to be \$274.21. (Ex. 1-AA, Tr. 41.)

71. Sovereign did not pay when it received this invoice. (Tr. 66.)

72. F.L. Kraemer issued a "Corrected Bill" dated March 29, 1976, to Sovereign with ocean freight stated as \$233.11. (Ex. 1-BB.)

73. This was the agreed rate with Waterman for Sovereign's shipments. (Tr. 42.)

74. Sovereign paid the amount of this invoice which reflected the agreed rate. (Tr. 44, 69.)

75. Waterman issued a check to F.L. Kraemer for the difference between the correct ocean freight of \$274.21 and the \$233.11 that Sovereign paid. (Tr. 42.)

76. When F.L. Kraemer received the checks from both Waterman and Sovereign, it paid the full amount of ocean freight to Waterman. (Tr. 42.)

77. The eighth shipment involved boxed condensing units documented by a Waterman bill of lading dated December 19, 1975. The commodity was rated at \$156.25 with an additional surcharge of 80 percent. The total ocean freight was \$1,083.59. (Ex. 1-CC, Tr. 42-43.)

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78. The tariff rate for "Machines and Machinery and Parts Thereof, N.O.S. INDUSTRIAL: Item No. 565" shows \$156.25 (Ex. 1-DD, Tr. 43.)

79. The invoice dated January 2, 1976, issued by F.L. Kraemer to Sovereign for this shipment showed the ocean freight to be \$1,083.59. (Ex. 1-EE, Tr. 43.)

80. Sovereign did not pay when it received this invoice. (Tr. 66.)

81. F.L. Kraemer issued a "Corrected Bill" dated March 29, 1976, to Sovereign with ocean freight stated as \$627.00 (Ex. 1-FF, Tr. 43.)

82. This was the agreed rate with Waterman for Sovereign's shipments. (Tr. 44.)

83. Sovereign paid the amount of this invoice which reflected the agreed rate. (Tr. 44, 69.)

84. Waterman issued a check to F.L. Kraemer for the difference between the correct ocean freight of \$1,083.59 and the \$627.00 that Sovereign paid.

85. When F.L. Kraemer received the checks from both Waterman and Sovereign, it paid the full amount of ocean freight to Waterman. (Tr. 44.)

86. Sovereign had used F.L. Kraemer, as represented by Mr. Weisberg, as its forwarder for thirty years. (Tr. 62.)

87. The usual procedure when a shipper used F.L. Kraemer was that the carrier billed the forwarder for the ocean freight. (Tr. 54.)

88. Sovereign never received a bill from the carrier directly when it used F.L. Kraemer as its forwarder. (Tr. 54.)

89. Mr. Weisberg testified that F.L. Kraemer always supplied shippers with a copy of the bill of lading for the shipment with the original freight figures. (Tr. 54.)

90. Sovereign always received a copy of the bill of lading from F.L. Kraemer for all shipments. (Tr. 55, 67.)

91. The secretary at Sovereign would review all the invoices from F.L. Kraemer when they arrived. The secretary knew what the agreed rate was for that shipment because it was noted in the shipment file. (Tr. 69.)

92. When the first bill came, the secretary did not bring it to Mr. Elghanayan if it did not correspond to the agreed rate as noted in the file. (Tr. 68, 69.)

93. When the second bill came and that corresponded with the agreed rate, the secretary prepared the check in payment and Mr. Elghanayan signed it. (Tr. 69.)

94. In no instance did Sovereign pay for a shipment until the invoice was received reflecting the agreement with Waterman as to what the charges should be. (Tr. 69-70.)

95. Sovereign is still in existence. (Tr. 71.)

96. Sovereign's sole business of shipping merchandise to Iran has ceased since the revolution in that country coupled with the existing restrictions imposed by the United States government. (Tr. 71-72.)

97. Given the opportunity, i.e., a counter-revolution and lifting of trade restrictions, Sovereign "hopes" to resume business with Iran. (Tr. 72, 73.)

SUMMARY OF THE EVIDENCE

During the period of November and December 1975, Sovereign exported eight shipments of resin and related machinery to Iran. Prior to this time frame it approached its freight forwarder F.L. Kraemer concerning obtaining lower ocean freight rates for shipments associated with a particular project in Iran. The stated purpose for Sovereign's seeking a rate lower than that contained in the published Conference tariffs was to compete with suppliers located in both Europe and Japan. A meeting was held at Sovereign's office which was attended by Mr. Elghanayan, Vice President of Sovereign, Mr. Weisberg, who handled the Sovereign account at the freight forwarding firm of F.L. Kraemer, and Mr. Charles Boyle, a Vice President of Waterman. The oral evidence in this proceeding was presented through the testimony of Messrs. Elghanayan and Weisberg. What basically emerges from the evidence is that: (1) at the meeting a lower freight rate was discussed; (2) Sovereign had a phone discussion with Waterman at a later date and Waterman agreed to a rate lower than that contained in its tariffs; and (3) soon thereafter Sovereign commenced utilizing Waterman for the shipments involved through F.L. Kraemer. The process used to achieve the underlying arrangements is well documented as to each shipment and further complemented by the testimony of the witnesses.

The shipments were normally documented by a bill of lading completed by a clerk in the office of F.L. Kraemer and then forwarded to Waterman for rating purpose. For the involved shipments the commodity was correctly rated on the bill of lading and Sovereign was sent an invoice for the correct amount and a copy of the bill of lading. Ordinarily a shipper was expected to pay the ocean freight charges incurred within a period of fifteen days after receipt of the invoice. Here, as clearly developed in the record, Sovereign never paid the amount due as reflected on the invoice.

The procedure developed here was simple—a corrected bill would be forwarded to Sovereign by F.L. Kraemer which reflected a lower amount for the charges involved. According to the testimony, this corrected bill (invoice) represented the "secret rate" which was previously agreed to by Waterman. The next steps were that Sovereign forwarded a check to F.L. Kraemer for this amount and Waterman would forward a check to F.L. Kraemer for the difference between the correct amount of ocean freight charges and what Sovereign had paid.

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And finally, F.L. Kraemer would then pay the full amount of ocean freight to Waterman.

The record also reflects that it was Sovereign's practice to note the agreed rate with Waterman in its files so that its secretary would know which invoice from F.L. Kraemer was to be paid. The secretary would then prepare the check for the invoice that corresponded with the agreed rate for Mr. Elghanayan's signature. Sovereign admitted that it would only pay an invoice for these shipments reflecting the agreed to or lower rate. Moreover, when a shipper utilized the services of F.L. Kraemer as a forwarder, the carrier always billed the forwarder for the ocean freight. And Sovereign had used F.L. Kraemer for thirty years and had never received a bill from the carrier for ocean freight. However, Sovereign would receive a copy of the rated bill of lading from F.L. Kraemer.

POSITION OF THE PARTIES

Hearing Counsel contends that: (1) the evidence reflects a violation by Sovereign of section 16, Initial Paragraph; (2) Sovereign knowingly participated in a scheme to transport its commodities at rates less than Waterman's applicable tariffs; (3) Sovereign acted "knowingly and wilfully"; (4) the "device or means" used was "unjust or unfair"; and, (5) Sovereign should be assessed civil penalties in the maximum amount, i.e., \$40,000.

On the other hand, Sovereign's brief largely focuses upon the activities of Waterman and F.L. Kraemer. It contends that the testimony "might establish a rebate arrangement between Waterman and F.L. Kraemer but certainly not between Waterman and Sovereign." It contends that it has not violated section 16. And it also argues that: (1) Hearing Counsel failed to present proof of scienter on its part; (2) there has been no showing of "wilfulness or bad faith" on its part; (3) the proceeding "must be dismissed since it cannot be found to have acted knowingly or wilfully"; (4) there is no evidence "to what degree if any, [that] Sovereign profited"; and (5) it is not "able to pay the penalties requested." As shown below, the last contention is the most troublesome.

DISCUSSION AND CONCLUSIONS

Section 16, initial paragraph, of the Shipping Act, 1916, as amended (46 U.S.C. Sec. 815) provides:

That it shall be unlawful for any shipper, consignor, consignee, forwarder, broker, or other person, or any officer, agent, or employee thereof, knowingly and wilfully, directly or indirectly, by means of false billing, false classification, false weighing, false report of weight, or by any other unjust or unfair device or means to obtain or attempt to obtain transpor-

tation by water for property at less than the rate or charges which would otherwise be applicable. . . .

Basically, the facts establish that for each of the involved shipments Sovereign paid freight charges at less than the rates or charges otherwise applicable under Waterman's tariffs. It has also been demonstrated that although Sovereign was never paid directly by Waterman, this alone does not establish that no rebating situation would be inferred. And although Sovereign relies upon selected portions of the transcript to buttress its argument,⁴ the totality of the evidence—both oral and the exhibits—substantiates the “device or means” used as contemplated within the provisions of the statute. What is controlling here—and one that is the necessary element to establish the violation—is that Sovereign, in fact, received transportation at less than the applicable rate. And despite the arguments raised to the contrary, the evidence overwhelmingly establishes that reality.

First, Sovereign repeatedly attempts to disavow any participation in the arrangement between F.L. Kraemer and Waterman concerning the system of invoices utilized. However, Sovereign has not shown that it resisted—questioned—or attempted to take any action other than one of participation in the arrangement. Such inaction commenced from the very first and continued to the last of the invoices involved in the shipments. On this record, Sovereign not only failed to show that it was not a participant in the involved activities, but what emerges is that it actually reaped the benefits flowing therefrom.

Second, while Sovereign contends that its initial meeting with Waterman was “innocent,” what remains is that the meeting set in motion the eventual “means” by which it became the beneficiary of lesser freight charges than would otherwise be applicable. And the assertion that Sovereign did not “issue the bills of lading” does not operate as any precedential support to the controlling consideration that it received lesser freight rates.

Third, Sovereign contends that it has no knowledge that the tariff rate received was not the proper and lawful rate. But, on the other hand, a tariff filing constitutes constructive notice to the shipping community of the terms and applicable rates for the carriage of the commodities listed therein. Here, Sovereign received the notice of the proper tariff rate applicable to the shipments from F.L. Kraemer. Nor can Sovereign legitimately claim that it is a mere novice in the field of shipping freight since it utilized the services of F.L. Kraemer as its forwarder for ocean carriers for 30 years. It would strain one's credence to infer that such experience would not impart a knowledge that a shipper was required to pay the applicable rate contained in a pub-

⁴ For example, See “Brief of Sovereign International Corporation,” pp. 2-6 in particular.

SOVEREIGN INTERNATIONAL - POSSIBLE VIOLATIONS OF 891
SECTION 16, SHIPPING ACT, 1916

lished tariff. And the actions of not paying the invoice which reflected the correct and applicable rate, but paying instead only the second or "corrected" invoice, belies the contention of Sovereign in this area.

Fourth, Sovereign asserts that there is a lack of evidence that it acted "willfully." Hearing Counsel, on brief, states, "wilfully . . . means purposely or obstinately and is designed to describe the attitude of a [party] who, having a free will or choice, either intentionally disregards the statute or is plainly indifferent to its requirements." Citing: *Sea-Land Service v. Acme Fast Freight*, Docket No. 73-3, served August 14, 1978, 21 F.M.C. 194, *affirmed sub nom., Capital Transportation, Inc. v. United States*, 612 F.2d 1312 (D.C. Cir. 1979), and *St. Louis & S.F.R. Co. v. United States*, 169 Fed. 69 (9th Cir. 1908). It is Hearing Counsel's contention that Sovereign's actions were obviously covered under these definitions. I agree. Here, the established booking procedures set up at Sovereign for the payment of the freight charges was an intentional disregard of the contents of the statute. All other evidentiary factors considered, Sovereign's actions were indeed such as contemplated within section 16.

Fifth, Sovereign argues that it was in the position to have received rates lower than those obtained from Waterman simply by using other carriers. This argument, aside from being irrelevant to a determination here, is hardly persuasive. If lower rates were available from other carriers and if Sovereign was concerned with competition from other suppliers, arrangements to utilize non-conference carriers could have been made by its freight forwarder. Instead, the course chosen by Sovereign to obtain the lower rates is well documented and the determination to utilize Waterman's services is amply demonstrated on this record. Indeed, Sovereign's continual failure to pay the rate stated on the correct invoice evidences a conscious and deliberate practice in avoidance of paying the proper tariff rate.

As noted earlier, Sovereign suggests that: (1) the testimony "might" establish a rebate arrangement between Waterman and F.L. Kraemer; (2) the evidence establishes "only a possible rebate situation between Kraemer and Waterman"; (3) "Mr. Weisberg merely established a scheme which either he or Waterman had concocted between them"; (4) the "guilty parties herein appear to have been the Waterman Line and F.L. Kraemer"; and (5) the "scheme was only between Kraemer and Waterman and there is no evidence whatsoever to involve Sovereign." Obviously, Sovereign points its accusatory finger at the others and argues "[F]or reasons known only to the Bureau, it brought a proceeding against Sovereign and not F.L. Kraemer & Co." and concludes, "[C]onsiderable more deterrents and perhaps penalties and profit could be shown in a proceeding against F.L. Kraemer or Waterman lines but they are not parties to this action." The short answer to Sovereign's position is that the Commission's Order of Investigation is

solely directed at its activities. Whatever course of action, if any, is to be instituted against F.L. Kraemer or Waterman is for this Commission to determine. Certainly, Hearing Counsel, as a party participant in this proceeding, has this record before it and is in the position to take such appropriate action as may be necessary. In any event, this Judge is guided by the Commission's Order and will remain within the issues raised therein.

Finally, Hearing Counsel urges that Sovereign be assessed the maximum penalty of \$40,000. Hearing Counsel is correct in pointing out that the imposition of such penalties is to discourage the offender from repeating the act and to deter others from doing the same. And it is pointed out that Sovereign has not "presented any meaningful, probative evidence of a lack of assets with which to pay the penalty." On the other hand, while Sovereign remains in existence, it has not carried on any business since the revolution in Iran, since its sole business was with that country. Also, Mr. Elghanayan's brother, Mr. Habib Elghanayan, was executed by a revolutionary court in Iran because of Zionist activities. In addition, at the same time all of the family property and assets were confiscated. It would appear realistic that before Sovereign could resume trade in Iran, "one would have to assume a major change in the political and economic climate" in Iran. Moreover, the present trade restrictions would have to be lifted before its business could resume. In this proceeding—as Sovereign points out—"the total amount of rebates was approximately \$2,400." And although Sovereign argues that the amount of rebates was received by F.L. Kraemer and not Sovereign—the record does show that the lower rates that it received would have placed it in a more favorable competitive posture than other shippers. In balancing these factors, this Judge is inclined to impose a civil penalty in the amount of \$3,000 under the exceptional circumstances presented in this area.

Upon the evidence of record it is *found*:

- (1) That Sovereign International Corp. violated section 16, initial paragraph of the Shipping Act, as amended; and
- (2) That it be assessed a civil penalty in the amount of \$3,000.

(S) PAUL J. FITZPATRICK
Administrative Law Judge

FEDERAL MARITIME COMMISSION

DOCKET NO. 80-83

GEMINI INTERNATIONAL COMPANY AND GEMINI
TRANSPORTATION INC. - POSSIBLE VIOLATIONS OF SECTION
44(A)/GEMINI INTERNATIONAL CO. INDEPENDENT OCEAN
FREIGHT FORWARDER LICENSE APPLICATION

DOCKET NO. 81-14

MARQUIS SURFACE CORPORATION - INDEPENDENT OCEAN
FREIGHT FORWARDER LICENSE NO. 1573

NOTICE

April 5, 1982

Notice is given that no exceptions have been filed to the February 22, 1982 initial decision in these proceedings and the time within which the Commission could determine to review that decision has expired. No such determination has been made and, accordingly, that decision has become administratively final.

(S) FRANCIS C. HURNEY
Secretary

FEDERAL MARITIME COMMISSION

DOCKET NO. 80-83

GEMINI INTERNATIONAL CO. AND GEMINI
TRANSPORTATION INC. - POSSIBLE VIOLATIONS OF SECTION
44(A)/GEMINI INTERNATIONAL CO.: INDEPENDENT OCEAN
FREIGHT FORWARDER LICENSE APPLICATION

DOCKET NO. 81-14

MARQUIS SURFACE CORPORATION
INDEPENDENT OCEAN FREIGHT
FORWARDER LICENSE NO. 1573

Settlement jointly proposed by the Bureau of Hearings and Field Operations and by the respondents, Gemini Transportation, Inc., and Marquis Surface Corporation approved; conditions of settlement include, among others, payment of \$2,500 by Gemini and \$2,500 by Marquis to compromise all civil penalty claims pursuant to section 32(e) of the Shipping Act, 1916, 46 U.S.C. section 831(e).

Marquis' alleged violative conduct did not affect Marquis' performance of its duties as an independent ocean freight forwarder; revocation of Marquis' ocean freight forwarder license not warranted.

Carlos Rodriguez for respondents.

John Robert Ewers and *Stuart James* as Hearing Counsel.

REVIEW OF PROPOSED SETTLEMENT AND OF
RECOMMENDATION FOR A FINDING OF FITNESS
AND INITIAL DECISION ¹ OF CHARLES E. MORGAN,
ADMINISTRATIVE LAW JUDGE

Finalized April 5, 1982

The present consolidated proceeding was instituted by two separate Orders of Investigation and Hearing. The matters were consolidated because of the similarity of facts and issues as per order served March 11, 1981. The matters under investigation are:

1. Whether Gemini International Co. and/or Gemini Transportation Inc. violated section 44(a) of the Shipping Act, 1916 (the Act), and section 510.3 of the Commission's General Order 4, by carrying on the business of forwarding without a license;

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

2. Whether civil penalties should be assessed against Gemini International Co. and/or Gemini Transportation Inc. pursuant to section 32 of the Act for violations of section 44(a) of the Act, and section 510.3 of General Order 4, and, if so, the amount of any such penalty which should be imposed;

3. Whether Marquis Surface Corporation had violated section 510.23(a) of General Order 4 by permitting Gemini Transportation Inc. to use Marquis' name and license number to perform ocean freight forwarding services on two hundred ninety (290) shipments during the period January 3, 1977 to January 28, 1980;

4. Whether Marquis violated section 44(e) of the Act and section 510.24(e) of the General Order 4, by accepting ocean carrier compensation on the above cited shipments for which it did not perform the ocean freight forwarding service;

5. Whether civil penalties should be assessed against Marquis pursuant to section 32(e) of the Act, for violations of section 44(e) of the Act, and/or section 510.23(a) and 510.24(e) of General Order 4, and, if so, the amount of any such penalty which should be assessed; and,

6. Whether Marquis' independent ocean freight forwarder license should be suspended or revoked pursuant to section 44(d) of the Act for:

(a) willful violations of section 44(e) of the Act and/or sections 510.23(a) and 510.24(e) of General Order 4; or

(b) such conduct as the Commission shall find renders Marquis unfit to carry on the business of forwarding in accordance with section 510.9(e) of General Order 4.

No longer in issue is whether or not Gemini International Co. should be issued a license as an independent ocean freight forwarder, inasmuch as its application has been withdrawn. There is no evidence of violation of the Act by Gemini International Co., and accordingly, this decision will be concerned only with the other two respondents.

Prior to any hearing in the consolidated proceeding the parties agreed upon a settlement. The formal record herein includes a joint stipulation of the facts, the proposed settlement, and two memoranda, one by Hearing Counsel in support of the proposed settlement and with a recommendation in regard to the issue of the fitness of Marquis Surface Corporation to continue to be licensed as an independent ocean freight forwarder, and a similar memorandum by the respondents.

The parties are in agreement that Marquis should retain its ocean freight forwarder license, and that the proposed settlement should be approved.

The stipulated facts include the following matters.

Gemini Transportation Inc. (GTI) has operated for more than 10 years in Miami, Florida, as a cartage company. Gemini International

Company (GIC) was incorporated in Florida in 1978, and applied for an independent ocean freight forwarder license on November 24, 1973.

Both GTI and GIC are owned equally by Edward Waitz and Michael Zambri. They are president and vice-president of both corporations.

Marquis Surface Corporation is a New York based corporation which operates as an independent ocean freight forwarder pursuant to a license issued on August 5, 1974. Charles Manuelian is president of Marquis.

By a letter dated August 22, 1978, Zambri was warned that no ocean freight forwarding could be performed until a license was issued by the Commission. Zambri was warned again on December 5, 1978, in the letter acknowledging receipt of GIC's forwarder application.

At that time GIC was not involved with forwarding for Marquis, and Zambri and Weitz were under the impression that the forwarding being done on behalf of Marquis by GTI was as a branch office, with the approval of the Commission.

Effective September 1, 1976, Marquis opened a branch office at the Miami airport, and on November 15, 1976, the Commission, through its Office of Freight Forwarders (OFF), approved this branch office. The OFF was aware that the Marquis branch office in Miami would be managed by John S. Lonx, but it was not aware that Mr. Lonx was an employee of GTI and that Marquis intended to use GTI personnel to carry on Marquis' ocean freight forwarding functions in Miami, with the intent of making these GTI personnel simultaneously also employees of Marquis.

At that time Zambri did not know what the requirements were for an ocean freight forwarder branch office.

Mr. Lonx left GTI in the summer of 1977, at which time Joe Marcos performed the ocean freight forwarding for Marquis. When Mr. Marcos left, Zambri personally performed the ocean freight forwarding services on behalf of Marquis.

The Commission's OFF was not made aware of this branch office management change until February, 1980. However, ever since the branch office of Marquis was established at Miami, Zambri and Weitz had supervisory responsibilities over Marquis' forwarding operations in Miami.

Zambri disclosed to OFF in November, 1978, that GTI acted as an agent for Marquis, but stated that neither GIC nor any of its officers were associated with any ocean freight forwarders. Weitz and Zambri did not disclose GIC's indirect relationship with Marquis because Weitz and Zambri did not want Marquis to find out that GIC intended to get an ocean freight forwarder's license.

Zambri and Weitz believed that it was GTI that had the direct relationship with Marquis. Zambri and Weitz considered themselves as

employees of Marquis in the operation of Marquis' branch office in Miami. When Zambri was asked by OFF whether GIC was engaged in unlicensed forwarding, Zambri responded that GIC was not.

On January 15, 1980, Zambri told a Commission investigator that there was no relationship between GTI and Marquis except that Marquis was operating a branch office on the premises of GTI.

During the period from January 3, 1977, through January 28, 1980, GTI performed ocean freight forwarding services on 290 ocean shipments. GTI billed Marquis for the documentation fee and for half of the ocean carrier's compensation and ocean forwarding fees for a total of \$13,897.48.

The sum of \$4,044.50 under "documentation fees" consisted mainly of sums which had been advanced for shippers in obtaining consular documents.

All forwarding functions were carried on by GTI personnel, GTI received the cargo, prepared the shipping documents, booked the space with the ocean carriers, prepared invoices to shippers using Marquis stationery, invoiced the carriers for compensation, and shared with Marquis the charges for freight forwarding and compensation.

GTI performed the ocean forwarding with its own employees, but in Zambri's opinion, these employees were working for Marquis and using Marquis' name.

None of GTI's employees were on Marquis' payroll, but in Zambri's opinion, the GTI personnel were supervised and controlled by Marquis.

On the other hand, Charles Manuelian, president of Marquis, stated that Marquis never had any employees in Miami, that GTI performed the forwarding services attributed to Marquis, that Marquis did not rent facilities in Miami, and that neither Zambri or Weitz were employees of Marquis.

On February 13, 1980, an investigator of the Commission met with Manuelian and Zambri, and advised them that Marquis had an ineffective branch office in Miami, that Marquis had no employees on its payroll in Miami, and that to continue forwarding would constitute unlawful forwarding. The investigator further advised that this matter could be corrected by taking a GTI employee from its payroll and by putting this employee on Marquis' payroll and by charging Marquis for rent at GTI's office in Miami.

On February 27, 1980, Manuelian informed the investigator in writing that arrangements were made on February 21, 1980, for Zambri to be put on Marquis' payroll and for Marquis to rent office space from GTI in Miami.

On February 17, 1981, GIC withdrew its application for a license as an ocean freight forwarder.

The GTI branch operation in Miami was set up and operated exclusively to forward for Marquis' clients. GTI had no ocean freight forwarder clients of its own.

Marquis supervised the branch office and its personnel visited the Miami branch office once a month for periods of three to five days. GTI personnel called Marquis daily to get directions on problems which arose. GTI dealt with Marquis rather than the shippers directly, until such time as GTI got to know a shipper well. GTI gave Marquis periodic reports on each phase of the forwarding.

A separate telephone and listing is maintained by Marquis in Miami, and is used for Marquis' forwarding of shipments. The telephone bill was paid by Marquis of New York. Advertising is carried and paid by Marquis. All billings for forwarding fees to shippers and compensation from carriers originate in New York in Marquis' office.

It was Marquis' intent that the GTI personnel who performed ocean freight forwarding services would be considered also as employees of Marquis.

The proposed settlement entered into between the Bureau of Investigation and Enforcement, now the Bureau of Hearings and Field Operations, and respondents GTI and Marquis requires GTI to pay a total of \$2,500, plus interest at 12 percent. The penalty is to be paid in five installments of \$500 each, the first installments payable 30 days following Commission approval of the proposed settlement, and the other four installments every six months following approval of the settlement, with the last installment payable two years following approval.

The proposed settlement requires Marquis to pay \$2,500 within 30 days following Commission approval of the proposed settlement.

The settlement shall not serve as a bar or defense if there were to be other proceedings for conduct engaged in by GTI or Marquis, other than that reflected in the factual record submitted in the present proceeding. There are other provisions of the proposed settlement, including one that the agreement is not to be construed as an admission by either GTI or Marquis of the violations alleged in the Orders of Investigation and Hearing.

The settlement agreement avoided discovery disputes and the expense of an oral hearing. When Marquis opened its ocean freight forwarder branch office in Miami in 1976, it believed that it could properly do so by using GTI personnel to carry out the forwarding services. When informed that its branch office operation was not in compliance with the law, Marquis promptly corrected the situation by hiring a GTI employee as an employee of Marquis, and by renting office space from GTI to Marquis. There does not appear to have been any willful violation of the Shipping Act. Thus, there is a mitigating factor to be considered in determining any penalties. In addition, respondents fully cooperated with the investigator. In the circumstances

herein, the proposed settlement serves the public interest, and is fair to the respondents. It is so concluded and found, and the proposed settlement agreement hereby is approved.

Revocation of the existing license of Marquis as an independent ocean freight forwarder would be an extreme sanction. Marquis has not evidenced an intent to engage in conduct violative of the Shipping Act. Rather, Marquis has taken steps to comply with the Act. Furthermore, Marquis' past conduct has not affected its performance of its duties as an independent ocean freight forwarder.

It further is concluded and found that revocation of Marquis' ocean freight forwarder license is not warranted.

(S) CHARLES E. MORGAN
Administrative Law Judge

FEDERAL MARITIME COMMISSION

**DOCKET NO. 80-76
HEIDELBERG EASTERN, INC.**

v.

**CONTAINER OVERSEAS SERVICES, INC. AND
CONTAINER OVERSEAS AGENCY, INC.**

NOTICE

April 7, 1982

Notice is given that no exceptions have been filed to the March 1, 1982 initial decision in this proceeding and the time within which the Commission could determine to review that decision has expired. No such determination has been made and, accordingly, that decision has become administratively final.

(S) FRANCIS C. HURNEY
Secretary

FEDERAL MARITIME COMMISSION

DOCKET NO. 80-76
HEIDELBERG EASTERN, INC.

v.

CONTAINER OVERSEAS SERVICES, INC. AND
CONTAINER OVERSEAS AGENCY, INC.

Container Overseas Agency, Inc. found to be an NVOCC subject to the Commission's jurisdiction.

Albert L. Lefkowitz for complainant.

Stephen L. Cohen for respondent Container Overseas Agency, Inc.

INITIAL DECISION ¹ ON REMAND OF JOHN E. COGRAVE,
ADMINISTRATIVE LAW JUDGE

Finalized April 7, 1982

In response to a petition for reconsideration from Container Overseas Agency, Inc. (COA), the Commission remanded this proceeding to me for the purpose of determining whether COA was "indeed subject to the Shipping Act, 1916, in the context of this proceeding."²

By complaint served October 30, 1980, Heidelberg Eastern, Inc., alleged that respondents Container Overseas Agency, Inc. (COA) and Container Overseas Services, Inc., had overcharged complainant on a shipment of photographic equipment to Denmark in violation of section 18(b)(3) of the Shipping Act, 1916. A Mr. Janison Foreman, Vice President of COS requested an extension of time to answer the complaint because he was having difficulty gathering the documents necessary for his defense to the complaint. On November 19, 1980, I granted the requested extension and directed respondent to consult with complainant in an effort to arrive at a stipulation of fact or documentary evidence which would allow the case to be handled under the shortened procedure in Subpart K of the Commission's Rules of Practice and Procedure. If either side felt that an evidentiary hearing was necessary, they were to state the specific facts to be proved at the hearing and give reasons why they could not be established by docu-

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

² The Commission noted that COA's petition for reconsideration was not timely filed and that in order to consider the arguments on the merits, it was necessary to waive the requirements of Rule 261. I mention this only because it is illustrative of COA's approach to this proceeding from its inception.

ments or affidavits, etc. The parties were to report to me by December 15, 1980, on the results of their efforts.

On December 22, 1980, counsel for complainant advised me that he had not heard from either COA or COS but that he saw no reason why the proceeding could not be submitted on documents alone. Additional telephone conversations were held with COS but to date I had heard nothing from respondent COA. On February 3, 1981, I received from COA a letter signed by a Mr. Peter F. Rondinone, Vice President of COA, which stated:

Honorable Sir:

Pursuant to the Commission's Order dated November 19, 1980, we would like to advise you that Container Overseas Agency, Inc., was nothing more than a receiving and stuffing agent for Container Overseas Services, Inc.

On February 5, 1981, Mr. Janison Foreman, by letter, advised:

We have requested an affidavit from Peter Rondinone, an employee of Container Overseas Agency, Inc. who was manager at the time of shipment and he has indicated his willingness to sign it indicating that the rate as billed was agreed upon with the shipper for a house to house move and special tariff was filed covering the item. He indicated that he has shipping invoices listing the contents which we will forward to you upon our receipt.³

We ask that we please be given time to defend ourselves because we feel that the complainant is in error.

On February 19, 1981, I issued an order setting up the following procedure for disposing of the case:

1. By March 16, 1981, complainant shall file a memorandum of facts and arguments separately in compliance with Rule 182.
2. By March 27, 1981, respondent shall file its answer to the complainant and its memorandum of facts and of arguments separately in compliance with Rule 183.
3. By April 10, 1981, complainant shall file its reply memorandum in compliance with Rule 184. . . .

On March 13, 1981, complainant filed a Memorandum of Facts and Points of Authority, but nothing further was heard from either of the respondents.

Taking the facts as stated in the complaint and evidenced in the supporting documents I issued an initial decision in which I found that

³ This statement by Mr. Foreman indicates that COA had considerably more to do with the shipment than "receiving and stuffing." The clear inference to be drawn is that someone at COA, if not Mr. Rondinone, negotiated the rate under which the cargo moved.

COA and COS had violated section 18(b)(3) and awarded complainant reparations in the amount of \$9,794.

No exceptions were filed to the decision, but the Commission reviewed it for the purpose of awarding interest. Subsequently, COS petitioned for reconsideration of the Commission's order adopting my initial decision and awarding interest. The Commission found that, "Because the subject of [COA's] petition is jurisdiction a challenge which cannot be dismissed as untimely, the Commission will entertain the petition." (Footnote omitted.) The Commission further concluded that the record before it was insufficient to make any determination on the jurisdictional issue raised and remanded the case to me "to determine whether [COA] is indeed subject to the Shipping Act, 1916, in the context of this proceeding."

Upon receiving the case on remand, I issued an order establishing the procedure for the disposition of the remand. I initially limited the proceeding to the submission of affidavits of fact and memoranda of law unless a party could show that an evidentiary hearing was necessary to "resolve a genuinely disputed issue of fact." The governing schedule was:

1. Container Overseas Agency, Inc. shall file its affidavit of fact and documentary evidence and opening memorandum of law by December 4, 1981.
2. Complainant Heidelberg Eastern Inc. shall file [its] affidavit of fact and reply memorandum of law by January 7, 1982.
3. Any motion for evidentiary hearing shall be filed only after the affidavits of fact have been examined by the parties for disputed issues of fact and shall be by January 22, 1982. *Any such motion must state each fact which is in dispute and the witness to be called at the hearing.* (Emphasis added.)⁴

In response to this order COA was content to submit an affidavit which is a mixture of asserted and unsupported fact and argument. The affiant is one Stephen L. Cohen, Esq., COA's attorney. Attorney Cohen stated that all matters contained in the affidavit are "upon information and belief except where another basis of knowledge is indicated." Attorney Cohen further states, "to date our office has yet to receive any pleadings in this matter other than the decision of the Administrative Law Judge . . . dated May 1, 1981." I am hard pressed to understand what is meant by this statement.⁵ Certainly the record shows no complaint

⁴ Notwithstanding what I considered to be the clearly established method for requesting an oral hearing, complainant's attorney's letter acknowledging receipt of the order requested an evidentiary hearing in lieu of the "modified procedure." Ostensibly, the request was made so that I could "determine the veracity" of some then unidentified witnesses.

⁵ Strangely enough, Attorney Cohen obviously includes orders and decisions of the Commission and myself in his use of "pleadings."

by Attorney Cohen that a party failed to serve him once he became active in the proceeding. In any event it appears to be a gratuitous statement since it plays no further part in Attorney Cohen's "case" for the respondent, his client.

The substantive part of the Cohen affidavit provides:

3. Robert Meyers, President of Container Overseas Agency has informed me that any tariff posted at that time [November 24, 1978] was Container Overseas Services, Inc. . . . not Agencies. All rates posted at that time were Services, as is noted in the bill of lading which is the subject of the dispute.

4. Services did their own billing, Agency could not because it had never filed a tariff nor was it responsible for any rates or rate negotiations.

5. Robert Meyers has informed me that there was never a mutuality of shareholders or corporate officers between Agency and Services and the representation by Complainant that the two companies were alter egos is entirely spurious. . . .⁶

In response to the above Heidelberg submitted the affidavit of Stewart B. Hauser, President of D. Hauser Inc., which acted as freight forwarder for Heidelberg and arranged for the shipment of the containers in question. Mr. Hauser states that pursuant to instructions from Heidelberg he contacted COA which advised Mr. Hauser that it provided the following services: "(A) NVOCC [non-vessel operating common carrier], (B) Export packing, (C) Warehousing, (D) Trucking, (E) Consolidating container service, (F) LCL pier deliveries, (G) Traffic consultants." Mr. Hauser confirmed the booking with COA and provided it with the necessary documents. Mr. Hauser further states that he ". . . was led to believe by Agency (COA) that it was simply the booking and documentation segment of Services (COS)." Mr. Hauser was under the impression that COA and COS were "the same entity" and COA did nothing to correct that impression.

Attached to Mr. Hauser's affidavit is an advertisement appearing in *Shipping Digest and Transportation Telephone Tickler* published by the *Journal of Commerce*. The ad bears the heading "Container Overseas Agency, Inc." which is described as offering "Complete Export Services." Leading the list of services said to be offered is that of an "NVOCC." Thus by its own admission COA is an NVOCC and Mr. Hauser by affidavit states that he "confirmed the booking with COA" and it was to COA that he gave "the necessary documents."

⁶ Paragraph 5 also contains the following which is argument: "These two organizations were entirely separate and operated in entirely different areas. The rate making, almost by definition, was in the hands of Services, the only company with a filed tariff, the only company over whom the Commission has jurisdiction in an 18(b)(3) proceeding." As for the asserted lack of mutuality of shareholders or corporate officers not a single bit of documentary evidence was offered in support of this assertion.

At this point both sides had recourse to an oral hearing under paragraph 3 of my order of November 16, 1981. Neither side chose to avail itself of the opportunity. Thus, the case is presented to me for decision on the "evidence" presently in the record.⁷

Respondent COA's "evidence" consists of the single affidavit filed by its attorney Stephen L. Cohen. As noted Mr. Cohen's "factual" statements are based on "information and belief except where another basis of knowledge is indicated." The affidavit is an impermissible mixture of hearsay, argument⁸ and conclusionary statements. The basis for two of the three relevant "factual" portions of the affidavit is Mr. Robert Meyers who "informed" Attorney Cohen of certain matters. No reason or explanation is offered as to why Mr. Meyers did not supply his own affidavit or why it was thought necessary or better to have the attorney in the case become the affiant. What we have here is a situation where the attorney in the case is testifying as a witness to facts crucial to the disposition of the crucial issue in the case.⁹

Under the federal rules of evidence attorneys are considered competent to testify, however, this practice is viewed with disfavor and is generally considered to be a breach of ethics. Weinstein, *Evidence*, pp. 601-32. The reason for this is that when, as here, the attorney offers testimony he is placed in the untenable position of having to argue his own credibility. Thus, the practice is discouraged. (See American Bar Association, Code of Professional Conduct, EC 5-9 and DR 5-101(B), following Canon 5 of the ABA Canons of Professional Ethics.) Exceptions to the preclusionary rule are sometimes allowed, but only if the attorney's testimony will (1) relate solely to an uncontested matter, or (2) will relate solely to a matter of formality and there is no reason to believe that evidence will be offered in opposition to the testimony. (DR 5-101(B)). Finally, an attorney will sometimes be permitted to give evidence if the evidence can be procured from no other source, *U.S. v. Fiorello*, 376 F2d 180, 185 (2nd Cir. 1967).¹⁰

The Cohen affidavit fails to meet any of the above criteria. The factual statements do not deal with uncontested matter; they do not concern formalities and no reason is given why Mr. Meyer could not have supplied his own affidavit. The remainder of the affidavit consists of unsupported conclusions and arguments. The affidavit was improperly submitted and is hereby rejected.

⁷ My experience in this case convinces me that it would be fruitless to offer the parties a further opportunity to adduce other evidence.

⁸ I am of course aware that generally hearsay evidence is admissible in administrative proceedings but this situation is at least in my experience somewhat unique.

⁹ The affidavit is nothing more or less than written testimony.

¹⁰ The Commission's Rules of Practice and Procedure follow these principles and vest considerable discretion in the judge. See Docket No. 74-33, *Amendments to Rules of Practice and Procedure, Order of Discontinuance*, March 13, 1975, p. 3.

From the record before me (admittedly somewhat sparse) it is clear that both Heidelberg and its forwarder, D. Hauser, Inc. dealt with COA under the impression that it was considerably more than a mere receiving and stuffing agent. Mr. Hauser believed that COA and COS were the same entity and it was with COA that Mr. Hauser confirmed the booking of the cargo and it was to COA that Mr. Hauser submitted the documents necessary to the shipment of the cargo. Mr. Hauser, was told by COA that one of the services it performed was that of a non-vessel owning common carrier. Indeed, when Heidelberg questioned the rate applied to the shipment, it did so in three letters addressed to COS but it was COA that finally answered the third letter and rejected the claim.

The three Heidelberg letters questioning the rate on its shipment were addressed to "Container Overseas Services, Inc., 1601 Edgar Road, Building A, Linden, New Jersey." COA's reply had a letterhead reading Container Overseas Agency, Inc., 1601 West Edgar Road, Linden, New Jersey. Additionally, in rejecting the claim of Heidelberg, COA stated:

According to attached tariff page of Container Overseas Services, Inc., Ocean Tariff No. 2, claims for ocean freight overcharge must be in writing in *this office* no later than six (6) months after date of booking. Therefore *your claim must be denied.* (Emphasis mine.)

From the foregoing one may quite reasonably infer that COA and COS occupied the same offices and that COA in addition to being the receiving and stuffing agent for COS was also empowered to reject claims for overcharge against COS.

The record also establishes that COA held itself out to the public as a non-vessel operating common carrier, first by its statements to Mr. Hauser and second by its advertisement in the *Shipping Digest and Transportation Telephone Tickler* published by the *Journal of Commerce*.¹¹ Respondent although it was afforded an opportunity to do so, offered nothing to rebut the evidence of complainant. The record further indicates that COA was a good deal more than a "receiving and stuffing agent" for COA on the shipment in question. Accordingly I conclude that Container Overseas Agency, Inc., is subject to the Commission's jurisdiction in the context of this proceeding.

(S) JOHN E. COGRAVE
Administrative Law Judge

¹¹ COA attempts to make much of the argument that because it did not have a tariff it cannot be subject to the Commission's jurisdiction. It could well be that COA in fact was itself in violation of the Shipping Act for holding itself out as an NVOCC without a tariff on file.

FEDERAL MARITIME COMMISSION

INFORMAL DOCKET NO. 1120(1)
SINGER PRODUCTS CO., INC.

v.

DELTA STEAMSHIP LINES, INC.

Applicant for a refund of freight charges has not met his burden of proving what was actually shipped. The Initial Decision is reversed and the refund application is denied.

REPORT AND ORDER

April 7, 1982

BY THE COMMISSION: (ALAN GREEN, JR., *Chairman*; THOMAS F. MOAKLEY, *Vice Chairman*; JAMES JOSEPH CAREY, *Commissioner*. *Commissioners* JAMES V. DAY AND RICHARD J. DASCHBACH did not participate.)

This proceeding was instituted as a result of a complaint filed by Singer Products Co., Inc. alleging that it was overcharged by Delta Steamship Lines, Inc. on a shipment of batteries in violation of section 18(b)(3) of the Shipping Act, 1916 (46 U.S.C. § 817(b)(3)). Settlement Officer D. Michael O'Rear held for Singer and ordered Delta to pay reparation in the amount of \$1,014.75 plus interest. This proceeding is now before the Commission on its own motion to review the Settlement Officer's decision.

BACKGROUND

In November of 1979, Delta transported 77 pallets of "Auto Storage Battery Boxes" from New York, New York to Puerto Cabello, Venezuela. There is no dispute concerning how the shipment was rated under the tariff of the United States Atlantic and Gulf-Venezuela and Netherlands Antilles Conference - FMC 2 (the Tariff) of which Delta is a member. Singer claims, however, that Delta improperly failed to deduct a pallet allowance, as provided in the Tariff, in calculating the freight due.

Rule No. 40(F) of the Tariff provides that either the actual height of the pallet, but not more than 6 inches, or the actual weight of the pallet, but not more than 10% of the gross weight of the cargo and pallet, will be deducted in assessing freight charges¹ if, at time of

¹ In calculating the allowance on the basis of the height of the pallet, the allowance is in no case to exceed 10% of the over-all height of the entire package.

shipment, a dock receipt is furnished by the shipper which indicates the actual weight and measurements of the pallet. Which deduction is appropriate depends upon whether the freight charges are calculated on the basis of measurement or weight.

The dock receipt for the shipment at issue indicates its gross weight, the number of packages, the number of pallets and the measurements of the loaded pallets. It does not, however, indicate either the measurements or the weight of the pallets themselves.

On June 10, 1981, Singer filed a claim with Delta seeking an adjustment based upon the pallet allowance. Delta denied the claim on the basis of the 6 month time limitation for the filing of such claims which is set out in the Tariff. On July 13, 1981, Singer filed this complaint.

In support of its claim made to Delta and its complaint filed with the Commission, Singer submitted a packing list which, among other things, indicates the weight and measure of the *empty* pallets. Each is alleged to measure 6" X 43" X 45" and weigh 64 pounds.² The packing list was signed by the rate analyst who filed the complaint on behalf of Singer and was notarized. In response to a request from the Settlement Officer, Singer also submitted four notarized packing slips signed by the same rate analyst.

In his decision served February 2, 1982, the Settlement Officer concluded that Singer was entitled to the pallet allowance provided in Rule 40 and ordered Delta to pay Singer \$1,014.75 plus interest at 12.6% accruing from the date on which the freight bill was paid.

The Settlement Officer conceded that Singer had not submitted a dock receipt at the time of shipment indicating the weight and measurement of the empty pallets. Concluding that this requirement is "arbitrary", the Settlement Officer determined, however, that it could not bar recovery of an otherwise legitimate overcharge claim. He felt that Singer should not be penalized because of any negligence which occurred in the preparation of the shipping documents.

DISCUSSION

The Commission has carefully reviewed the Settlement Officer's decision and the record in the case. For reasons discussed below, it concludes that Singer is not entitled to reparation and that its claim must be denied.

In determining whether reparation should be awarded, the appropriate test is what claimant can establish was actually shipped, even if the actual shipment differed from the bill of lading description.³ Where the

² On the basis of these figures, Singer seeks reparation in the amount of \$1,086.71.

³ *Western Publishing Co., Inc. v. Hapag Lloyd A.G.*, 13 S.R.R. 16, 17 (1972); *Ocean Freight Consultants Inc. v. Itaipacific Line*, 15 F.M.C. 314, 315 (1972); *Merck Sharp & Dohme (I.A.) Corp. v. Flota Mercante Grancolombiana, S.A.*, 18 F.M.C. 384, 387 (1975).

shipment has left the custody of the carrier, a shipper seeking reparation must indicate with reasonable certainty and definiteness the validity of his claim.⁴ This has been characterized by the Commission as a heavy burden.⁵

There is no disagreement between Delta and Singer over what commodity was shipped. Delta believes, however, that because Singer failed to comply with Rule 40(F) of the Tariff, it is not entitled to a pallet allowance.

The Commission has generally held that even when a shipper has failed to comply with a tariff provision, it is still entitled to reparation if it proves what was actually shipped and corrects, with evidence introduced after shipment, the non-compliance with the tariff provision.⁶ Because the required information was not provided in the dock receipt at the time of shipment, Singer must now prove the weight and measurements of the pallets used if it is to be entitled to reparation. The only proof offered by Singer consists of packing slips signed by the rate analyst who filed this complaint. There is no other corroboration.

An examination of the packing slips indicates that they are dated 1980, the year after the shipment was made, and were notarized in 1981, the year in which the claim was brought. The weight and measurements of the pallets indicated on the packing slips and packing list appear gratuitous⁷ and included simply to support the claim. Finally, the packing slips indicate that 78 pallets were involved in the shipment while the packing list indicates that 77 pallets were shipped.

Because the record contains no other evidence as to the weight and measurements of the pallets themselves, and because the evidence presented is not adequate, the Commission concludes that Singer has not met its burden of proving what was actually shipped.

THEREFORE, IT IS ORDERED, That the Initial Decision in Informal Docket No. 1120(I) is reversed; and

IT IS FURTHER ORDERED, That Singer's application for reparation is denied; and

IT IS FURTHER ORDERED, That this proceeding is discontinued.

(S) FRANCIS C. HURNEY,
Secretary

⁴ *Colgate Palmolive Peet Co. v. United Fruit Co.*, 11 S.R.R. 979, 981 (1970); *Ocean Freight Consultants v. Royal Netherlands Steamship Co.*, 17 F.M.C. 143, 144 (1973).

⁵ *Id.* In later cases, the Commission stated that the shipper must prove by the preponderance of the evidence what was actually shipped.

⁶ *Sun Co., Inc. v. Lykes Bros. Steamship Co., Inc.*, 20 F.M.C. (1977); *Cities Service International, Inc. v. The Lykes Bros. Steamship Co., Inc.*, 19 F.M.C. 128 (1976); *Union Carbide Corporation v. American and Australian Steamship Line*, 17 F.M.C. 177 (1973); *Abbott Laboratories v. Venezuelan Line*, 19 F.M.C. 426 (1977); *The Carborundum Co. v. Royal Netherlands Steamship Co. (Antilles) N.V.*, 19 F.M.C. 431 (1977).

⁷ Neither the packing slip nor the packing list calls for this information.

Commissioner Richard J. Daschbach issues the following separate opinion:

I am not participating because I do not believe that the Commission should review the decisions of Settlement Officers in informal docket proceedings. Under Subpart S of the Commission's Rules of Practice and Procedure (46 C.F.R. 502.301), parties consent to waive the rights and obligations associated with normal adjudicatory proceedings for the express purpose of receiving prompt consideration of a small claim. Commission review precludes the inexpensive and expeditious handling of small claims which is the foundation of the informal docket process. The Settlement Officer's decisions in informal dockets do not have precedential value. Commission review therefore imposes unnecessary expense and delay in an arbitration process designed to settle minor commercial disputes in a prompt and responsive manner.

FEDERAL MARITIME COMMISSION

DOCKET NO. 81-1

UNIVERSAL TRANSCONTINENTAL CORPORATION AND J. S. STASS CO., DIVISION OF UNIVERSAL TRANSCONTINENTAL CORPORATION - INDEPENDENT OCEAN FREIGHT FORWARDER LICENSE NO. 394-R

Agreements providing for the payment of civil penalties in settlement of alleged violations of the Shipping Act, 1916 found fair and reasonable and approved by the Commission.

Respondent found fit to carry on the business of ocean freight forwarding.

Paul G. Kirchner for Universal Transcontinental Corporation and J. S. Stass, a Division of Universal Transcontinental Corp.

John Robert Ewers, Joseph B. Slunt and Stewart James for the Bureau of Hearings and Field Operations.

REPORT AND ORDER

April 16, 1982

BY THE COMMISSION: (ALAN GREEN, JR., *Chairman*; THOMAS F. MOAKLEY, *Vice Chairman*; JAMES JOSEPH CAREY, RICHARD J. DASCHBACH AND JAMES V. DAY, *Commissioners*)

This proceeding was initiated by Order of Investigation and Hearing served January 5, 1981 to determine whether Universal Transcontinental Corporation/J. S. Stass Co., Division of Universal Transcontinental Corporation (UTC or Respondent)¹: (1) violated sections 15 and 16, Initial Paragraph, Shipping Act, 1916 (46 U.S.C. 814, 815) by receiving non-tariffed freight forwarder compensation; (2) continues to qualify as an independent ocean freight forwarder because of its corporate relationship to an export shipper, Tropigas International Corporation; (3) violated section 16, Initial Paragraph, by collecting freight forwarder compensation on Tropigas' shipments; (4) should have its license suspended or revoked because it is no longer "fit" to carry on the business of forwarding; and (5) should be assessed civil penalties pursuant to section 32(e) of the Shipping Act, 1916 (46 U.S.C. 831(e)) for any violations of the Act found.

¹ The assets of J. S. Stass Co. were purchased by UTC in August of 1972. Stass was operated as a division of UTC until 1975, when it was phased out. Stass was not in existence during the period relevant to this proceeding.

During the course of the proceeding, Respondent and the Commission's Bureau of Hearings and Field Operations (Hearing Counsel) submitted joint stipulations and two proposed settlement agreements under which UTC agreed to pay civil penalties totaling \$67,000 for the violations alleged.

On August 19, 1981, Administrative Law Judge William Beasley Harris served his Initial Decision which: (1) approved, in part, the settlement agreements; (2) "terminated" the proceeding as to the fitness issue based on the settlement agreements; (3) found that UTC is shipper-connected by virtue of its corporate relationship with Tropigas and ordered UTC to divest itself of this relationship;² and (4) discontinued the proceeding upon UTC's payment of civil penalties and divestiture. The proceeding is now before the Commission on the Exceptions of UTC and Hearing Counsel to the Initial Decision.

BACKGROUND

The record before the Presiding Officer consisted of joint stipulations, uncontested affidavits and two settlement agreements, the essential parts of which are summarized below.

UTC and its predecessor company have been engaged in the business of forwarding since 1925. UTC is, and has always been, a wholly-owned subsidiary of Transway International Corporation. Transway is a holding company with interests in freight forwarding, marine transportation, truck trailer manufacturing, and the marketing and distribution of petroleum gas. Tropigas and Coordinated Caribbean Transport, Inc. (CCT), a Ro/Ro operator, are other Transway holdings.

Between January, 1976 and January, 1977, UTC received \$127,640.48 in non-tariffed freight forwarder compensation from seven different carriers. UTC retained all of the non-tariffed compensation and reported it as ordinary income. UTC did not pass on this compensation to any of its shipper clients. UTC discontinued the practice of accepting such compensation on January 1, 1977.

UTC also handled 1721 shipments for Tropigas during the period January, 1976 to May, 1981, for which it was paid \$30,494.45 in forwarder compensation. Between 1976 and 1981, UTC received in excess

² The Initial Decision was served six days after section 1 of the Shipping Act, 1916 (46 U.S.C. 801) was amended by the Omnibus Budget Reconciliation Act, P.L. 97-35, 95 Stat. 752 (Budget Act), to remove the prohibition against the licensing of a freight forwarder which is shipper-connected. Prior to its amendment section 1 provided:

An "independent ocean freight forwarder" is a person carrying on the business of forwarding 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.

The Budget Act amended section 1 by deleting the two "nor" clauses. The Commission had construed section 1 as prohibiting a licensed independent freight forwarder from being owned by a company that also owned a shipper or consignee of shipments to foreign countries. *North American Van Lines*, 14 F.M.C. 215 (1971).

of \$6.5 million in total brokerage payments on over 219,000 shipments. CCT carried 65% of Tropigas' shipments during this period. Since March of 1978, when an informal investigation of UTC was initiated, UTC has cooperated fully with the Commission's staff.

On May 15, 1981, UTC and Hearing Counsel submitted a settlement agreement disposing of the alleged violations of sections 15 and 16. Under the terms of that document, Respondent agreed to pay a civil penalty of \$37,000 to avoid the expenses of litigation. Other pertinent provisions of the May 15 agreement are summarized below:

- (1) UTC agrees to review its operation and to make whatever adjustments are necessary to assure that it does not receive non-tariffed compensation. UTC's chief executive officer will submit an annual report to the Commission certifying that UTC has not received such compensation.

This reporting requirement will terminate on June 1, 1983. UTC will also submit reports to the Commission as it may from time to time require concerning UTC's compliance with the terms of the settlement. (Paragraph 3).

- (2) UTC agrees to furnish copies of the settlement agreement and give notice of its terms and provisions to all of its directors, officers, and field managers. (Paragraph 4).

- (3) In the event of a change of law or other circumstances UTC may petition the Commission for a modification or mitigation of the agreement. (Paragraph 6).

On July 15, 1981, UTC and Hearing Counsel submitted a second settlement agreement disposing of the allegations regarding the shipper connection and UTC's receipt of forwarder compensation on Tropigas' shipments. In that agreement Respondent agreed to pay a civil penalty of \$30,000 to avoid the expenses of litigation. Other pertinent provisions of the June 15 agreement are summarized below:

- (1) UTC agrees to sever, within 90 days of the Commission's approval, its affiliation with Tropigas. UTC may maintain its affiliation with Tropigas if, during the 90-day period, it has taken steps to insure that Tropigas or its foreign affiliates will no longer be a shipper or consignee or seller or purchaser of shipments to foreign countries as those terms are used in the definition of an independent ocean freight forwarder in section 1 of the Shipping Act, 1916. (Paragraph 3).

- (2) If section 1 of the Shipping Act, 1916 is amended within the 90-day period to remove the prohibition against "shipper connections," Paragraph 3 will not apply (Paragraph 4).

- (3) UTC agrees to take all necessary steps to cease handling shipments on behalf of Tropigas until such time as UTC severs its affiliation or there is a change of law. (Paragraph 5).

- (4) UTC's chief executive officer will submit an affidavit to the Commission detailing how UTC has complied with Para-

graphs 3, 4, and 5, above. If the Commission finds that UTC has failed to comply with these paragraphs, the Commission may: (a) require UTC to take such further steps as the Commission deems necessary; (b) revoke or suspend UTC's license; (c) take such other action as the Commission deems appropriate. If UTC fails to submit the required affidavits, its license would be suspended automatically. (Paragraph 6).

(5) UTC agrees to notify its directors and officers of the terms of the settlement agreement within 30 days following approval by the Commission. (Paragraph 8).

(6) UTC may petition the Commission if it believes there has been a change of law or other circumstances which would warrant modification or mitigation of this proposed settlement agreement. (Paragraph 10).

INITIAL DECISION

On the basis of UTC's admission that it was corporately affiliated with Tropigas, the Presiding Officer found that UTC no longer met the section 1 definition of an independent ocean freight forwarder. The Presiding Officer accordingly directed Respondent to divest itself of its shipper connection within 90 days.

With respect to the "fitness" issue, the Presiding Officer noted Hearing Counsel's recommendation "that UTC be found fit" and then approved the settlement agreements and terminated the proceeding as to that issue.

The Presiding Officer did not, however, approve the two settlement agreements in their entirety. He advised that he could not "consent to the inclusion in the record as fact" the following provisions of the May 15th Agreement:

- (1) Paragraph 3 because it is ambiguous and does not provide for an immediate "stop and desist" from receiving non-tariffed compensation. The Presiding Officer viewed this provision as suggesting the extension of this litigation until June 1, 1983.
- (2) Paragraph 4 because it raises the question whether UTC's directors have given counsel the authority to enter into the settlement.
- (3) Paragraph 6 because it is ambiguous and *per se* unfair as it gives UTC a unilateral right of action.

The following provisions of the July 15 agreement were also "disapproved":

- (1) Paragraph 3 because it allows UTC to maintain its affiliation with Tropigas for 90 days.
- (2) The "change of law" provisions of Paragraphs 4 and 5 because they are "too nebulous".
- (3) Paragraph 6 because it appears to allow an "extension of litigation".

(4) Paragraph 8 because it raises the question whether UTC's directors have given counsel the authority to enter into the settlement.

(5) Paragraph 10 because it is *per se* unfair since it gives UTC a unilateral right of action.

POSITIONS OF THE PARTIES

In their Exceptions, UTC and Hearing Counsel challenge the Presiding Officer's disapproval of portions of the settlement agreements. They argue that the Presiding Officer deleted fair, necessary, and unambiguous provisions which, to a large extent, formed the basis upon which the parties agreed to settle. It is noted that the non-tariffed compensation provisions are modeled after the settlement agreement which the Commission approved in *Behring International, Inc.—Independent Ocean Freight Forwarder License No. 910*, 23 F.M.C. 973 (1981). UTC and Hearing Counsel further point out that the reporting requirement provisions are generally standard in Commission settlement agreements and that these provisions would not, as the Presiding Officer found, "extend this litigation." Rather, these provisions are allegedly designed to aid the Commission in monitoring UTC's future activities. Finally, UTC and Hearing Counsel explain that the "change of law provisions," which the Presiding Officer disapproved as "nebulous," were included in anticipation of the enactment of the then-pending legislation removing the prohibition against shipper connections.

UTC also argues that the Presiding Officer erred in finding it to be shipper-connected. UTC contends that it never "admitted" such a connection and that there is no evidence of record to support the Presiding Officer's finding. UTC explains that although it conceded a corporate relationship with Tropigas, it held to the position that this relationship did not preclude it from qualifying as an independent ocean freight forwarder.

Hearing Counsel and UTC urge the Commission to find that UTC is fit to retain its freight forwarder license. They argue that there are sufficient mitigating factors, including UTC's cooperation in this investigation, to warrant such a finding.

DISCUSSION

The Commission will, for the reasons stated below, approve the settlement agreements as filed, vacate the Presiding Officer's finding of a prohibited shipper connection and find that UTC remains "fit" to be licensed as an independent ocean freight forwarder.

In determining whether to approve a proposed settlement agreement, the Commission engages in every presumption "which favors a finding

that the agreement is fair, correct, and valid.”³ This does not mean, however, that the Commission will summarily accept a proffered settlement. The Commission has a responsibility to examine every agreement to ensure that the settlement contemplated does not violate any law or public policy and is free of fraud, duress, undue influence, or other defects which might make it unapprovable despite the strong policy of the law encouraging settlement.⁴ Given the present record, there is no reason to believe that the two settlement agreements at issue here suffer from any of these deficiencies.

The two agreements are not only designed to aid the Commission's oversight of UTC's future activities, but also include appropriate provisions to ensure that UTC's corporate officers and operating managers are aware of the terms as well as the restrictions provided for in these agreements. In addition, the Commission believes that the agreements' "change of law provisions" are fair and reasonable given the existence of the then pending legislation amending section 1 of the Shipping Act, 1916. The May 15 and July 15 settlement agreements are therefore approved, as submitted, and the Presiding Officer's rulings to the contrary are reversed.

One of the other conclusions reached by the Presiding Officer is that UTC is "shipper-connected" and therefore must "divest itself and make all necessary changes of circumstance in its operations so as to avoid any appearance or possibility of shipper control." The Initial Decision does not clearly explain the basis for this finding. However, whatever the merits for the finding and divestiture order may be, they have been overtaken by the passage of the Budget Act amendment to section 1. That amendment removed shipper connections as a bar to licensing. Accordingly, the Presiding Officer's shipper connection finding and resultant divestiture order will be vacated.

Finally, there is no evidence in the record of this proceeding which would call into question Respondent's continued fitness to be licensed as an ocean freight forwarder. The compensation practices at issue have not, in this case, been held to constitute a violation of the Shipping Act, 1916 or any Commission rule. Moreover, there is no indication that UTC otherwise violated the Act by passing on any compensation received to its shipper-clients or by entering into any unapproved section 15 agreements with the involved carriers. Nor does the record indicate that Respondent engaged in any conduct inconsistent with its fiduciary responsibility to its shipper-clients. On the other hand, Respondent did terminate the practices prior to the institution of this

³ *Old Ben Coal Company v. Sea-Land Service, Inc.*, 21 F.M.C. 506 (1978); *Behring International, Inc.—Independent Ocean Freight Forwarder No. 910*, 23 F.M.C. 973 (1981); *Merck Sharp and Dohme International v. Atlantic Line*, 17 F.M.C. 244 (1973).

⁴ *Ibid.*

proceeding and agreed to implement certain internal controls to preclude their reoccurrence. Accordingly, the Commission finds that UTC remains fit to be licensed as an independent ocean freight forwarder.

THEREFORE, IT IS ORDERED, That the Exceptions of UTC and Hearing Counsel are granted to the extent indicated above;

IT IS FURTHER ORDERED, That the May 15, 1981 and July 15, 1981 settlement agreements entered into between UTC and Hearing Counsel are approved as filed;

FURTHER, IT IS FURTHER ORDERED, That the Initial Decision served August 19, 1981 is reversed to the extent indicated above; and

FINALLY, IT IS ORDERED, That this proceeding is discontinued.

(S) FRANCIS C. HURNEY
Secretary

FEDERAL MARITIME COMMISSION

DOCKET NO. 81-63

**ERICH H. TRENDEL - INDEPENDENT OCEAN
FREIGHT FORWARDER APPLICATION**

NOTICE

April 19, 1982

Notice is given that no appeal has been taken to the March 12, 1982 Order of Discontinuance in this proceeding and that the time within which the Commission could determine to review has expired. No such determination has been made and, accordingly, the order has become administratively final.

(S) FRANCIS C. HURNEY
Secretary

FEDERAL MARITIME COMMISSION

DOCKET NO. 81-63

ERICH H. TRENDEL - INDEPENDENT OCEAN
FREIGHT FORWARDER APPLICATION

DISCONTINUANCE OF PROCEEDING

Finalized April 19, 1982

By letter dated February 26, 1982, to the Commission's Office of Freight Forwarders, notice was given of the withdrawal of the application of Erich H. Trendel for a license as an independent ocean freight forwarder. By "Notice of Discontinuance" (construed as a motion to discontinue) also dated February 26, 1982, discontinuance without prejudice was requested by counsel for Trendel.

Hearing Counsel do not object to the issuance of a ruling discontinuing the proceeding.

Accordingly, the subject proceeding hereby is discontinued.

(S) CHARLES E. MORGAN
Administrative Law Judge

FEDERAL MARITIME COMMISSION

DOCKET NO. 81-73

ARTHUR J. FRITZ & CO., INC.

v.

**UNITED STATES ATLANTIC & GULF/ECUADOR
FREIGHT CONFERENCE, ET AL.**

NOTICE

April 23, 1982

Notice is given that no appeal has been taken to the March 17, 1982 dismissal of the complaint in this proceeding and that the time within which the Commission could determine to review has expired. No such determination has been made and accordingly, the dismissal has become administratively final.

(S) FRANCIS C. HURNEY
Secretary

FEDERAL MARITIME COMMISSION

DOCKET NO. 81-73

ARTHUR J. FRITZ & CO., INC.

v.

U.S. ATLANTIC & GULF/ECUADOR FREIGHT CONFERENCE
AND U.S. FLORIDA/ECUADOR STEAMSHIP CONFERENCE, ET
AL.

DISMISSAL OF PROCEEDING

Finalized April 23, 1982

Arthur J. Fritz & Co., Inc., by complaint, alleged that the respondents here had violated sections 15, 16 and 17 of the Shipping Act, 1916 (46 U.S.C. 814, 815 and 816), by the publication and filing of certain tariff provisions which sought to impose upon Fritz and others certain obligations for the payment of freight charges. Respondents have now made a number of revisions which have removed complainant's objections and it now moves to withdraw its complaint.

Since the complainant no longer desires to pursue any remedy before the Commission and since he cannot be compelled to do so, the motion is hereby granted and the case is dismissed.

(S) JOHN E. COGRAVE
Administrative Law Judge

FEDERAL MARITIME COMMISSION

INFORMAL DOCKET NO. 1126(1)
SINGER PRODUCTS CO., INC.

v.

DELTA STEAMSHIP LINES, INC.

Applicant for a refund of freight charges has not met his burden of proving what was actually shipped. The Initial Decision is reversed and the refund application is denied.

REPORT AND ORDER

April 27, 1982

BY THE COMMISSION: (ALAN GREEN, JR., *Chairman*; THOMAS F. MOAKLEY, *Vice Chairman*; JAMES JOSEPH CAREY AND JAMES V. DAY, *Commissioners*. COMMISSIONER RICHARD J. DASCHBACH did not participate)

This proceeding was instituted as a result of a complaint filed by Singer Products Co., Inc. alleging that it was overcharged by Delta Steamship Lines, Inc. on a shipment of batteries in violation of section 18(b)(3) of the Shipping Act, 1916 (46 U.S.C. § 817(b)(3)). Settlement Officer D. Michael O'Rear held for Singer and ordered Delta to pay reparation in the amount of \$1,439.32 plus interest. This proceeding is now before the Commission on its own motion to review the Settlement Officer's decision.

BACKGROUND

By Bill of Lading dated May 23, 1980, Delta contracted with Singer to ship 78 pallets of Auto Storage Battery Boxes from New York, New York to Valparaiso, Chile. There is no dispute concerning how the shipment was rated under the tariff of the Atlantic & Gulf/West Coast of South America Conference SA-13-F.M.C. No. 2 (the Tariff) of which Delta is a member. Singer claims, however, that Delta improperly failed to deduct a pallet allowance, as provided in the Tariff, in calculating the freight due.

According to rule 40(D) of the Tariff, either the actual height of the pallet, but not more than six inches, or the actual weight of the pallet, but not more than 10% of the gross weight of the cargo and pallet, will be deducted in assessing freight charges¹ if, at the time of shipment,

¹ In calculating the allowance on the basis of the height of the pallet, the allowance is in no case to exceed 10% of the over-all height of the entire package.

the weight and measurement of the pallet are furnished by the shipper on the dock receipt and bill of lading. Which deduction is appropriate depends upon whether the freight charges are calculated on the basis of measurement or weight.

The Bill of Lading for the shipment indicates its gross weight, the number of packages and the number of pallets. The Dock Receipt contains the shipment's gross weight, the number of packages, the number of pallets and the measurements of the loaded pallets. Neither the Bill of Lading nor the Dock Receipt contains the weight and measurements of the pallets themselves.²

On June 1, 1981, Singer filed a claim with Delta seeking reparation based upon the pallet allowance. Delta denied the claim on the basis of the six-month time limitation set out in the Tariff and because, according to rule 40(F) of the Tariff, cargo mounted on skids is not eligible for a pallet allowance. On July 15, 1981, Singer filed a complaint with the Commission seeking the same reparation. In support of its complaint, Singer submitted a packing slip which, among other things, indicates the weight and measurements of the *empty* pallets. Each is alleged to weigh 64 pounds and measure 43" x 45" x 6".³ The packing slip was signed by the rate analyst who filed the complaint and was notarized on July 15, 1981, by a New York Notary Public.

In his decision served February 8, 1982, Settlement Officer D. Michael O'Rear concluded that Singer was entitled to the pallet allowance provided in Rule 40 for 56 pallets used in the shipment. Noting that the Dock Receipt, unlike the Bill of Lading, indicates that 22 skids were involved in the shipment, the Settlement Officer decided that on the basis of Rule 40(F),⁴ Singer was not entitled to a pallet allowance for that portion of the shipment described as skids. Delta was ordered to pay \$1,439.32 plus interest at 12.5% accruing from the date on which the freight bill was paid.

The Settlement Officer conceded that Singer had not submitted either a Dock Receipt or Bill of Lading at the time of shipment indicating the weight and measurement of the pallets. Concluding that this requirement was "arbitrary," the Settlement Officer determined that it could not bar recovery of an otherwise legitimate overcharge claim. He felt that Singer should not be penalized because of any negligence which occurred in the preparation of the shipping documents.

² The Dock Receipt indicates that the shipment consisted of 22 skids of cargo and 56 pallets, the Bill of Lading indicates that 78 pallets were shipped.

³ On the basis of these figures, Singer determined that it was entitled to reparation of \$1,480.00.

⁴ Rule 40(F) says "Cargo mounted on skids shall not be considered to be pre-palletized."

DISCUSSION

The Commission has carefully reviewed the Settlement Officer's decision and the record in the case. For reasons discussed below and in reliance upon the recent disposition of Informal Docket No. 1120(I), *Singer Products Co., Inc. v Delta Steamship Lines, Inc.* (24 F.M.C. 907 (1982)), it concludes that Singer is not entitled to reparation and that its claim must be denied.

In determining whether reparation should be awarded, the appropriate test is what claimant can establish was actually shipped, even if the actual shipment differed from the bill of lading description.⁵ Where the shipment has left the custody of the carrier, a shipper seeking reparation must indicate with reasonable certainty and definiteness the validity of his claim.⁶ This has been characterized by the Commission as a heavy burden.⁷

There is no disagreement between Delta and Singer over what commodity was shipped. Delta believes, however, that because Singer failed to comply with Rule 40(D) of the Tariff, it is not entitled to a pallet allowance.

The Commission has generally held that even when a shipper has failed to comply with a tariff provision, it is still entitled to reparation if it proves what was actually shipped and corrects, with evidence introduced after shipment, the non-compliance with the tariff provision.⁸ Because the required information was not provided in the dock receipt at the time of shipment, Singer must now prove the weight and measurements of the pallets used if it is to be entitled to reparation. The only proof offered by Singer consists of a packing slip signed by the rate analyst who filed this complaint. There is no other corroboration.

An examination of the packing slip indicates that it is dated 1980, the year in which the shipment was made, but that it was not notarized until 1981, the year in which the claim was brought. The weight and measurements of the pallets indicated on the packing slip appear gratuitous⁹ and included simply to support the claim. Finally, the packing slip indicates that 56 pallets were involved in the shipment while the bill of lading indicates that 78 pallets were shipped.

⁵ *Western Publishing Co., Inc. v Hapag Lloyd A.G.*, 13 S.R.R. 16, 17 (1972); *Ocean Freight Consultants Inc. v Itaipacific Line*, 15 F.M.C. 314, 315 (1972); *Merck Sharp & Dohme (I.A.) Corp. v Flota Mercante Grancolombiana, S.A.*, 18 F.M.C. 384, 387 (1975).

⁶ *Colgate Palmolive Pest Co. v Untied Fruit Co.*, 11 S.R.R. 979, 981 (1970); *Ocean Freight Consultants v Royal Netherlands Steamship Co.*, 17 F.M.C. 143, 144 (1973).

⁷ *Id.* In later cases, the Commission stated that the shipper must prove by the preponderance of the evidence what was actually shipped.

⁸ *Sun Co., Inc. v Lykes Bros. Steamship Co., Inc.*, 20 F.M.C. (1977); *Cities Service International, Inc. v The Lykes Bros. Steamship Co., Inc.*, 19 F.M.C. 128 (1976); *Union Carbide Corporation v American and Australian Steamship Line*, 17 F.M.C. 177 (1973); *Abbott Laboratories v Venezuelan Line*, 19 F.M.C. 426 (1977); *The Carborundum Co. v Royal Netherlands Steamship Co. (Anilles) N.V.*, 19 F.M.C. 431 (1977).

⁹ The packing slip does not call for this information.

Because the record contains no other evidence as to the weight and measurements of the pallets themselves, and because the evidence presented is not adequate, the Commission concludes that Singer has not met its burden of proving what was actually shipped.

THEREFORE, IT IS ORDERED, That the Initial Decision in Informal Docket No. 1126(I) is reversed; and

IT IS FURTHER ORDERED, That Singer's application for reparation is denied; and

IT IS FURTHER ORDERED, That this proceeding is discontinued.

(S) FRANCIS C. HURNEY
Secretary

Commissioner Richard J. Daschbach issues the following separate opinion:

I am not participating because I do not believe that the Commission should review the decisions of Settlement Officers in informal docket proceedings. Under Subpart S of the Commission's Rules of Practice and Procedure (46 C.F.R. 502.301), parties consent to waive the rights and obligations associated with normal adjudicatory proceedings for the express purpose of receiving prompt consideration of a small claim. Commission review precludes the inexpensive and expeditious handling of small claims which is the foundation of the informal docket process. The Settlement Officer's decisions in informal dockets do not have precedential value. Commission review therefore imposes unnecessary expense and delay in an arbitration process designed to settle minor commercial disputes in a prompt and responsive manner.

FEDERAL MARITIME COMMISSION

DOCKET NO. 80-72

**NORTH RIVER INSURANCE COMPANY AND
NORTHWESTERN NATIONAL INSURANCE COMPANY**

v.

FEDERAL COMMERCE AND NAVIGATION COMPANY, LTD.

NOTICE

April 28, 1982

Notice is given that no appeal has been taken to the March 22, 1982 dismissal of the complaint in this proceeding and that the time within which the Commission could determine to review has expired. No such determination has been made and, accordingly, the dismissal has become administratively final.

(S) FRANCIS C. HURNEY
Secretary

FEDERAL MARITIME COMMISSION

DOCKET NO. 80-72

NORTH RIVER INSURANCE COMPANY AND
NORTHWESTERN NATIONAL INSURANCE COMPANY

v.

FEDERAL COMMERCE AND NAVIGATION COMPANY, LTD.

DISMISSAL OF PROCEEDING

Finalized April 28, 1982

Counsel for North River Insurance Company and Northwestern National Insurance Company has by letter informed me that his clients no longer "wish to further this already protracted matter" and request "dismissal with prejudice." Accordingly, the proceeding is hereby dismissed with prejudice.

(S) JOHN E. COGRAVE
Administrative Law Judge

FEDERAL MARITIME COMMISSION

DOCKET NO. 81-66

JOSE TORRENTE D/B/A NETWORK EXPRESS, INDEPENDENT
OCEAN FREIGHT FORWARDER APPLICATION AND POSSIBLE
VIOLATION OF SECTION 44, SHIPPING ACT, 1916

NOTICE

May 3, 1982

Notice is given that no appeal has been taken to the March 29, 1982 dismissal of the proceeding and that the time within which the Commission could determine to review has expired. No such determination has been made and accordingly, the dismissal has become administratively final.

(S) FRANCIS C. HURNEY
Secretary

FEDERAL MARITIME COMMISSION

DOCKET NO. 81-66

JOSE TORRENTE D/B/A NETWORK EXPRESS, INDEPENDENT
OCEAN FREIGHT FORWARDER APPLICATION AND POSSIBLE
VIOLATION OF SECTION 44, SHIPPING ACT, 1916

PROCEEDING DISMISSED

Finalized May 3, 1982

When the Commission instituted this proceeding, it had before it the application of Jose Torrente, a sole proprietor, d/b/a Network Express, to operate as an independent ocean freight forwarder. In its order the Commission posed for issues for determination:

1. Whether Jose Torrente violated section 44(a) of the Shipping Act, 1916, by engaging in unlicensed forwarding activities; and if so, the nature and extent of these activities, including the number of any unlicensed shipments handled and the compensation received therefore;
2. Whether Jose Torrente's conduct as qualifying officer of T&T during November 21, 1977 through the voluntary revocation of T&T's license was in conformance with the Shipping Act and applicable regulations;
3. Whether in the light of the issues above the Applicant lacks the degree of fitness required to carry on the business of ocean freight forwarding;
4. Whether civil penalties should be assessed against Jose Torrente pursuant to 46 U.S.C. 831(e) for unlicensed forwarding in violation of the Shipping Act, 1916, and, if so, the amount of any such penalty which should be imposed, taking into consideration factors in possible mitigation of such a penalty.

Hearing Counsel now moves to dismiss the proceeding because (1) Jose Torrente has withdrawn his application, (2) Hearing Counsel does not feel that there is sufficient evidence to prove that Mr. Torrente violated section 44(a) of the Shipping Act, 1916, and (3) any allegations in the Order of Investigation of violations by T&T International Freight Forwarding Inc. could not result in penalties assessed against Mr. Torrente personally, although he was qualifying officer at the time of the violations.¹ In addition to its motion to dismiss Hearing Counsel has submit-

¹ Mr. Torrente was formerly President and 50 percent owner of T&T International Freight Forwarders Inc. and the violations alleged in the Commission's order are against T&T.

ted (1) a stipulation, (2) the deposition of Mr. Torrente, (3) a number of exhibits, and (4) a memorandum in support of the motion to dismiss. The stipulation is set forth below.

STIPULATION

1. T&T International Freight Forwarding, Inc. ("T&T"), incorporated February 22, 1977 in the state of Florida was issued FMC License No. 2010 on November 21, 1977.

2. On 37 occasions between December 13, 1977 and December 21, 1978, T&T collected insurance premiums from Caribbean Group, Inc. of Miami, Florida, without placing such insurance. The shipments originated in Miami and were shipped out of the Miami office of T&T.

3. On about 50 shipments, Jose Torrente, while an officer of T&T, between June 16, 1978 and March 5, 1979, paid \$10.00 per shipment to Moses Colon, an employee of R.H. Belam & Co. ("Belam"), the shipper. (Transcript from Deposition of Jose Torrente, December 18, 1981 ("Dep. Tr.") 77-78; Deposition Exhibit ("Dep. Ex.") Nos. 10-16).

4. The payments referred to in Stipulation No. 3 were made because Mr. Colon directed shipments to T&T and because he was very efficient in providing T&T all the information and documentation T&T needed to handle the shipments of Belam.

5. T&T did not pay over to Eller & Co., agent for Manaure Line, ocean freight of \$21,028 received in the Miami office for shipments moving out of Miami from the shipper.

6. None of the money referred to in Stipulation No. 5 benefited Mr. Jose Torrente personally.

7. On October 3, 1979, Jose Torrente entered into an agreement with Peerless Insurance Company ("Peerless") in which he agreed to pay to Eller & Co. the amount of \$10,000 and \$1,000 to Peerless on October 10, 1979. (Exhibit ("Ex.") No. 1.)

8. Peerless held the surety bond required by the Federal Maritime Commission for T&T.

9. Jose Torrente paid the balance of \$10,028 T&T owed Eller & Co. at the rate of \$1,000.00 a month until September 2, 1980. (Ex. No. 2.)

10. T&T was involuntarily dissolved on August 14, 1979 by an order of a court in Dade County, Florida. (Dep. Tr. 3, Dep. Ex. 3.)

11. On August 30, 1979, the court-appointed receiver surrendered T&T's FMC License No. 2010 for voluntary revocation. (Ex. No. 3.)

12. By order served September 14, 1979, the Commission revoked FMC License No. 2010. (Ex. No. 4.)

13. On seven occasions during the period September 10 through September 28, 1979, Jose Torrente forwarded ship-

ments from New York for the account of and under the FMC license number of Seaflet, Inc. ("Seaflet"). (Ex. No. 5.) Total compensation from ocean carriers on those shipments was \$246.54 and total fees received from shippers was \$261.00.

14. Seaflet applied for approval from the Federal Maritime Commission for a branch office at 11 Broadway, Suite 1604, New York, New York, on September 15, 1979 and received such approval on October 4, 1979.

15. Jose Torrente applied for approval from the Federal Maritime Commission to be branch manager of Seaflet's New York office on September 15, 1979, and received such approval on October 4, 1979.

16. On October 10, 1979, Jose Torrente submitted an application for an Independent Ocean Freight Forwarder (IOFF) license as an individual d/b/a Network Express. (Dep. Ex. No. 25.)

17. Jose Torrente, in his application to the Commission as an IOFF dated October 10, 1979, did not identify his association with Seaflet.

18. The following documents are stipulated to be part of this record:

- a. a letter dated December 14, 1979 from the Commission's Office of Freight Forwarders to Jose Torrente (Ex. No. 6);
- b. a letter dated December 21, 1979 from Mr. Jose Torrente to the Commission's Office of Freight Forwarders (Ex. No. 7);
- c. a letter dated January 16, 1980 from the Commission's Office of Freight Forwarders to Jose Torrente (Ex. No. 8); and
- d. a letter dated January 18, 1980 from Jose Torrente to the Commission's Office of Freight Forwarders. (Ex. No. 9.)

19. Jose Torrente sent copies of all bills of lading and invoices to the shippers to Seaflet in Miami on a continual basis. (Dep. Tr. 57.)

20. An accountant from Seaflet first visited the New York office of Seaflet in March, 1980. (Dep. Tr. 59-60.)

21. The accountant referred to in Stipulation No. 20 visited the New York office approximately every three or four months after his first visit in March, 1980. (Dep. Tr. 60.)

22. The terms of the employment arrangement between Seaflet and Mr. Torrente are set forth in exhibits 5, 6, 7 and 8 to the deposition of December 18, 1981.

23. The transcript and the accompanying exhibits from the deposition taken of Mr. Jose Torrente on December 18, 1981, and all other exhibits submitted herein are the record in this proceeding.

24. Mr. Torrente's signing of the deposition transcript referred to in Stipulation No. 23 is waived.

The withdrawal of Mr. Torrente's application for a license renders the issues raised in paragraphs 1, 2, and 3 of the Commission's Order of Investigation moot and there remains only the issue of whether Mr. Torrente engaged in unlicensed forwarding and if so should civil penalties be assessed.

Although Hearing Counsel has filed a motion to dismiss, the present posture of this case places a rather curious cast to the motion. Although in the motion itself Hearing Counsel grounds dismissal on an insufficiency of evidence to prove a violation, the stipulation admits to seven occasions of forwarding after T&T's license was revoked. However, Hearing Counsel in their memorandum in support of the motion to dismiss argue that the seven shipments in question were handled by Mr. Torrente on behalf of Seaflet, Inc., a Miami based forwarder licensed by the Commission. This, argues Hearing Counsel results in Mr. Torrente acting as manager of an unauthorized branch office of Seaflet, an activity for which Mr. Torrente would not be subject to penalties under section 44(a). Hearing Counsel in their memorandum argue that the operation of an unauthorized branch office would or could result in the imposition of penalties upon Seaflet. However Seaflet is not a respondent here. It would not impose penalties on Mr. Torrente Hearing Counsel argues because "Liability for a penalty cannot be imposed upon one, not within the meaning of the statute imposing the penalty, who, under the directions of another performs the prohibited act. 70 CJS Penalties section 6 (1951) and cases cited therein." The question presented by Hearing Counsel is not so much one of an insufficiency of evidence but rather of the legal consequences of the evidence adduced. This in turn presents two questions, (1) Was Mr. Torrente in fact acting as the manager of a Seaflet branch office during the period in issue, and (2) if he was, is he nevertheless subject to civil penalties for his activities during that time.

The record shows that on August 30, 1979, the Commission revoked T&T's license and on September 4, 1979, Seaflet and Mr. Torrente agreed to request from the Commission permission for approval for a Seaflet branch office in New York. Mr. Torrente was nominated an "incorporated employee and General Manager" of the branch. Between September 10, 1979 and September 28, 1979, Mr. Torrente forwarded seven shipments from New York for the account of and under the FMC license of Seaflet. On October 4, 1979, the Commission approved the New York branch office.

From September 4, 1979, Mr. Torrente was an employee of Seaflet and the shipments forwarded by Mr. Torrente from that point on were handled by him in that capacity, albeit he was the General Manager of an unlicensed or unapproved branch office.

JOSE TORRENTE D/B/A NETWORK EXPRESS - FREIGHT 933
FORWARDER APPLICATION

Section 23(a) of the Commission's Regulations for the Licensing of Independent Ocean Freight Forwarders provides in relevant part:

. . . No licensee may provide freight forwarding services through an unlicensed branch office or other separate establishment without written approval of the Federal Maritime Commission.

This is obviously directed to the licensee, in this case Seaflet, and not to employees of the licensee. Thus the only violation that could have occurred from the record here does not involve respondent. As for the violation alleged, unlicensed forwarding, at the time of the shipments involved the evidence before me indicates that Mr. Torrente was nothing more than an employee of Seaflet and thus did not violate section 44(a). Hearing Counsel's motion to dismiss is granted.

(S) JOHN E. COGRAVE
Administrative Law Judge

FEDERAL MARITIME COMMISSION

DOCKET NO. 78-1

SAIPAN SHIPPING COMPANY, INC.

v.

ISLAND NAVIGATION CO. LTD. AND OCEANIA LINE, INC.

NOTICE

May 5, 1982

Notice is given that no exceptions have been filed to the February 26, 1982 initial decision in this proceeding and the time within which the Commission could determine to review that decision has expired. No such determination has been made and accordingly, that decision has become administratively final.

(S) FRANCIS C. HURNEY
Secretary

FEDERAL MARITIME COMMISSION

DOCKET NO. 78-1

SAIPAN SHIPPING COMPANY, INC.

v.

ISLAND NAVIGATION CO., LTD.

AND OCEANIA LINE, INC.

During the period from April 5, 1977, through July 28, 1977, inclusive, Oceania Line, Inc., and Island Navigation Company jointly conducted a water carrier service between Guam and the Northern Mariana Islands, except for the period between June 21, 1977, through July 2, 1977, inclusive. Inasmuch as Oceania did not have an effective tariff on file with the Commission during the period from April 5, 1977, through July 2, 1977, Oceania was operating as a common carrier in violation of section 18(b)(1) of the Shipping Act, 1916, from April 5, 1977, through June 20, 1977, inclusive.

During the period from April 5, 1977, through July 28, 1977, the relationship between Oceania and Island Navigation constituted an agreement requiring approval under section 15 of the Shipping Act, 1916. This agreement was implemented and continued in effect without prior approval of the Commission in violation of section 15.

The relationship between Oceania and several non-respondent companies, including a common carrier—Asiatic Intermodal Seabridge S.A.—constituted an agreement requiring approval under section 15 of the Shipping Act, 1916. This agreement was implemented and continued in effect without prior approval of the Commission in violation of section 15.

Reparation, in the amount of \$267,755.11, awarded. Additional reparation to be determined under Rules 251 and 252 of the Commission's Rules of Practice and Procedure.

R. Frederic Fisher for Saipan Shipping Company, Inc., complainant.

Donald J. Brunner and John C. Morrison for Oceania Line, Inc., respondent.

INITIAL DECISION ¹ OF SEYMOUR GLANZER, ADMINISTRATIVE LAW JUDGE

Finalized May 5, 1982

This is a complaint proceeding instituted under the provisions of section 22 of the Shipping Act, 1916, 46 U.S.C. 821,² whereby Saipan

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

² The complaint did not specifically invoke section 22. Although it was probably superfluous to do so, the complaint was deemed amended to include an allegation that the proceeding was commenced under section 22. See Motion for Protective Order Denied and Notice of Prehearing Conference, served March 21, 1978.

Shipping Company, Inc., the complainant, seeks reparation from and a cease and desist order against Island Navigation Company, Ltd., and Oceania Line, Inc., the respondents, for violations of sections 15, 16, 17 and 18(b) of the Shipping Act, 1916, 46 U.S.C. 814, 815, 816 and 817(b)³ in connection with carriage of cargo by respondents in the Guam/Northern Mariana Islands trade.

One of the respondents, Island Navigation Company, Ltd., defaulted by failing to answer the complaint. The other respondent, Oceania Line, Inc., vigorously contested the complainant's allegations of violations.

After extensive prehearing discovery and inspection and a lengthy prehearing conference, the matter came on for hearing in San Francisco, California, on October 24, 1978. There were eight days of hearing at that session. The hearing resumed in Saipan, Northern Mariana Islands, on January 22, 1979, for nine days and then moved on to the Territory of Guam for another four days. The twenty-one days of hearing produced an evidentiary record consisting of 2,809 pages of transcript (Tr.) and 258 numbered exhibits, many of which are multi-paged documents.

In accordance with a revised briefing schedule,⁴ complainant filed an opening brief of 108 pages together with an appendix of 40 pages and, later, a reply brief of 70 pages. The respondent, Oceania Line, Inc., filed an answering brief of 119 pages.

As part of the opening brief, complainant submitted 55 proposed findings of fact. The answering brief dealt seriatim with complainant's proposed findings, accepting some, modifying others and rejecting still others. The answering brief also recommended another 27 proposed findings. The reply brief devoted a section to general and specific comments defending its own proposed findings as well as attacking those proposed by Oceania Line, Inc.

Before proceeding to the facts it will be useful to introduce and provide a brief sketch of some of the individuals and companies that play leading roles in this case. The cast includes those that neither appeared as parties or as witnesses and omits others who did testify. See APPENDIX, a profile to accompany this sketch of the cast.

³ The complaint alleged violation of sections 15, 17 and 18(b). An amended complaint, entitled First Amendment to Complaint, alleged that respondents, in addition to those matters alleged in the complaint, charged some shippers rates that were less than or different than those stated in tariffs on file with the Commission. At the conclusion of the hearing complainant stipulated that it would not seek reparation under section 18 for the matters alleged in the amended complaint.

⁴ The original briefing schedule could not be met because of unanticipated problems associated with the delivery of the transcript to the parties and to the Commission for the Saipan/Guam portion of the hearing. This portion of the transcript was not received until September, 1979.

Jose C. Tenorio (JOETEN):

A citizen of the Northern Mariana Islands (NMI or Marianas).⁵ JOETEN is the dominant individual in Saipan Shipping Company, Inc. and in J.C. Tenorio Enterprises, an organization which imports substantial cargo to the NMI. JOETEN did not testify.

Joseph F. Screen (SCREEN):

An accountant, who serves various JOETEN businesses in a managerial and consulting capacity.

Robert Earl Hahn (HAHN):

General manager of Saipan Shipping Company, Inc., in Guam.

Saipan Shipping Company, Inc. (SAISHIP):

A common carrier by water in the Guam/NMI trade.

Peter R. Gallagher (GALLAGHER):

President of Island Navigation Company, Ltd., until about August 1, 1977. GALLAGHER did not testify.

Ernesto V. Candoleta (CANDOLETA):

An employee of Island Navigation Company, Ltd., who became its president about August 1, 1977.

Island Navigation Company, Ltd. (ISLNAVCO or INCO):

A Guamanian corporation chartered March 14, 1975, as Island Navigation Co., Ltd. Among other things, it is authorized to act as a common carrier and generally to do everything related to the shipping industry. It filed a tariff for the Guam/NMI trade on February 15, 1977, which became effective March 17, 1977, and was later canceled, effective July 29, 1977. While its tariff was in effect it was a party to two approved section 15 agreements—a cooperative working agreement with United States Lines, Agreement No. 10297 and a leasing agreement with Matson Navigation Company, Agreement No. 9926. It was also a party to another agreement dated January 14, 1977, with Oceania Lines, Inc., for which section 15 approval was sought-Agreement No. 10306.

John H. Robinson (ROBINSON):

Executive Consultant to Oceania Line, Inc., and its de facto chief executive and operations officer. He has extensive experi-

⁵ Geographically, the Mariana Islands extend from Guam, in the south, to Maug (Guam, spelled backwards) in the north. Politically, Guam is not a part of the NMI; it is a Territory of the United States. The NMI was formerly part of the Trust Territory of the United Nations (TT) and is now a "Commonwealth . . . in Political Union With the United States of America." For a brief discussion of the recent history of the NMI and certain aspects of "Political Union" see Order Vacating Ruling Made at Prehearing Conference, served May 5, 1978. The most important of the islands in the NMI from a political and economic standpoint are Saipan, Tinian and Rota, and among those three, Saipan is the most significant.

ence in marine and shipping matters and among other things he has qualified as a marine average adjustor, a licensed first mate, an insurance assessor and a loss adjustor in various jurisdictions. He partially completed a Bachelor of Law degree at the University of Wellington, New Zealand. At one time he was employed as claims officer by SAISHIP. ROBINSON's wife is the majority shareholder in Oceania Line, Inc. ROBINSON is a British citizen. See Ex. 24; Answering Brief, p. 10 n. 9.

Oceania Lines, Inc. (OCEANIA):

OCEANIA is an NMI corporation incorporated on January 8, 1976. On June 3, 1977, it filed a tariff for the Guam/NMI trade, effective July 3, 1977. It is the charterer of a tug and barge used in the Guam/NMI trade since April 5, 1977. It is uncontroverted that OCEANIA has been a common carrier by water since that date. Since January or February, 1977, it has been Asiatic Intermodal Seabridge S.A.'s agent in Saipan. Exs. 36, 68, 90.

Donald I. Marshall (MARSHALL or DIM):

SAISHIP claims DIM is the mastermind and power behind the alleged violations of the Shipping Act by OCEANIA/ISLNAVCO and others not named as parties in this case. ROBINSON says DIM's involvement in OCEANIA/ISLNAVCO affairs is just that of a friend interested in ROBINSON's well being. DIM receives mail at C.C.P.O. Box 1914, Makati Commercial Centre, Makati, Rizal, Philippines, whether addressed to him personally or in care of a named company. ROBINSON has written to him as President, Transpac Marine S.A. (Ex. 29) and has described him as "The owner of the vessels we charter." (Ex. 24, p. 21, cross referencing Ex. 24 App. 29) ⁶

DIM is a prolific letter/memo/electronic communicator who uses the letterhead and call signs of many companies, e.g., Cabras Marine Corporation (Ex. 253); Asiatic Intermodal Seabridge S.A. (Ex. 76); Malayan Towage & Salvage Corporation (Ex. 70); Asia Pacific Chartering Phil., Inc. (Ex. 64); DIM was president of Luzon Stevedoring Corporation. In Ex. 141, a telex to Atkins Kroll (Guam) Ltd., he calls himself "Attorney-in-Fact" for Asiatic Intermodal Seabridge S.A. DIM did not testify.

⁶ ROBINSON made the cited statement in his prepared written direct testimony, but in his oral testimony, which lasted many days, he dissembled, attempting to give the appearance that DIM had no connection with the AFFILIATED/ASSOCIATED COMPANIES described in the text, *infra*, but was merely a charter broker trying to protect his commissions or, as indicated in the text, was a benevolent friend.

Harry A. Patterson (PATTERSON or HAP):

President of Asiatic Intermodal Seabridge, S.A. General Manager of China Pacific Intermodal, Ltd. Consultant and advisor to OCEANIA and ISLNAVCO (See Ex. 56 for OCEANIA and ISLNAVCO references). HAP did not testify.

Jose C. Reyes (REYES, phonetically Rayjis):

An accountant. An officer of Asiatic Intermodal Seabridge S.A. (See Ex. 2 App. 56 App. 3.) ROBINSON believes REYES to be an official (officer or director) of Transpac Marine S.A. and Pacific Logistics S.A. Receives mail at Malayan Towage and Salvage Corporation. Although not OCEANIA's accountant, REYES, directly or indirectly, provided costly, but free accounting or bookkeeping assistance to OCEANIA. REYES did not testify.

Lee R. Katindoy (KATINDOY or LK):

General Manager of Cabras Marine Corporation in Guam. LK is authorized by Transpac Marine S.A. and by Pacific Logistics S.A. to act fully on behalf of each on all matters relating to the Barge TM-644. See Exs. 85 and 86.

At the request of SAISHIP's counsel, I issued a subpoena which was duly served on KATINDOY in Guam. After KATINDOY failed to appear at the hearing in Guam on the return day, SAISHIP's counsel made timely application to the United States District Court for enforcement of the subpoena pursuant to the Commission's Rules of Practice and Procedure. The United States District Court Judge granted the application and issued an order compelling obedience to the subpoena. However, despite diligent effort to effectuate service of that order, KATINDOY could not be located and the order was not served prior to the close of the hearing in Guam. (See 46 U.S.C. 826, 841a; 46 C.F.R. 502.131-136, 502.210(c)).

AFFILIATED/ASSOCIATED COMPANIES

Luzon Stevedoring Corporation (LUSTVECO):

Once, it claimed to be the largest and fastest growing cargo transport organization in the Pacific. Although not entirely clear on this record, LUSTVECO (or some of its assets and operations) appears to have been acquired by the Philippine Government or Philippine private interests.

China Pacific S.A. (CHIPAC S.A.):

May be the owner of the Tug *Terry M* chartered by Pacific Logistics S.A., as operator, to OCEANIA. See Ex. 16B.

Malayan Towage and Salvage Corporation (SALVTUG):

May be the owner of the Tug *Terry M*. See Ex. 97. Received OCEANIA and Asiatic Intermodal Seabridge S.A. voyage

reports from Atkins Kroll (Guam) Ltd. per written instructions from REYES, confirming previous oral instructions from ROBINSON and REYES. See Ex. 241. SALVTUG, which has the same Post Office Box as MARSHALL, serves as MARSHALL's communication center.

Transpac Marine S.A. (TRANSPAC):

Owner of the Barge TM-644, also sometimes known as TPM-644.

China-Pacific Intermodal, Ltd. (CHIPAC):

General Agent for Asiatic Intermodal Seabridge S.A., CHIPAC S.A., Pacific Logistics S.A., TRANSPAC and ISLNAVCO. Received OCEANIA and Asiatic Intermodal Seabridge S.A. freight collections from Atkins Kroll (Guam) Ltd. in its sundry account No. 241 032 at CITIBANK N.A., 8 Queens Road Central Hong Kong. CHIPAC is paying OCEANIA's legal fees for this case. Tr. 1777.

Asiatic Intermodal Seabridge S.A. (AIS):

A common carrier by water which operated the vessel *Endurance* in the trade between various Far Eastern Ports on the one hand and Guam and Saipan on the other. Official notice is taken that AIS ceased to be a common carrier subject to the Shipping Act, 1916, on July 14, 1980, when it canceled its tariffs—FMC Nos. 1 and 2.

Asia-Pacific Chartering Phil., Inc. (APC):

Little is known of this affiliate except that DIM communicates on its letterhead and it, too, has the same mailing address as DIM.

Pacific Logistics S.A. (PACLOG):

In the charter agreement for the Tug *Terry M* and the barge TM-644, PACLOG appears as the Operator and as Owner and is supposed to receive the charter payments but there is no credible evidence to show that it has ever received such payments. See Ex. 24 App. 56 App. 16. KATINDOY executed the charter for PACLOG.

Cabras Marine Corporation (CABTUG):

May own the Tug *Husky* and the Tug *Piti* which were substituted for the Tug *Terry M* to tow the TM-644. After GALLAGHER left Guam at the end of July 1977, CANDOLETA was hired and paid by CABTUG to try to collect freight charges due ISLNAVCO so those monies could be turned over to Atkins Kroll (Guam) Ltd. for remittance to CHIPAC, in accordance with ROBINSON/ REYES instructions.

OTHER COMPANIES

Atkins Kroll (Guam) Ltd. (AK or AKSHIP):

Guam agent for AIS and OCEANIA beginning about August 1, 1977. The manager of its steamship agency department in Guam is Godfrey G. Anderson.

International Tariff Services, Inc. (ITS):

A Washington, D.C., tariff filing and watching service. Under direction of HAP, filed tariffs for AIS, OCEANIA and ISL-NAVCO and watched SAISHIP tariff filings. Fees for those services paid by CHIPAC or AIS.

INTRODUCTION

In its answering brief, in a section entitled, NATURE AND BACKGROUND OF THE CASE, OCEANIA pictures this proceeding as "the outgrowth of a competitive struggle between two small common carriers by water in the trade between Guam on the one hand, and the NMI on the other." SAISHIP has a different view of the case. It contends that one of those two small common carriers, OCEANIA, is in the picture only because it provided MARSHALL with access to the NMI under local laws, applicable at the time the competing service commenced and, that, when the picture is placed in focus, it shows MARSHALL, through his control of the AFFILIATED/ASSOCIATED COMPANIES (one of which—AIS—is a water carrier), attempting to crush the other small common carrier, SAISHIP. The facts disclose that SAISHIP's perception of the case to be the more accurate.

FACTS ⁷

1. SAISHIP is an NMI corporation wholly owned, financed and controlled by NMI citizens.⁸ It has operated as a common carrier by water in the Guam/NMI trade since 1956 when the Commander of U.S. Naval Forces, Marianas, granted SAISHIP an exclusive franchise for carrier service between Guam and the Saipan District. Prior to 1974, the service was performed in SAISHIP's vessels. Since 1974, with the advent of containers SAISHIP has served this trade with a weekly tug and barge service. The vessels utilized are U.S.-built, U.S. flag vessels, chartered on commercial, market terms from a U.S. company.⁹

⁷ The findings of fact will not make reference to the record in each instance. As was the case in providing a sketch of the cast, citations to the record will be made mainly to highlight or to resolve disputed proposed findings of material or major factual issues. The numbered findings will follow the sequence used in the Opening and Answering Briefs. Any proposed findings not adopted under the heading of FACTS (including the preceding presentation of the cast) or in the Discussion which follows, have been rejected for reasons of accuracy, materiality, relevancy, etc.

⁸ Financed does not mean debt. SAISHIP owes money to the TT and to Pacific Far East Lines.

⁹ SAISHIP was able to reduce its charter hire by about \$1,000 per voyage after May 26, 1977, when, following negotiations with the vessel owner, SAISHIP was allowed a credit for bulk oil transported in the deep tank of its barge by the owner (Dilmar).

2. Before April 11, 1976, when the NMI was within the jurisdiction of the TT, the Guam/NMI trade was subject to provisions of the TT Code and to rules and practices of that government in which vessel entry assurances, issued by the TT government, were necessary for vessels to enter NMI and other TT ports.

3. In addition, under the TT Code, restrictions, designed to protect and encourage local enterprises, were placed on non-TT citizens seeking to do business there. Upon the creation of the NMI as a separate governmental structure, laws of the TT continued to apply until modifications were made by the NMI government.

4. TT and NMI controls on foreign investments and doing business resulted in a system of vessel entry assurances or permits. In practice this system involved a public convenience and necessity or franchise-type approach to vessel entry, designed to encourage and protect local enterprises and also designed to assure adequacy and continuity of service in trades with one-way (inbound) cargo movements and paucity of cargoes.

5. The NMI government continued to apply the TT entry assurance permit system for vessel entry to NMI ports, and, as late as July 13, 1978, itself promulgated an administrative order requiring all vessels entering NMI ports to have entry assurances. Regardless of whether the NMI government had power after "eleven o'clock on the morning of January 9, 1978, Northern Marianas local time"¹⁰ to so require, it asserted the power and the parties to this proceeding continued to operate under such entry assurances through at least October 1978. OCEANIA and AIS and its affiliates believed, as late as the autumn of 1978, that entry assurances from the NMI government were required.

6. In the late 1960's, in the hope of assuring adequate service to TT ports, the TT government granted an exclusive franchise to a company ultimately known as Transpacific Lines, Inc. (Transpacific), to serve TT ports. However, SAISHIP's existing service between Guam and Saipan, authorized by the earlier Navy Department franchise, was treated as an exception, and SAISHIP was permitted to continue this operation.

7. Upon the collapse of Transpacific and its service in 1974, SAISHIP, at the TT government's request, commenced a service with chartered vessels from Far East ports to TT ports. At about the same time SAISHIP switched its Guam/NMI service from self-propelled vessels to chartered tugs and barges. SAISHIP advanced monies to the TT government to put a vessel into the Far East/TT service. This service did not prosper, and SAISHIP suffered substantial losses therein with the result that as of the end of 1976, SAISHIP owed the TT

¹⁰ See Order cited in n. 5, *supra*.

government substantial sums of money. This fact was known to OCEANIA and to others familiar with the shipping business in the area.

8. As a result of losses in the Far East trade, SAISHIP's continued existence, in late 1976 and during 1977, was particularly vulnerable to diversion of cargoes and revenues or to any action by the TT government insisting upon immediate repayment of SAISHIP's debt. Accordingly, between late 1976 and the autumn of 1977, to avoid the aspect of this financial vulnerability, SAISHIP engaged in negotiations with the TT government for a long-term payback schedule which would not destroy SAISHIP in the process of repaying this debt. These negotiations resulted in an arrangement for SAISHIP to make interest free payments of its \$239,000.00 indebtedness by making a down payment of \$20,000.00 and monthly payments of \$2,000.00, thereafter.

9. SAISHIP's vulnerable financial situation is explained in a letter of March 8, 1977, from an official of the TT government to SCREEN which, among other things, referred to SAISHIP's debt to the TT and SAISHIP's ability to repay it. By the time this letter was sent, the proposed new service, advertised in the names of ISLNAVCO and OCEANIA, between Guam and the NMI had been announced. In the letter, which predated the payback arrangement referred to in No. 8, above, TT expressed concern that the competition offered by OCEANIA's proposed barge service to Saipan might drain off too much of the revenue needed by SAISHIP to cover the costs of its barge operation because the TT believed that the cargo then moving between Guam and Saipan could not sustain two barges. SAISHIP had had a profit in the trade in 1976 but suffered a loss in 1977.

10. The Guam/NMI trade is largely a one-way trade with about 95% of the cargo moving from Guam to the NMI. Most cargo revenues are received on Guam, and most of this cargo is cargo arriving at Guam from U.S. and foreign ports for transshipment to the NMI. Since the advent of containers and regular arrivals of container ships from the United States, a weekly (2-3 day, turnaround) barge service is required in the trade to meet the needs of NMI consignees. At the same time, only a limited amount of one-way cargo is available. SAISHIP estimated that in 1977, at then prevailing rates, there were less than 1 million dollars per annum in total cargo revenues available in the trade. The NMI have a total population of only about 16,000-17,000. Its economy is essentially subsistence and government supported. (Ex. 2, pp. 9-12.) SAISHIP at all relevant times ¹¹ had capacity to carry all the cargo in

¹¹OCEANIA objects to the use of the phrase "at all relevant times" since, it believes, relevant times are an ultimate issue in this proceeding. Answering Brief, p. 8 n. 5. Thus, this constitutes the finding that as relevant to the conclusion and order which follow, SAISHIP had the capacity to carry all the cargo in the trade on a schedule of one trip per week. Given the needs of all shippers to get their goods to market efficiently, there has been no satisfactory showing, including the testimony of Kenneth D. Jones, Jr., a shipper, that a more frequent schedule was essential or even desirable.

the trade, and until April of 1977 had carried nearly all of it. (Ex. 2 pp. 9-12, Tr. 418.) Forty to fifty percent of the total cargo moving in the trade is for companies affiliated with JOETEN.

11. SAISHIP's charter hire obligations to Dilmar and its ratio of fixed to variable costs meant that, at the level of cargo moving in the trade during 1977, a diversion of 50% of the cargo in the trade as a result of a competitive service would throw SAISHIP into a loss position in that trade. SCREEN's testimony shows, by way of example, that based upon an estimated gross annual trade revenue of \$895,000 for 1977, SAISHIP's weekly barge service would lose \$2,622.97 per voyage if it carried only 50% of the cargo in the trade. (Ex. 2, p. 14.) From June 2, 1977, forward, however, SAISHIP also received \$1,000 per voyage from the vessel owners as a credit against charter hire for permitting the owners to bring bulk oil to Saipan in the barges' deep tanks.¹² The charter hire used by SAISHIP in the example was an average of actual per voyage charter hire (including demurrage) for 1977. An analysis based on the months after June 1977 would therefore reduce the per voyage loss shown in SCREEN's example.

12. OCEANIA is a common carrier by water in the Guam/NMI trade and, admittedly, it has been one since at least April 5, 1977. (Ex. 2-24 shows OCEANIA solicited cargo in the trade as early as March 2, 1977.) OCEANIA has few assets, and its share-holders have a capital investment of \$13,000 in the company. OCEANIA has not owned vessels and, other than the tug and barge, has not chartered vessels on a time or voyage basis,¹³ although it purports to have engaged in oral space chartering on the AIS' vessel *Endurance*, with the amount of space "chartered" varying with the amount of cargo available. Nevertheless, this vessel entered TT and/or NMI ports under OCEANIA's entry assurance which authorizes entry for vessels owned, operated or chartered by OCEANIA.

13. Shortly after its incorporation, on January 12, 1976, OCEANIA proposed to inaugurate a shipping service from Australia and the Solomon Islands to the TT. On January 16, 1976, the TT sent a letter to OCEANIA denying its request for an entry assurance. On an unspecified date thereafter, OCEANIA did obtain the requisite entry assurance and from July 1976 until April 1977 OCEANIA participated in a joint service with DAIWA Line to provide service between Australia and the TT. The agreement called for OCEANIA to have a 5% share in the profits or losses. The bills of lading which they issued were imprint-

¹² The arrangement between SAISHIP and Dilmar for the \$1,000 credit was entered into on August 5, 1977, and was made retroactive to June 2, 1977.

¹³ Ex. 24 App. 7 is a Master Time Charter between OCEANIA and PACLOG for the tug *Terry M* and the barge TPM-644. This agreement expired on or about April 4, 1978. Therefore, OCEANIA is on a voyage to voyage basis with the owners, or "on severance," since the time of expiry. Tr. 2214.

ed with the DAIWA name and had a typewritten reference to OCEANIA. See Exs. 146, 153. Nevertheless, with the full advance knowledge and approval of ROBINSON, the service's Australian agent published advertisements depicting the service solely as an OCEANIA service to Guam and TT ports, including Saipan. Ex. 63, Tr. 1243-44, 1485-89.

14. ISLNAVCO did not answer the complaint herein and hence has admitted all allegations in the complaint as to it, e.g.—that it operated during 1977 as a common carrier by water under an unapproved section 15 agreement with OCEANIA, which agreement injured complainant.¹⁴ ISLNAVCO was incorporated almost three months after the incorporation on Guam of CABTUG. ISLNAVCO performed steamship agency services at the port of Agana, Guam (Tr. 2606) and was appointed the first Guam agent for AIS. AIS commenced service to Guam at about the time ISLNAVCO was incorporated. There was no evidence of record that ISLNAVCO has ever been dissolved or otherwise terminated as a corporation. (See Tr. 350, 790, 2608.) There is evidence that CANDOLETA, its post-July, 1977 President,¹⁵ while on the payroll of CABTUG, solely for the purpose of collecting ISLNAVCO's pre-August, 1977 receivables, assisted AKSHIP in AKSHIP's attempt to collect those receivables, at least as late as the end of 1977. (Tr. 1828, 2603-2605, 2516, 2589.)

15. In January 1977, ISLNAVCO's "General Agent" was CHIPAC. There is no evidence to show that this relationship was terminated at any time prior to the close of the hearing.¹⁶ The first tariff "information circular" (FMC Form-9) which ISLNAVCO caused to be filed with the Commission was dated January 28, 1977. The "information circular" was signed by HAP as managing director of CHIPAC. The only address for ISLNAVCO which appears on that form is CHIPAC's

¹⁴ I ruled at the prehearing conference (P.H. Tr. 12) that those admissions might be used against ISLNAVCO, but would not be binding upon OCEANIA. This ruling, of course, did not mean that OCEANIA would be insulated from proof of the allegations against it if sustained by independent evidence.

¹⁵ Until the departure of GALLAGHER at the end of July 1977, an event which made ISLNAVCO virtually defunct, CANDOLETA was ISLNAVCO's operational manager. OCEANIA would attempt to cast some doubt on CANDOLETA's accession to the presidency in brief (Answering Brief, p. 13) just as it did at the hearing (Tr. 2641-44). However, I adhere to the ruling I made at the hearing, based upon CANDOLETA's testimony and demeanor, that without regard to his willingness or sophistication, he knew he had held himself out to be president and he knew that his presidency has never been terminated (Tr. 2603-4). The holding out particularly related to his efforts to collect ISLNAVCO's receivables for AKSHIP.

¹⁶ OCEANIA contests a proposed finding of SAISHIP which speculates that CHIPAC may still be ISLNAVCO's general agent, citing Ex. 2 App. 43, an "information circular" filed by ISLNAVCO on July 18, 1977. This document shows ISLNAVCO's Guam address and makes no new reference to CHIPAC but does not state that CHIPAC's general agency, set forth in ISLNAVCO's first "information circular," was ended. CHIPAC's PATTERSON continued to represent ISLNAVCO in dealings with the Commission's staff after July 18, 1977.

Hong Kong street address.¹⁷ See Ex. 2 App. 11. A document entitled Power of Attorney, bearing a blank date for February 1977 and signed by GALLAGHER, gave ITS a power of attorney to file tariffs in the name of ISLNAVCO. There, again, the only address shown for ISLNAVCO is c/o CHIPAC in Hong Kong. The Power of Attorney was mailed to ITS by HAP, by letter dated January 31, 1977. That letter also states that there is enclosed a CHIPAC "cheque" for "\$400 as advance payment for the cost of preparation and filing" of a tariff, also enclosed, on behalf of ISLNAVCO.

16. AIS' "General Agent," at least since October 7, 1976, was CHIPAC. This fact appears in the FMC Form-9 which AIS caused to be filed with the Commission by HAP, its president, when AIS was preparing to inaugurate a service from Far East Ports to Guam. That form also shows ISLNAVCO as its Guam agent and Trans Trans as its U.S.A. agent. (Ex. 2 App. 13.) When AIS began its service to Saipan in 1977, either directly to Saipan from foreign ports or with a prior call at Guam, OCEANIA was its agent at Saipan. (Ex. 90).¹⁸ Like ISLNAVCO, AIS gave ITS its tariff power of attorney. On that document AIS gave its address as c/o CHIPAC in Hong Kong. (Ex. 2 App. 13-A.)

17. Pursuant to that "General Agency," and the specific written instructions of REYES, AIS' service vessel revenues at Guam,¹⁹ net of local port expense, were paid directly into CHIPAC's bank account by AKSHIP from about August 1977 through about September 1978 when the AIS/AKSHIP agency was terminated and a new AIS agent was appointed.

18. As already seen, AIS and ISLNAVCO were represented by the same San Francisco agent—Trans Trans—during 1977. On September 15, 1977, DIM, using his personal letterhead, wrote a personal and business letter to Werner Lewald, the president of Trans Trans. The business portion concerned the "Guam/Saipan (OCEANIA LINES) operations." The business portion assumed that Mr. Lewald was familiar with those operations, but to make certain, MARSHALL enclosed a

¹⁷ Transpacific Transportation Company of San Francisco, California, (Trans Trans) is named as ISLNAVCO's "USA Agents" on the first Form FMC-9.

¹⁸ OCEANIA objected to the proposed finding of SAISHIP which stated that AIS served Saipan as a common carrier because the record reference utilized by SAISHIP for that finding "does not support that AIS serviced Saipan as a common carrier prior to 1978." Insofar as the record reference is concerned, OCEANIA is correct. Unfortunately, and despite what charitably may be termed as equivocal testimony of ROBINSON to the contrary, the evidence of record convincingly shows that AIS served Saipan since 1977 and that OCEANIA was AIS' agent in Saipan. See, e.g., Exs. 36, 90.

¹⁹ AIS' first FMC tariff to Guam became effective on November 13, 1976. This service involved cargo transported from Australia to Manila by another carrier under an arrangement whereby the cargo was transhipped via AIS vessels to Guam. AIS vessels also carried cargo from Taiwan and Hong Kong to Guam.

copy of a letter GALLAGHER sent on March 16, 1977.²⁰ MARSHALL also assumed that Mr. Lewald was aware that GALLAGHER "has departed Guam and his INCO operation is closed" and that AKSHIP was appointed a successor agent. MARSHALL informed Mr. Lewald that the subject operation had a problem with cargo originating at United States West Coast Ports, as mentioned in his letter of even date to Mr. Anderson of AKSHIP, which was also enclosed. MARSHALL's letter to AKSHIP contained, minimally, a suggestion that Mr. Anderson write to and request some assistance from Mr. Lewald in the solicitation of cargo for OCEANIA because MARSHALL concluded the business portion of the letter, saying that, after the AKSHIP letter to Trans Trans is written, "I'd greatly appreciate receiving your usual 'can do' support and, OCEANIA will naturally accept whatever charges you propose to cover your West Coast 'hustling.'" Copies of the MARSHALL letter were sent to Mr. Anderson, ROBINSON, KATINDOY, REYES and HAP.

19. On November 29, 1976, OCEANIA applied to the NMI government for another vessel entry assurance for vessels owned, operated or chartered by OCEANIA, a "Mariana based company, owned solely by Mariana citizens" (Ex. 2 App. 19), for service to, from and within the NMI from Hong Kong, Kaohsiung, Manila and Guam. At that time OCEANIA neither owned, operated nor chartered any vessel operating a service over the described route (the joint OCEANIA/DAIWA service did not follow that route). On November 30, 1976, the requested entry assurance was granted. Although no reference was made in the application to a barge service between Guam/Saipan, the general terms of the approval covered that service, as well as the service represented in the application.

The application specified that OCEANIA proposed a direct service involving three conventional vessels beginning in January 1977. OCEANIA represented that two of those vessels were then in operation on that route, excluding Saipan. OCEANIA represented that the third vessel would be added on the inclusion of Saipan "and will offer consignees a frequency of service which they have never previously enjoyed."

From that application and from such additional evidence showing that: the route described in the application (except for Saipan) was then being served by AIS; that ISLNAVCO was AIS' agent in Guam; ROBINSON and GALLAGHER had engaged in discussions about a Guam/Saipan service over the latter half of 1976; that in the latter part of November 1976, MARSHALL was brought into those discussions; that in January of 1977 GALLAGHER and ROBINSON made plans

²⁰ MARSHALL inferred that this letter was sent by GALLAGHER to Mr. Lewald. MARSHALL's possession of the letter is not explained.

for a call at Saipan by the AIS vessel *Endurance* in February 1977;²¹ and because the AIS vessel *Endurance* did, in fact, call at Saipan in 1977 under OCEANIA's entry assurance, it is fair to find, as a fact, that prior to the end of November 1976, it had been agreed by OCEANIA, ISLNAVCO and AIS, among other things, that an AIS vessel call at Saipan would be protected by OCEANIA's entry assurance. See, also, Exs. 160, 161 and 162 showing, among other things, that this agreement, as refined, was reached during January 1977 meetings, arranged by MARSHALL, and attended by PATTERSON, GALLAGHER, ROBINSON and others (see text, No. 22, *infra*) and that HAP was balking at some of the arrangements but he finally agreed (in accordance with MARSHALL's views) to go ahead, reserving the right to have AIS *Endurance* cargo transshipped "via TM-644 at no additional freight cost to shippers. . . ."

20. During the latter part of November and during December 1976, ROBINSON (OCEANIA) and GALLAGHER (ISLNAVCO) negotiated with MARSHALL and with CABTUG²² to obtain a tug and barge for a new common carrier barge service between Guam and Saipan. The tugs to be used were to be provided by CABTUG.²³ The barge was to be foreign built and registered. It was to be purchased by TRANSPAC, chartered to PACLOG and subchartered to OCEANIA along with a CABTUG tug. Among other things, Ex. 29 confirmed ISLNAVCO's involvement in the agreement as a condition of the deal.

²¹ GALLAGHER's letter of January 26, 1977, to ROBINSON (Ex. 68) reads:

Reference is made to your cable of January 25th, and accordingly we've enclosed our brochures with the overseas agents addresses for your solicitation purposes. . . . We'll publish a joint Inco/Oceania flyer in March and advertise Saipan calls in the Pacific Daily News as well. For your guidance, the *Endurance* voyage I will commence loading Manila February 7th, then Hong Kong ETA 11th, then Kaohsiung ETA 15th, then Guam ETA 22nd then, Saipan ETA 24th. This should give you good lead time for soliciting. Do you have a copy of our *Far East tariff*? Please keep us advised as bookings develop and let us know if you need any assistance. [Emphasis supplied.]

Inasmuch as AIS was the only one of the three companies (OCEANIA, INCO and AIS) to have a Far East tariff at that time, it is manifest that this was a reference to an AIS, and not an OCEANIA, operation.

²² Curiously in response to SAISHIP's proposed finding No. 20, OCEANIA disputes the proposed finding that CABTUG participated in the negotiations. Yet, it does not dispute, in fact, it confirms Saiship's statement, in the latter's proposed finding No. 21, that CABTUG participated in the discussions. See Tr. 1087, testimony of ROBINSON, in which he said that CABTUG "had been a party to the discussions all the way through." CABTUG, however, was not a party to the agreement for the charter of the equipment (tugs and barge). See Ex. 29. Ex. 29 is a letter, previously referred to in the sketch of MARSHALL, written on January 10, 1977, from ROBINSON to MARSHALL, with a copy to GALLAGHER. There was no provision made for a copy of the letter to be sent to CABTUG or KATINDOY. In stating that CABTUG participated in the discussions, ROBINSON did not show that it participated through KATINDOY. It is evident that CABTUG's participation derived from MARSHALL, directly, or, through GALLAGHER, indirectly.

²³ ROBINSON testified, ". . . it was agreed that [CABTUG] would charter direct from [PACLOG] tugs to be provided in the interim until such time as the PITI became available." Tr. 1087. The *Piti* was a former U.S. Navy tug rehabilitated in the Philippines. The *Terry M.*, the first tug used, was registered in Panama. There is no clear cut evidence of registry of the *Husky* or *Piti*. Hahn testified that neither of the two were U.S. bottoms and that the crew of the *Piti* was not a U.S. crew.

The letter was addressed to MARSHALL as president of TRANSPAC at the same Manila Post Office Box number used by MARSHALL, AIS, SALVTUG and some other AFFILIATED/ASSOCIATED COMPANIES. MARSHALL arranged for PACLOG, in Singapore, to purchase the barge on behalf of TRANSPAC in late December, 1976, or early January, 1977, and the contract was signed with the builders on January 10, 1977, after MARSHALL made the decision to meet the builder's purchase price demands.

21. The broad outlines of the four basic terms and conditions of the OCEANIA agreement with ISLNAVCO and MARSHALL concerning the Guam/NMI tug and barge operation are covered in ROBINSON's letter of January 10, 1977 (Ex. 29). The letter confirmed the prior discussions with MARSHALL "regarding the viability of a new tug and barge service." It also confirmed that CABTUG would provide the tug(s).²⁴ Another of those basic terms provided for ISLNAVCO to be appointed "operational agents for the service." ROBINSON acknowledged that ISLNAVCO's participation, as operator, to "provide management and operational services" (Ex. 2 App. 56 App. 15) was a sine qua non for OCEANIA obtaining the tug and barge under charter. See, e.g., Exs. 24 p. 6, 2 App. 16, Tr. 1143-44, 158384, 1613, 1857-58, 1879.

22. During the third week in January 1977, GALLAGHER and ROBINSON traveled to Manila to discuss the proposed new barge service with MARSHALL and to negotiate the final terms. (While not entirely clear this appears to have been the first time that ROBINSON and MARSHALL saw each other.) Thereafter the three of them traveled to Singapore to inspect the new barge and then went to Hong Kong to discuss with HAP of CHIPAC/AIS a proposed AIS shuttle service from Manila to Guam in conjunction with an Australian carrier bringing Australian cargo as far as Manila. In connection with that visit to Hong Kong, MARSHALL directed GALLAGHER to carry with him ISLNAVCO's recapitulation of AIS' accounts for reconciliation.

23. The OCEANIA/ISLNAVCO contract (Ex. 2 App. 56 App. 15)²⁵ was executed January 24, 1977, but was prepared earlier and dated January 14, 1977. Much later on, after a Commission staff inquiry generated by a letter of complaint from SAISHIP, this document was ultimately transmitted to the Commission for filing by letter sent by GALLAGHER on ISLNAVCO's letterhead, on July 5, 1977. The

²⁴ It is worthwhile noting that even though the discussions that led up to the agreement and Ex. 29, itself, contemplated that CABTUG would furnish its own tug, *Piti*, to tow the barge, it was never intended that charter hire payments for the tug would be paid to CABTUG. Tr. 1086-91. When testifying in San Francisco, ROBINSON said that charter hire payments for the tug were sent to PACLOG. In fact, as previously found the payments went to CHIPAC's numbered sundry account.

²⁵ Ex. 2 App. 56 App. 15 is identical to Ex. 2 App. 16.

letter was drafted by ROBINSON. The agreement was assigned FMC Agreement No. 10306.

24. Agreement 10306, however, was never formally acted upon by the Commission, as the parties withdrew it²⁶ by ISLNAVCO letter dated July 29, 1977 (Ex. 2-15). This letter was actually signed and dispatched from Guam on August 2, 1979. The text of the letter was suggested by ITS. Agreement 10306, which contains a reference to PACLOG, but not AIS, is between two parties—OCEANIA and ISLNAVCO. OCEANIA is denominated the "Charterer" and ISLNAVCO is called the "Operator." It recites that OCEANIA had undertaken to charter vessels from PACLOG on condition that OCEANIA appoint ISLNAVCO as "Operator to manage such charters on behalf of the Charterer." The importance of OCEANIA's NMI entry assurance in this undertaking is stressed by OCEANIA's affirmation in the first clause, that it is the holder of an NMI entry assurance which is appended as the only attachment to Agreement 10306. OCEANIA undertook to perform customary ship agency functions in the NMI for the service. ISLNAVCO as "Operator" agreed to do the same in Guam. ISLNAVCO was entitled to standard fees of 5% of outbound freight revenues and 2-½% of inbound freight revenues plus a minimum fee of \$400.00 per vessel call as remuneration for agency functions performed at Guam. OCEANIA could charge the same standard fees plus the same minimum against the income of the service for agency functions performed at Saipan, but, at Tinian and Rota, OCEANIA was limited to the percentage fees without a minimum. Agreement 10306 stated that OCEANIA would provide ISLNAVCO with "a prompt and complete accounting of all disbursements and collections, made or received by" OCEANIA on the voyages performed. ISLNAVCO agreed to provide "operational management" for the voyage.

25. Agreement 10306 did not expressly state whether OCEANIA, as "Charterer," ISLNAVCO, as "Operator," or both were to hold out to the public as common carriers in the trade. It did provide that the management and operational services would be performed by ISLNAVCO for the chartered vessels on behalf of OCEANIA. The management to be provided included tariff preparation and filing, providing bills of lading and manifests, receiving and paying cargo claims (upon the charterer's approval), preparation of voyage accounts, making arrangements for insurance and performing other customary carrier management functions. Each entity agreed to make its books and documents relevant to the service available to the other upon request. The

²⁶ OCEANIA desires to substitute the words "it was withdrawn" for the words "the parties withdrew it" on the grounds that "Reference to the parties is ambiguous," without further explanation. In fact, both parties to the agreement wanted it withdrawn. The letter was signed by CANDOLETA, as Operations Manager, "by order of Peter R. Gallagher President."

agreement closed with a provision that ISLNAVCO would receive 40% of annual net profits in return for the management services performed. The agreement made no mention of losses.

26. Agreement 10306 referred to OCEANIA's undertaking to charter vessels from PACLOG. Remembering that Agreement 10306 was prepared for signatures not later than January 14, 1977, and recalling, too, that ROBINSON did not meet with MARSHALL to negotiate the final terms of the charter until the third week in January, 1977, it is clear that the undertaking referred to was the one contained in ROBINSON's letter to MARSHALL, as President of TRANSPAC, dated January 10, 1977. (Ex. 29) That letter contemplated provision of a barge by TRANSPAC and tugs by CABTUG and said nothing about PACLOG. Of course, GALLAGHER knew about PACLOG's involvement in negotiations for the barge on behalf of TRANSPAC because he was one of the distributees of a December 31, 1976, telecommunication from PACLOG to DIM asking DIM to make the decision whether to accept the purchase price demands made by the builder of the barge TM-644. Other distributees were REYES, KATINDOY and HAP. Ex. 65.

In part, the undertaking by OCEANIA resulted in a "MASTER TIME CHARTER" agreement between OCEANIA and PACLOG. The agreement was dated March 5, 1977, and was signed by an official of OCEANIA and by KATINDOY of CABTUG for PACLOG. This charter covered only the barge TM-644 and the tug *Terry M*, the latter vessel being owned either by CHIPAC S.A. or by SALVTUG, and managed either by TRANSPAC or SALVTUG.²⁷ The charter party designated PACLOG as "operators," the same term used to describe ISLNAVCO in Agreement 10306. The MASTER TIME CHARTER provided for a charter hire rate of \$3,200.00 per 3-day voyage plus \$200.00 per hour for demurrage. Charter hire payments were required to be made to PACLOG at the Hong Kong and Shanghai Bank in Singapore. It made no mention of either AIS or CHIPAC as the recipient of the charter hire payments. The agreement provided for a three-month moratorium on payment of charter hire, and was to be

²⁷ In response to SAISHIP's proposed finding No. 26, OCEANIA notes that there is no record citation given for the proposed finding that the *Terry M* is "managed" by TRANSPAC and SALVTUG, yet it agrees with this proposed finding. Nevertheless, it deems yet another of SAISHIP's proposed findings—No. 53—so unsupported and argumentative that it cannot be corrected. (SAISHIP's proposed finding No. 53, among other things, reiterates some of this data, relying primarily upon Lloyds Register of Ships and Lloyds List of Shipowners for 1979-1980.) Although OCEANIA does not dispute that CHIPAC S.A. is the owner, there is other evidence of record to show that SALVTUG may be the owner of that vessel. See Ex. 97, Tr. 16631666. It really does not matter whether CHIPAC S.A. or SALVTUG is the owner or whether TRANSPAC or SALVTUG is the manager of the *Terry M*. This blurring of corporate distinction between the AFFILIATED/ASSOCIATED COMPANIES throughout the record does matter, for it shows that they are managed and controlled in a common interest by MARSHALL.

effective for one year, provided that if any portion of the charter hire were to be in arrears for 30 days, PACLOG could withdraw the vessels from the service. It provided that OCEANIA would be billed by PACLOG for insurance premiums on the vessel. The agreement also provided for termination of the charter by PACLOG in the event of its breach by OCEANIA.

27. As described more fully at finding No. 15, *supra*, by letter dated January 31, 1977, seven days after the execution of Agreement 10306, HAP/CHIPAC, in Hong Kong, sent ITS, in Washington, an ISLNAVCO tariff to be filed with the Commission and an ISLNAVCO power of attorney authorizing ITS to file tariffs for ISLNAVCO.

According to ROBINSON, the filing of a tariff for the Guam/Saipan service in the name of ISLNAVCO occurred without OCEANIA's prior knowledge and this position is consistent with OCEANIA's claim, in this proceeding, that it had decided to file an FMC tariff in its own name during February 1977. ROBINSON stated that he was surprised, later on, to learn that ISLNAVCO had not acted in accordance with OCEANIA's decision. Yet when ROBINSON learned of the ISLNAVCO filing of the tariff, ROBINSON admits that he did nothing to correct the alleged mistake. ROBINSON's knowledge of the existence of the ISLNAVCO tariff came about not later than the end of February 1977. On April 14, 1977, GALLAGHER was testifying in a court case brought by SAISHIP against OCEANIA, ISLNAVCO and others in a TT court, sitting in Saipan. In preparation for that trial ROBINSON attached a piece of OCEANIA stationery to the front of a copy of ISLNAVCO's tariff to make it appear to the TT that OCEANIA was the only carrier. However, ROBINSON let stand the holding out that OCEANIA was participating in ISLNAVCO's tariff by either adding or leaving unaltered the words "Islnavco Oceania Barge Service Tariff." That document was made an exhibit in the court case.

28. In February, 1977 ISLNAVCO and OCEANIA began circulating a draft of the ISLNAVCO tariff to shippers and connecting carriers, such as United States Lines, soliciting cargo in the trade. However, in Saipan, OCEANIA furnished a copy of the tariff with an OCEANIA letterhead attached thereto. ISLNAVCO entered into connecting and equipment interchange agreements for the Guam/Saipan service with United States Lines and Matson Navigation Company which were filed with the Commission during March, 1977 by United States Lines and Matson, respectively. Neither of those agreements nor anything else in those filings made mention of OCEANIA. ISLNAVCO authorized United States Lines to justify the section 15 agreement by representing that ISLNAVCO was a common carrier in the trade.

29. In February and March, 1977, as ISLNAVCO and OCEANIA were preparing to begin the contemplated tug and barge service between Guam and Saipan, ISLNAVCO was taking steps to promote an

inbound AIS service to Guam, and OCEANIA was doing the same with respect to an inbound AIS service to Saipan, aboard the AIS vessel *Endurance*. See n. 21, *supra*; Exs. 181 and 205. The call at Saipan was to be covered by OCEANIA's entry assurance.²⁸

30. An ISLNAVCO letter (Ex. 2 App. 9), signed by GALLAGHER, to ITS, dated February 21, 1977, referred to the ISLNAVCO tariff filed by ISLNAVCO's Hong Kong agent, AIS,²⁹ and asked ITS to advise the Commission that OCEANIA "may participate in the use of this tariff." ISLNAVCO also asked that ITS advise AIS in Hong Kong directly when the Commission had approved such joint use of a single tariff. ITS claimed (no one from ITS testified) it never received this letter. Although ROBINSON later expressed doubts that ISLNAVCO ever sent it, he continued to rely upon its contents as late as July, 1977, in making representations to the Commission and to the NMI government. (Exs. 2 App. 39, 2 App. 18; Ex. 24 pp. 16, 17 and Ex. 26.)³⁰

31. During late February and March, 1977, ISLNAVCO and OCEANIA commenced promoting the Guam/Saipan barge service. A promotional flier distributed to shippers and consignees advertised the service as "Island Navigation/Oceania Line," from which it is reasonable to infer³¹ a joint service was being offered by the two parties. In early March, OCEANIA wrote additional promotional letters to consignees representing itself as the common carrier for both the *Endurance* and the barge services. ISLNAVCO sought cargo on Guam from

²⁸ OCEANIA proposes a finding that ISLNAVCO and OCEANIA, each, were promoting the *Endurance* as its own, and not an AIS, service. Ex. 205 is a brochure advertising an ISLNAVCO service, showing AIS as its Hong Kong agent. But it is the same brochure mentioned in Ex. 68. As seen, the service was an AIS service. Although ROBINSON did testify that he was promoting the *Endurance* as an OCEANIA operation and that OCEANIA's participation was under an oral space charter, that testimony conflicts with other testimony given by ROBINSON and does not stand up against more reliable evidence to the contrary. Documentary evidence shows that from the outset, as between AIS and OCEANIA, OCEANIA was AIS' agent at Saipan and not a space charterer. See, e.g., Exs. 36 and 90 referred to in n. 18, *supra*, and although those documents speak of a time period a few months later, Ex. 68 clearly shows that the agency goes back to January/February 1977. See, also, text, *infra*, No. 46.

²⁹ In this letter GALLAGHER recognized no distinction between AIS and CHIPAC, the general agent shown on ISLNAVCO's tariff power of attorney and on form FMC-9.

³⁰ Confronted by ROBINSON's reliance upon Ex. 2 App. 9 and its effect upon his credibility, OCEANIA tries to give the impression that ROBINSON had no doubts that GALLAGHER mailed Ex. 2 App. 9 until he prepared his testimony for this proceeding in November, 1978. (ROBINSON relied upon Ex. 2 App. 9 through July 1977 in: (a) Ex. 2 App. 18—the letter ROBINSON drafted for ISLNAVCO, dated July 5, 1977, and sent to the Commission; (b) Ex. 26—a July 20, 1977, letter from ROBINSON to ITS; (c) Ex. 148—a chronology prepared by ROBINSON some time after July 14, 1977, for ITS use in dealing with the Commission; and (d) Ex. 2 App. 39—a letter dated June 9, 1977, from ROBINSON to the NMI government.) However, OCEANIA's proposal suffers because ROBINSON testified to the contrary, claiming he had reservations about GALLAGHER sending Ex. 2 App. 9 as early as June 27, 1977. Tr. 1005-1006.

³¹ OCEANIA opposed SAISHIP's proposed finding characterizing the advertising as indicating a joint service, as argumentative and conclusory. OCEANIA proffers no other meaning to be derived from the described promotional material.

shippers and connecting carriers, using a draft of the ISLNAVCO tariff for promotional material.

32. The first week of April, 1977, marked the beginning of the new Guam/Saipan barge service by ISLNAVCO/OCEANIA. After the first voyage, public allegations of respondents' violations of NMI entry assurance requirements and of the Shipping Act, 1916, surfaced. This was a quite natural consequence flowing from the shipping documents used in the new service. In the beginning, OCEANIA had no bills of lading or manifests in its own name even though it had obtained its entry assurance for the service in November, 1976. Thus, on the first voyage, the bills of lading were issued in the name of ISLNAVCO and the barge manifests bore the name of AIS. Therefore, unless a shipper or consignee had seen particular promotional advertising, of the kind referred to in No. 31, above, holding out either an ISLNAVCO/OCEANIA service or an OCEANIA service, it is difficult to understand how a shipper or consignee could recognize that OCEANIA was providing a common carrier service.

33. Meantime, during late February and March, 1977, the new barge service had come to SAISHIP's attention. Since SAISHIP was aware that it was being conducted and advertised as ISLNAVCO on Guam, through circulation of ISLNAVCO's draft FMC tariff, SAISHIP protested at various times to the NMI government. When this was unavailing, SAISHIP brought an action under local law in the Trust Territory court against respondents, seeking injunctive relief against ISLNAVCO's operation of a service without an entry assurance. On April 14, 1977, a preliminary injunction was denied.

A partial transcript of the testimony before the Court is an exhibit in this case (Ex. 2 App. 28). According to that transcript GALLAGHER early on gave an affirmative answer to a question asking if OCEANIA and ISLNAVCO had joined "in any sort of joint venture or anything." Later on he described the arrangement ISLNAVCO had with OCEANIA as that of general agent at Guam, loading and soliciting cargo, etc.

It must be observed that GALLAGHER's testimony in the injunction proceeding is not particularly helpful to OCEANIA's cause in this proceeding even though he testified that ISLNAVCO was OCEANIA's agent at Guam. GALLAGHER's interest lay in establishing before the NMI court that OCEANIA was the carrier in the trade. GALLAGHER, a graduate of the United States Merchant Marine Academy with thirteen years in the shipping business, also maintained, among other things, that even though ISLNAVCO had filed a tariff in its own name with the Commission, issued bills of lading in its own name and was allowing OCEANIA to participate in its (ISLNAVCO's) tariff, that OCEANIA was the carrier because ISLNAVCO signed bills of lading as agent for an unnamed master.

34. After the first voyage of the barge service and the hearing before the TT court there were some changes made in the documentation for subsequent voyages, although those changes varied. Until the end of July, 1977, however, the ISLNAVCO bill of lading continued to be used in most instances. For voyages from Guam to Saipan, there was added, by rubber stamp, the words "OCEANIA LINE," above the ISLNAVCO imprint on bills of lading. For shipments from Saipan to Guam the bills of lading bore the statement "ON BEHALF OF OCEANIA LINE, INC," beside the ISLNAVCO imprint. Similarly, the manifests continued to be AIS manifests: from Guam to Saipan there was added the OCEANIA rubber stamp; from Saipan to Guam the stamp was omitted for a time; at Tinian an OCEANIA stamped manifest was used.

35. As a result of protests concerning tariff filing violations by OCEANIA and section 15 violations by both ISLNAVCO and OCEANIA, from SAISHIP to the Commission, several responsive letters were written by the Commission staff (on May 20, 1977, June 6, 1977 and June 29, 1977). The letter of May 20, 1977, was sent to SAISHIP with a copy to the NMI government, producing an inquiry from the Office of the Resident Commissioner to OCEANIA.

Upon learning of the May 20th letter, ROBINSON, on May 28, 1977, telexed ITS requesting that ITS make an "urgent filing same [ISLNAVCO] tariff, in OCEANIA name." However, the telex did not request that the ISLNAVCO tariff be amended or canceled.³² By letter dated June, 1977, the NMI government sent a formal inquiry to OCEANIA. On June 4, 1977, ROBINSON telexed GALLAGHER for information in order to respond to the inquiry. On June 9, 1977, ROBINSON responded stating that it was OCEANIA's earlier understanding that participation "in the use of a tariff filed by another carrier was permissible on giving notice of such participation" to the FMC and that ISLNAVCO, OCEANIA's managing agents, were instructed to arrange for that notification. ROBINSON attached a copy of the GALLAGHER/ISLNAVCO letter of February 21, 1977 (Ex. 2 App. 9) to ITS in support, as noted in No. 30, above.

Meanwhile, ITS, acting on OCEANIA's request, filed the OCEANIA tariff with the Commission on June 3, 1977, effective July 3, 1977. ROBINSON's response of June 9, 1977, informed the NMI of this.

On June 21, 1977, the NMI government suspended OCEANIA's entry assurance, pending the effective date of the OCEANIA tariff. This temporary halt to the barge operation until July 3, 1977, brought

³² When ISLNAVCO's tariff later was canceled, in July, 1977, it was done after GALLAGHER instructed ITS to do so after GALLAGHER was instructed by ROBINSON to do so, after HAP advised ROBINSON to have GALLAGHER do so after the entire sequence was set in motion by ITS' advice.

to an end OCEANIA's violation of section 18 of the Shipping Act, 1916, arising from the absence of an OCEANIA tariff.

36. Although the June 21, 1977, NMI suspension of OCEANIA's entry assurance was based upon the absence of an effective OCEANIA tariff, the Attorney General of NMI had given the opinion that the OCEANIA/ISLNAVCO relationship was also subject to section 15 of the Shipping Act, 1916. An article referring to this opinion appeared in the local press on July 14, 1977, again raising the possibility that the OCEANIA entry assurance would be suspended. As a result of that article, ROBINSON met with the Resident Commissioner and Attorney General of the NMI on July 18, 1977. He disputed that there was any current violation of section 15. Following the meeting ROBINSON wrote a letter of even date to the Resident Commissioner, stating:

Whilst such an opinion may have been valid prior to an approval by the FMC of Oceania Line tariff number 1, the approval and implementation of that tariff as of July 3, 1977 removed the need for a section 15 agreement between the two companies.

In the letter ROBINSON contended that as of July 3, 1977, ISLNAVCO was not a person subject to the Shipping Act (no reference was made to ISLNAVCO's tariff and section 15 agreements with United States Lines and Matson, all of which remained in effect). He stated that the earlier mistake of tariff filing had been corrected and that OCEANIA was now acting as a common carrier and ISLNAVCO was acting as OCEANIA's agent in Guam.

However, the bills of lading issued during July 1977 continued to be ISLNAVCO bills of lading, with OCEANIA rubber stamped thereon, additionally, and manifests continued to be AIS manifests, with an OCEANIA stamp on Guam origin cargo but without that stamp or any other on Saipan origin cargo. There is no evidence that a voyage schedule issued on ISLNAVCO stationery (without any mention of OCEANIA),³³ holding out the scheduled voyages from June 27, 1977 through July 28, 1977, was either canceled or recalled by ISLNAVCO or OCEANIA.

37. Meanwhile, by letter dated July 5, 1977,³⁴ in response to a June 6, 1977, request made by the Commission's Office of Agreements, GALLAGHER forwarded to the Commission for filing and approval, sixteen copies of the January 14, 1977, OCEANIA/ISLNAVCO agreement, which was later assigned No. 10306. Also enclosed in that letter

³³ Ex. 2 App. 47. The exhibit bears no date.

³⁴ In late June 1977, the first version of this letter was drafted by Mr. Cushnie, a Guam attorney who represented both ISLNAVCO and OCEANIA and who, at that time, was an officer of ISLNAVCO. The letter was redrafted by ROBINSON on June 30, 1977, and was sent to GALLAGHER. The letter sent by GALLAGHER changed only one word of ROBINSON's draft.

was an "information circular" in the name of OCEANIA and a revised "information circular" in the name of ISLNAVCO. The latter form FMC-9 made no reference to CHIPAC as ISLNAVCO's Hong Kong general agent and without reference to its earlier filing claimed that ISLNAVCO was an agent, only, and was not a common carrier.

38. Ex. 24 App. 18 is an important document in this proceeding. It is material not so much for what it purports to say or do, but, because the circumstances surrounding its introduction in this proceeding bear heavily on the credibility of ROBINSON.³⁵

SAISHIP proposes the following finding for which citations are provided separately in its Opening Brief.

38. On or about July 18, 1977, respondents were faced with the prospect of further litigation with the NMI government over possible additional suspension of the OCEANIA entry assurance for violation of section 15 of the Shipping Act and executed a document backdated to July 3, 1977. The "July 3" document purported to create a fixed fee agency agreement in which Island would appear to be OCEANIA's Guam agent only. Neither the Federal Maritime Commission nor SAISHIP as a party in this case was advised of the existence of the revision to Agreement 10306 alleged by OCEANIA to have been executed on July 3. OCEANIA denied its existence in discovery responses in the case and failed to respond to document demands which covered the July 3 document.

OCEANIA rejects SAISHIP's proposed finding out of hand, and, although making reference to it in the argument section of its Answering Brief, proffers no alternative findings in response to No. 38 or in its proposed additional findings. OCEANIA's entire response to SAISHIP's proposed finding is as follows:

38. This proposed finding is specifically rejected particularly because of its lack of record reference (e.g. Complainant's brief Argument IV D). Proposed Finding 38 is argumentative and cannot be supported by evidence in the record.

I find:

By making no reference to the July 3, 1977, "agreement" in discovery responses in this proceeding and by failing to respond to document demands which should have produced that agreement,³⁶ OCEANIA denied the existence of that agreement.

³⁵ As was often the case during particular portions of his testimony, ROBINSON's demeanor was carefully observed during his cross-examination concerning Ex. 24 App. 18 (Tr. 908). This may be illustrated by some of my inquiries, e.g.—Tr. 952-957, occasioned by the fact that the very existence of this document contradicted an answer to another question on cross-examination just a few minutes earlier.

³⁶ The circumstances concerning the finding of the document, itself, are not clear to anyone, including OCEANIA's counsel. Tr. 928, et seq.

The first reference to the July 3, 1977, agreement in this proceeding appears in ROBINSON's written prepared direct testimony (Ex. 24 p. 11 para. 20), which, under prehearing rulings, was not turned over to SAISHIP's counsel until complainant rested. This occurred on the sixth day of the hearing (Tr. 845). That reference is very brief, as follows:

20. On July 3rd Oceania entered into a new agreement with Island effective that date which eliminated the provisions for sharing of profits (Ex. 18).

Even though the prepared testimony of ROBINSON made specific reference to and attached a copy of the July 3, 1977 agreement which purports to be a replacement for a cancelled January 14, 1977 "MANAGEMENT AGENCY AGREEMENT,"³⁷ in answer to a series of questions posed on cross-examination (prior to the time when SAISHIP's counsel directed ROBINSON's attention to Ex. 24 App. 18), ROBINSON testified that, as of July 21, 1977, there was no agreement between OCEANIA and ISLNAVCO other than the January 14, 1977, agreement (Tr. 896).

After he was referred to Ex. 24 App. 18 on cross-examination, ROBINSON agreed that it purported to terminate the January 14, 1977, agreement that was causing OCEANIA trouble with both the NMI government and the Commission over the section 15 issue (Tr. 904-906). ROBINSON acknowledged that if the Commission ruled that the January 14th agreement was subject to section 15, the NMI was going to shut down the OCEANIA operation until the Commission approved it.

Nevertheless, ROBINSON never informed the Commission of the July 3, 1977, agreement, directly or indirectly. Although PATTERSON and ITS representatives met with Commission personnel on July 26, 1977, in connection with the January 14th agreement on OCEANIA's behalf, neither PATTERSON nor the ITS representatives mentioned the July 3rd cancellation of and replacement to the January 14th agreement. ROBINSON doubted that it would have been mentioned because neither PATTERSON nor ITS was informed by him of the July 3rd agreement prior to the meeting of July 26, 1977, with the Commission staff (Tr. 906-909).³⁸

³⁷ See letter, purportedly dated July 3, 1977, from ROBINSON to GALLAGHER purporting to transmit the July 3, 1977, agreement. Ex. 24 App. 18, p. 1.

³⁸ In fact, it may be said that the Commission was not informed of the July 3, 1977, agreement until October 31, 1978, when the prepared testimony was marked for identification in this proceeding. The argument made in the Answering Brief by OCEANIA, attempting to excuse ROBINSON for not informing the Commission about the July 3rd agreement in the July 5, 1977, letter is unacceptable. It may be recalled that the July 5th letter was prepared in late June, 1977, by Mr. Cushnie, was redrafted by ROBINSON about June 30th and was sent over GALLAGHER's signature to the Office of Agreements virtually as redrafted by ROBINSON. OCEANIA's argument is that in preparing the response to the Office of Agreements' June 6th letter, ROBINSON "considered that he was responding

Continued

In answer to my question, "What was the significance of [Ex. 24 App. 18], in your mind?" Robinson gave the following answer (Tr. 908-09):

I had been advised by Mr. Cushnie, arising out of our meeting, in fact, earlier because the indications, first of all, from the Northern Marianas Attorney General, Mr. La[y]ne, I think go back to late June on some of the documents, I think will reflect that. I had already been receiving indications from Mr. La[y]ne that regardless of the opinion, which I think is already in evidence, written by Mr. Cushnie as to the characterization of the January 14 agreement being a joint venture. Mr. La[y]ne was still of the opinion that such an agreement would, under Trust Territory and Northern Marianas' law, constitute a joint venture. Mr. Cushnie, towards the end of June, suggested that in order to remove that problem area it would be far better for the January 14 agreement which mentioned sharing of profits to be cancelled and a simple agency agreement setting a flat remuneration to be entered into. It was in that context that Mr. Cushnie was requested by me to draft a suitable agreement and the agreement, after drafting and some minor revisions discussed with Mr. Gallagher of Island Navigation and finally entered into between the parties. Now, this did not, in my view, do anything to stop the inquiries that were going on from the FMC to ourselves regarding the Section 15 aspects of the January 14 agreement.

Neither of the two documents comprising Ex. 24 App. 18 were signed on the date of July 3, 1977. The first document is ROBINSON's letter to GALLAGHER confirming their discussion of that day which culminated in the agreement dated July 3rd cancelling the January 14th

to an inquiry for a specific agreement (Tr. 912-913); he made no connection between the January 14—Agreement—FMC Agreement No. 10306—and the July 3 agency agreement, although the latter in fact cancelled the former." OCEANIA adds, "it is little wonder that the July 3, 1977 agreement was relegated to insignificance by Mr. Robinson, who was at that time, striving to maintain the vitality of Oceania in the face of the onslaught by Saiship, the failure of Island and the desertion of his friend, Mr. Gallagher."

There are several answers to OCEANIA's arguments and statements. The short ones are that at the time ROBINSON prepared the July 5th letter, the failure of ISLNAVCO and the desertion of GALLAGHER were not even considered a matter of conjecture by OCEANIA and would not occur until about one month thereafter. Moreover, there is no evidence to show that those events were considered a possibility, much less a probability, by OCEANIA during the time of the PATTERSON, ITS and Commission staff meeting on July 26th.

For the longer answer, one must examine Mr. Cushnie's draft of late June (Ex. 156). In the very first paragraph of that draft, the statement was made that the enclosed agreement [Agreement No. 10306] "is also expected to be altered effective July 3, 1977 to provide for an agency operation by [ISLNAVCO] and an altered method of compensation for management services rendered by [ISLNAVCO] to [OCEANIA]." The draft closed with a paragraph referring once again to the fact that the enclosed agreement would be altered to provide for agency services by ISLNAVCO and for an altered method of compensation for management services when OCEANIA's own tariff would become effective on July 3rd. ROBINSON deliberately eliminated those references in his redraft of the letter.

agreement and replacing it with one that redefines the functions to be performed by ISLNAVCO and sets a flat monthly fee for those services performed above normal ship agency functions. It also confirms that ROBINSON has handed GALLAGHER two copies of the July 3rd agreement duly signed by both parties. The second document is the agreement, itself, which was signed by Jesus Q. Guerrero for OCEANIA and GALLAGHER for ISLNAVCO.

Ex. 129 contains copies of Mr. Cushnie's billings to OCEANIA and ISLNAVCO for several months during 1977. It shows that Mr. Cushnie did not even start to draw up the agreement that bears date of July 3, 1977, until July 5, 1977, and that Mr. Cushnie again revised the agreement upon review on July 8, 1977. (See, also, above citation from Tr. 908-09.) Moreover, ROBINSON's testimony describing the date when the two signatories executed the agreement and the circumstances of the signing is both vacillating and contradictory and hardly lends credence to his claim that both parts of Ex. 24 App. 18 were executed on July 3, 1977 (Tr. 981-83).

It should be said that on redirect examination ROBINSON sponsored Ex. 157 (Tr. 1966) to explain why there was a physical gap in the date shown on Ex. 24 App. 18. In the latter, the typed word "July" obviously did not occupy the planned spacing between "This 3rd day of" and "July." Ex. 157 is an unsigned version of Ex. 24 App. 18 and ROBINSON said it was used as the model for Ex. 24 App. 18, but his secretary made a mistake in copying the date, which ROBINSON corrected before Ex. 24 App. 18 was executed. On Ex. 157, the date appears as "This 3rd day of January, 1971," but "January" is crossed out.

Whenever Ex. 24 App. 18 was executed and whatever its purpose may have been, it is manifest that it was not intended to and did not, in fact, redefine or alter the mutual obligations of the January 14, 1977, agreement between OCEANIA and ISLNAVCO prior to the end of July, 1977, when ISLNAVCO became virtually defunct because of GALLAGHER's disappearance. See text, No. 42, *infra*.

39. Faced with anticipated NMI governmental action to suspend OCEANIA's entry assurance because of perceived section 15 violations arising from the Attorney General's opinion that; ISLNAVCO was an "other person subject to the Act," MARSHALL, then in Guam, agreed with GALLAGHER that a specified lawyer³⁹ be hired by OCEANIA to resist that action. From Guam, MARSHALL also called PATTERSON in Hong Kong directing him "to fly to Washington via Guam/Saipan to resolve this mess" with the Commission and, thereby, with the NMI government as well. (Ex. 2 App. 46.) Meantime PATTERSON had been in contact with ITS in Washington, asking ITS for

³⁹ Mr. Cushnie was out of town. The specified lawyer was associated with Mr. Cushnie's law firm.

the "most expedient course *we* could take" to stop further interference with "*our* Guam/NMI service" (Ex. 98, emphasis supplied). From CHIPAC, in Hong Kong, PATTERSON telexed MARSHALL, at CABTUG, in Guam, informing him that ITS had answered his communication (Ex. 98) advising that the "FMC intervention could be stopped cold." Apparently when ITS answered PATTERSON, it had not yet seen Agreement No. 10306 and erroneously believed it to relate to leasing or chartering of a barge and tug.

40. Following the course chartered by ITS, PATTERSON and ROBINSON (see Ex. 2 App. 9-A; Exs. 25 and 26), PATTERSON and ITS made ITS' prediction come true. On July 26, 1977, PATTERSON and ITS personnel, representing both ISLNAVCO and OCEANIA (see Ex. 56, Ex. 258 (Schwarz Deposition p. 1-56), Ex. 24 App. 24), met with six members of the Commission's staff in Washington, D. C.⁴⁰ In essence, the staff was told that the tariff had been filed in ISLNAVCO's name by mistake, that ISLNAVCO was a mere agent and not a carrier and that OCEANIA was the only carrier in the trade. The staff was not advised that AIS and ISLNAVCO had a common "General Agent,"⁴¹ was not shown copies of the "Island Navigation/Oceania Line" promotional material (e.g., Ex. 2 App. 25) nor copies of the actual shipping documents used on the barge voyages in question.⁴² No disclosure was made to the staff about ISLNAVCO's participation in section 15 agreements with United States Lines and Matson,⁴³ or its connecting carrier agreement with United States Lines. Nothing was said to the staff about the supposed July 3rd cancellation of the agreement that was on file with the Commission-Agreement No. 10306.⁴⁴ The staff was not told anything about CABTUG, CHIPAC, or SALVTUG or their relationships with OCEANIA, ISLNAVCO and AIS. The day before the meeting with the staff, PATTERSON had arranged, through OCEAN-

⁴⁰ The depositions of seven staff members, including the six who attended the meeting, appear in the two volumes of Ex. 258.

⁴¹ The staff was not aware of the filing of Ex. 2 Apps. 11 and 13 (the information circulars on file with the Commission), showing that CHIPAC was the "general agent" of both AIS and ISLNAVCO at the time of the meeting.

⁴² OCEANIA proposes that the staff indicated that none of the matters referred to in this sentence were important, citing Ex. 258 pp. 1-52, 53. A reading of pp. 1-52, 53 in each of the volumes of Ex. 258 fails to reveal that indication.

⁴³ Of course, ISLNAVCO's participation in those agreements with United States Lines and Matson were on record with the FMC and presumably were available to the staff just as were the information circulars. The depositions of those staff members fail to establish, however, that OCEANIA's and ISLNAVCO's representatives referred the staff to those documents during the meeting.

⁴⁴ OCEANIA proposes that this finding read "The record is silent as to whether the FMC staff was informed about the July 3 agency agreement," footnoting that SAISHIP's citation to Ex. 258, cross-examination is an "unintelligible record citation." The fact is, however, as found, *supra*, neither PATTERSON nor ITS was informed of the July 3rd "agreement" prior to the meeting and, thus, could not have told the staff about it, and as was also found, *supra*, the first time that either the Commission or SAISHIP learned of that "agreement" was the day ROBINSON took the stand to testify in this proceeding. (See text No. 38 and n. 38, *supra*.)

IA, for ISLNAVCO to send a message cancelling the ISLNAVCO tariff so that PATTERSON was able to represent to staff that the "mistaken" Island tariff (which Patterson himself had vouchsafed by forwarding it for filing as an ISLNAVCO tariff in the first place and which continued in effect until July 29, 1977) had been cancelled.

41. On July 29, 1977, ITS communicated by telex with PATTERSON who by then was at OCEANIA's office in Saipan. ITS suggested a draft letter be sent to the Commission staff "categorically" refuting alleged violations of the Shipping Act. Having taken care of the section 15 problem, this communication closed by referring to OCEANIA's "technical" violation of section 18 of the Act until July 3, 1977,⁴⁵ but advising that Oceania could "always argue that the tariff was filed in the name of INCO due to ignorance of the regulations and said tariff really belonged to Oceania." (Ex. 27.) From the July 26, 1977, meeting with the staff onward, OCEANIA, ISLNAVCO and their representatives made representations consistent with the argument suggested by ITS although their prior statements to the Commission, to the NMI government and to each other had represented something entirely different, i.e.—that OCEANIA and ISLNAVCO had attempted to provide for notification to the Commission of OCEANIA's use of or participation in ISLNAVCO's tariff.⁴⁶

Moreover, Ex. 153, a letter, dated June 3, 1976, from ROBINSON to ITS, in connection with OCEANIA's joint service arrangement with DAIWA Line further detracts from the "mistake" argument, Ex. 153 patently establishes that ROBINSON had been informed by ITS and had become familiar with the Commission's tariff filing requirements as well as the need for proper captioning of shipping documents, i.e.—bills of lading—to show the identity of the person performing the common carrier service.

42. On or about July 30, 1977, GALLAGHER departed hastily from Guam allegedly with substantial amounts of ISLNAVCO's principals' money. This left ISLNAVCO in disarray but, more important, it left unpaid bills which ISLNAVCO was to have paid to the Port of Guam for both the AIS and the OCEANIA/ISLNAVCO services. His depar-

⁴⁵ OCEANIA had no tariff on file with the Commission and, therefore, no OCEANIA tariff was in effect from the time of the first voyage of the barge on April 5, 1977, to July 3, 1977, when OCEANIA's filed tariff became effective. See, text, No. 35, *supra*.

⁴⁶ OCEANIA proposes that the beginning date should not be July 26, but July 20, 1977, the date when ROBINSON wrote to ITS, enclosing copies of the January 14 agreement to be filed with the Commission (Ex. 26). ROBINSON, however, did not make that specific representation. He did say that it was always intended that ISLNAVCO act solely, as agent and not as a common carrier. While this statement may permit an interpretation that the ISLNAVCO filing was a mistake, the other representations previously made to the NMI and the Commission and to each other by GALLAGHER and ROBINSON shows that the argument which ITS advised be made is a subtle refinement of ROBINSON's statement. Therefore, the "mistake" position taken by OCEANIA cannot be justified by the letter of July 27th.

ture also left the OCEANIA/ ISLNAVCO service without an effective cargo solicitor on Guam. Accordingly, at meetings occurring in the first two days of August, 1977, at which MARSHALL, PATTERSON, KATINDOY, ROBINSON and others were present, AIS and OCEANIA jointly switched to AKSHIP, as their mutual Guam agent. (Exs. 48, 241.)⁴⁷

43. Because the vessel deal with MARSHALL had been contingent on ISLNAVCO/GALLAGHER being the manager and operator of the service (Ex. 216, 29; Tr. 1857-58, 1879), ROBINSON was extremely concerned that, as a result of GALLAGHER's disappearance, the "owners" might withdraw the vessels from the service. (Tr. 1143-44, 1583-84, 1613.) The service had been losing substantial monies, extensive enough for MARSHALL to refer to them together with AIS losses as "our sacrifices." (Ex. 76; see Exs. 28, 38, 30, App. 20B-D; Tr. 1068-69, 1581-83.)⁴⁸ However, in early August, 1977, REYES advised ROBINSON that the vessels would continue to be available so long as, in the future, the pre-existing reporting and accounting functions of ISLNAVCO were channeled to SALVTUG, and barge service revenues, net of local expenses and OCEANIA draws, were channeled to AIS/CHIPAC. (Tr. 1143-44, 1583-84, 1613; Exs. 48, 237-38, 240, 241.) No changes were required or occurred as to the physical operation of the actual service, which continued with the tugs furnished by CABTUG without any provision for payment by OCEANIA or its new Guam agent, AKSHIP.

44. Accordingly, on August 5, 1977, by separate letters, but as part of the joint arrangement reached earlier,⁴⁹ ROBINSON and REYES directed AKSHIP in the manner it was to account, report and handle money for the OCEANIA/AIS service.⁵⁰ ROBINSON instructed

⁴⁷ OCEANIA argues that the record does not support SAISHIP's use of the words "joint" and "mutual" in the proposed finding. OCEANIA is wrong. Ex. 48, ROBINSON's letter of August 5, 1977, to AKSHIP, concerning the TM-644, specifically refers to the remittance by AKSHIP of balances from freight collections after deduction of disbursements and agency fees to AIS, Hong Kong. Ex. 241, an AIS letter, signed by REYES, to AKSHIP, gives AKSHIP instructions in connection with both the AIS vessel *Endurance* and OCEANIA's barge TM-644.

⁴⁸ Ex. 76 is a letter dated May 17, 1977, from MARSHALL to GALLAGHER and an attached electronic communication from DIM to HAP of even date. The letter is on AIS stationery. The attachment was sent from SALVTUG's machine to ISLNAVCO's machine. In these messages, as in many others in the record, MARSHALL appears as the ultimate decision maker in all matters pertaining to the tugs and barge used in the Guam/Saipan service and the AIS vessel *Endurance*. Among other things, MARSHALL says in the letter:

While wishing to give John Robinson, the Saipan consignees and Australian shippers our full support—I think, objectively speaking; they are enjoying, through the ANL/ENDURANCE/TM-644 linkage, the most reliable/ economical service obtainable under the circumstances—particularly considering our sacrifices through currently unprofitable ENDURANCE/TERRY/TM 644 operations.

It is interesting to note that Ex. 76 is DIM's 11th numbered AIS letter for 1977. He wrote many more. E.g., Ex. 105, dated October 25, 1977, is number 85.

⁴⁹ See text, No. 42, and n. 47, *supra*.

⁵⁰ *Id.*

AKSHIP to remit all freight collection balances after necessary disbursements and agency fees to AIS. (Ex. 48.) At first, ROBINSON testified that the instruction in Ex. 48 had been changed. (Tr. 1355.) Later, he conceded that there was no change authorized by him. (Tr. 1881.)⁵¹

ROBINSON's letter advised that statements of collections, deductions, and accounting would be handled in a manner to be advised. On the same day the further advice arrived. REYES, writing for AIS, gave detailed instructions for both AIS and OCEANIA reporting and accounting functions and payment of revenues. REYES' letter stated that PATTERSON was to approve payments made on behalf of both carriers.⁵² Voyage accounts for both AIS and OCEANIA were to go to SALVTUG, attention of REYES. Freight collections were to be reported in a weekly telex summary to SALVTUG with a copy to OCEANIA as to OCEANIA collections. Monies due for both services were to be sent to an account maintained for AIS by CHIPAC at CITIBANK NA, Hong Kong,⁵³ with SALVTUG and REYES to be notified of remittances by telex. In general, these instructions from REYES were followed. Mr. Anderson believed that on one occasion payment was made by AKSHIP mistakenly to AIS instead of CHIPAC for both AIS and OCEANIA funds. In fact, on two occasions, checks were drawn to the order of AIS by AKSHIP in settlement of AIS/OCEANIA accounts (Exs. 239, 240). Ex. 239 includes a check dated March 21, 1978, for \$19,761.00 and Ex. 240 includes a check dated April 21, 1978, for \$34,975.93. On a third occasion AKSHIP sent a check drawn to the order of AIS solely in settlement of an OCEANIA account; that check was dated January 10, 1978, and was in the amount of \$15,075.69. (Ex. 237.)

⁵¹ OCEANIA claims that Tr. 1881 "does not support the statement that Mr. Robinson conceded the directions of Ex. 48 were not changed." Although ROBINSON equivocated, the record supports SAI-SHIP's proposed finding. On cross-examination, ROBINSON answered questions as follows, Tr. 1881:

Q. Did these handwritten instructions you refer to ever direct them to send the freight monies collected to anybody besides Asiatic Intermodal Seabridge?

A. I don't think it did no. I can't remember ever writing such a document, my hand.

Q. Do you assert that you gave an oral instruction now specifically, Mr. Robinson an oral instruction to give the freight monies collected on the TM-644 to anybody other than A.I.S.?

A. I don't think I did. I believe that there may have been a written instruction from Mr. Reyes to Atkins Kroll regarding payment to the Pacific Logistics Hong Kong-Shanghai Bank. I believe I may have verbally confirmed that instruction with Mr. Anderson, but for myself writing such an instruction I have no memory and I don't think I did. I have no memory of giving a verbal instruction apart from what I've just described.

Moreover, AKSHIP's Manager, Mr. G. G. Anderson, testified that those instructions were not changed by ROBINSON. (Tr. 2508, et seq.)

⁵² See Ex. 241 paragraph "B" under *M.V. Endurance* and under TM-644. AKSHIP refused to follow this instruction. Instead it paid the bills without prior approval after telling PATTERSON that REYES procedure was impractical because the commercial Port of Guam required payment of its bills within two weeks.

⁵³ Mr. Anderson was also told by PATTERSON to remit OCEANIA and AIS money to CHIPAC. (Tr. 2479.)

45. Commencing with the first TM-644 voyage in August, 1977. ISLNAVCO bills of lading ceased to be used and thereafter only OCEANIA bills of lading were used in the barge service. AIS manifests, however, continued to be used for a time into the autumn of 1977. Ultimately an OCEANIA manifest was developed and put into use.

46.⁵⁴ Beginning with OCEANIA's third answer to interrogatories in September, 1978 (Ex. 2 App. 55), ROBINSON has tried to give the impression that OCEANIA's relationship with AIS during 1977 was only that of a space charterer, on two occasions, on an AIS vessel. ROBINSON maintained that "No other contractual relationships existed during the period but a close informal relationship was maintained from a mutual interest in cargo movements within the Western Pacific." In effect, this answer denied the existence of any other relationship, including agency relationships between AIS or CHIPAC, on the one hand, and, OCEANIA, on the other hand. (Ex. 2 App. 55 p. 1). ROBINSON's prepared written testimony said virtually the same thing. (Ex. 24 p. 18.) Several times during his testimony, ROBINSON insisted that OCEANIA was not an agent of AIS during 1977, sometimes adding that the only relationship was that of space charterer on an AIS vessel (Tr. 1204-05, 1229, 1642, 1983). However, ROBINSON's characterization of OCEANIA's relationship with AIS does not stand up in the face of documentary evidence and his own testimony to the contrary, vacillating and evasive as that testimony might be. See, e.g., Ex. 36, 90, 92, 102, 106, 136, 176; Tr. 1384-90, 1401-02, 1519-29, 1674, 1833, 1983-90, 2012, 2158-2169, 2174.

The following are some examples of ROBINSON's testimony on this subject.

When questioned about an earlier statement, at Tr. 1229, denying that OCEANIA was an agent for AIS in 1977, ROBINSON testified, at Tr. 1242:

Q. Now, Mr. Robinson, do you now wish to change your testimony where, I believe, you stated twice in answer to my questions, that you did not become the agent for Asiatic Intermodal Seabridge until January, 1978?

A. Yeah, I guess you are right.

* * *

Q. But you were the agents for Asiatic Intermodal Seabridge as of June 11, 1977, weren't you.

A. Yes, Sir, we handled the vessel at that time.

⁵⁴ OCEANIA rejects SAISHIP's proposed finding No. 46 as "being so argumentative and unsupported that they can not be corrected for purposes of modified proposed findings." However, I find little support for OCEANIA's statement. With slight modification and some amplification SAISHIP's No. 46 is incorporated in these findings.

Q. When did you now become the agents for Asiatic Inter-modal Seabridge in Saipan. You recall you previously said January '78. Now when was the beginning of that agency relationship?

A. I guess it must have been the vessel's first call here in 1977, whatever date that was.

* * *

When asked again about the first AIS call at Saipan by the vessel *Endurance*, Voyage No. 1, in January or February 1977 (ROBINSON seems to have established to his own satisfaction that Voyage No. 1 called at Saipan then although he also refers to this event as having taken place in March), ROBINSON testified, Tr. 1523:

Q. Who was the Saipan Agent?

A. We handled the vessel in Saipan.

Q. We being Oceania Line?

A. Oceania Line, yes.

Q. And you were its agent for the Saipan call, local agent?

A. I guess you would characterize us in that fashion, yes.

I find:

From January or February, 1977, and for the rest of the year 1977, OCEANIA served as AIS agent on Saipan although the vessel *Endurance* called there only on Voyages 1 and 4. Voyage 1 brought little, if any, cargo but Voyage 4 was more productive. Despite ROBINSON's claims that Voyage 4 involved an oral space charter and despite the fact that OCEANIA had obtained an entry assurance to operate as a carrier in November 1976, OCEANIA had no bills of lading, no manifests and no tariffs of its own, for the "space charter" service. Although ROBINSON said that he intended to develop shipping documents if the cargo warranted, the cargo which arrived on the *Endurance*, Voyage No. 4, came in on AIS bills of lading, rated at the Guam rate set forth in the AIS tariff, and on an AIS manifest.

It is true that from time to time OCEANIA held out to the public that it was a common carrier in the service conducted by AIS in 1977 and 1978.⁵⁵ As late as mid-1978, OCEANIA was advertising the likeness of the AIS vessel *Endurance* in newspapers, depicting it as an OCEANIA vessel inbound to Guam⁵⁶ and representing that various

⁵⁵ This holding out is consistent with OCEANIA's "space charter" representations but inconsistent with other documentary and testimonial evidence showing OCEANIA to be an AIS agent during that time. See, e.g., ROBINSON's testimony at Tr. 1242, *supra*, in which he admits not only the undisputed fact that OCEANIA was an AIS agent from 1978 on, but that OCEANIA was an AIS agent in 1977 as well.

⁵⁶ OCEANIA had no tariff on file with the Commission from foreign ports to Guam.

AIS agents in foreign ports were OCEANIA agents. (Exs. 49, 50.)⁵⁷ This advertisement employed a similar format to the one that OCEANIA previously used for its joint service with DAIWA Line, *supra*, at No. 13 (Exs. 63, 146) because of entry assurance requirements.

47. The OCEANIA/ISLNAVCO barge operation together with its linkage to an exclusive transshipment agreement with AIS⁵⁸ affected SAISHIP adversely. By the time Voyage 14 of the TM-644 was completed, the impact on SAISHIP was considered significantly harmful by SAISHIP, albeit "dismal" by OCEANIA. According to ROBINSON's telex to MARSHALL and REYES at SALVTUG, for Voyages 7 through 14, inclusive, the TM-644 had carried 28.67% of the cargo in the Guam/Saipan trade.⁵⁹ Revenues for those eight voyages amounted to \$45,725.93. Revenues for eight later voyages, e.g., 71 through 78, inclusive, increased substantially, amounting to \$84,246.46.

48. The ISLNAVCO/OCEANIA draft of the ISLNAVCO tariff was circulated among shippers in February and March, 1977. Subsequent tariff filings and circulars mailed to shippers and consignees advertised the TM-644 barge rates to be lower than those of SAISHIP. (Exs. 45, 187, Tr. 228.)

Although the TM-644 rates remained below SAISHIP's up to the time when the hearing resumed in 1979, the TM-644 service operated at a loss in the sense that after paying local port and agency costs, the revenues that were paid to AIS/CHIPAC were only about fifty percent of what OCEANIA claimed to be a fixed charter hire obligation of \$3,200.00 per voyage.⁶⁰ Through voyage 73 in 1978, the total net

⁵⁷ Prior to the time Ex. 49 was introduced, ROBINSON testified that CHIPAC was not OCEANIA's Hong Kong agent. Ex. 49, an advertisement in a publication, *New Pacific Magazine*, shows CHIPAC as OCEANIA's Hong Kong agent. ROBINSON placed the advertisement in the publication. (Tr. 1372-73.) PATTERSON provided ROBINSON with the list of agents. (Tr. 1375.)

⁵⁸ OCEANIA disputes SAISHIP's proposed finding that there was an exclusive transshipment agreement giving as its reason that the record citations do not support that finding. OCEANIA's position is not well taken. (See Exs. 76, 91, 160, 161; Tr. 1245-46, 1270, 1378, 1519-22, 1761, 1786.) The containers used by OCEANIA/ISLNAVCO, and, later, by OCEANIA, were assigned to the Guam/Saipan service by PATTERSON, acting either for AIS or TRANSPAC, the lessee, of those containers. In addition, those assigned containers were freely interchanged with other containers assigned to the *Endurance*. Further evidence of the linkage is seen in Ex. 164, a telex from ROBINSON to DIM at SALVTUG dated September 27, 1977. ROBINSON asks DIM if *Endurance* will call Saipan, saying that he has a booking for Manila which he will send via TM-644 if *Endurance* does not call. Copies of the telex were sent to REYES and HAP. Apparently, DIM sent two handwritten replies to this telex, one to ROBINSON, the other to PATTERSON. To ROBINSON, he wrote apologetically, "John—I'm deeply embarrassed—Don." The note to PATTERSON was a rebuke. DIM said, "HAP—This is glaringly poor AIS liason [sic]—." (Exs. 102, 103, 109; Tr. 1537-38.)

⁵⁹ Telex dated July 28, 1977. Voyage 14 occurred on July 20, 1977. (See Exs. 30, 38.)

⁶⁰ But these payments do not take into account what necessarily were extensive legal (Tr. 1777), accounting (Tr. 2088), travel (Ex. 60; Tr. 891, 1220-27, 1500), container (Tr. 1538-38), demurrage (Tr. 1782), insurance (Tr. 1875); printing (Tr. 2156-57), and other expenses of the service, e.g., remodeling of the barge at a cost of \$30,000.00 (Tr. 1782), all of which were advanced by AIS, CHIPAC, PATTERSON, REYES and others controlled by or subordinate to MARSHALL without any increases in charter hire rates. Another advance, as noted earlier, was tariff filing and tariff watching. Ex. 60

Continued

revenues from the TM-644 service (after paying local port and agency expenses), which were sent to AIS/CHIPAC, came to only \$1,355.00 per voyage. For the purpose of these computations, only, it is assumed that the \$3,200.00 "charter hire" was a bona fide negotiated price reflecting the market value of the equipment. The same equipment at the rates stated in Ex. 16⁶¹ would have cost \$7,425.00 per voyage, exclusive of demurrage. (Ex. 28.) OCEANIA notes that Ex. 16 is undated and contends that the rates shown therein are for salvage and not common carrier operations, implying that the rate of \$3,200.00 reflected market value of the *Terry M/Husky/Piti* and TM-644 for the Guam/Saipan service whereas the \$7,425.00 reflected the going rate for salvage usage. There is no validity to OCEANIA's position in regard to market value, as may be seen by an examination of Exs. 20 and 2 App. 20-E.

Ex. 20 is a confidential inquiry in the form of a letter dated November 11, 1976, from HAHN, representing SAISHIP, to PACLOG, attention of MARSHALL, asking that MARSHALL present a preliminary proposal to provide a tug and barge for service within the Marianas. The specifications were set out in the letter. Consistent with HAHN's understanding that KATINDOY was a subordinate of MARSHALL and that CABTUG was a MARSHALL company (see, e.g.—Tr. 2664-65) HAHN sent a copy to KATINDOY. HAHN's understanding of those relationships was confirmed when he received Ex. 2 App. 20-E in reply. Ex. 2 App. 20-E is a letter dated February 17, 1977, on CABTUG's letterhead from KATINDOY to HAHN containing a proposal for a tug and barge, identical to those used by OCEANIA/ ISL-NAVCO, at the roundtrip charter rate of \$7,600.00. (HAHN, as an employee of one of JOETEN's companies, may well have an interest in the outcome of the event. However, this does not detract from the evidentiary value of his understanding, for at the time he wrote the letter there was no indication that MARSHALL or KATINDOY would be involved in an operation in competition with JOETEN. HAHN's understanding was based upon knowledge gained in the past, when he worked for LUSTVECO's former Guam agent. See, e.g., Tr. 2604-05, 2663-66, 2701-10, 2713-14.)

Until June 1, 1977, SAISHIP's charter cost for a tug and barge supplied by Dilmar were \$6,400.00 per voyage, plus demurrage. This was later amended, retroactive to June 1, 1977, to \$5,400.00 (a credit of

shows that ITS performed the watch over SAISHIP's tariff filings on behalf of its client, AIS. After receiving the watch report, HAP, writing on CHIPAC stationery, sent the report to ROBINSON and Mr. Anderson of AKSHIP, asking if they agreed with him that OCEANIA should promptly file identical tariff material. HAP sent a copy of this letter, with the same enclosures, to MARSHALL.

⁶¹ Ex. 16 is a brochure published by SALVTUG. The brochure states that SALVTUG "is popularly known as SALVTUG and its OFFSHORE GROUP." The brochure identifies CHIPAC, TRAN-SPAC, APC, CABTUG and PACLOG as members of the OFFSHORE GROUP.

\$1,000.00) per 45 hour voyage because Dilmar was hauling fuel in the deep tank of the barge. (Exs. 233, 235.) (OCEANIA's charter is for 72 hours.)

49. Even before the OCEANIA/ISLNAVCO service commenced, in Guam, GALLAGHER was representing to shippers that SAISHIP was going out of business. (Tr. 401, 418.) SAISHIP countered with its own letters denying those rumors and stating that it was in the trade to stay. (Ex. 2 Apps. 1 and 2.) Shortly after the OCEANIA/ISLNAVCO service began, while its performance was still "dismal," on Saipan, OCEANIA's president wrote to the TT and NMI governments in a similar vein. (Ex. 2 App. 4.) After claiming that OCEANIA had built a profitable operation (which was untrue), OCEANIA's president stated, in that letter, that SAISHIP's financial collapse was inevitable and asked the TT government to demand immediate repayment of the monies owed by SAISHIP. Had the TT government made that demand, SAISHIP would have gone under. (Ex. 2 p. 11; Tr. 1574.)⁶² Although ROBINSON testified that he did not agree with the other stockholders of OCEANIA to send that letter, in later discussions with the governmental representatives about the letter, he did nothing to disassociate himself from the statement contained therein.⁶³

50. Acting directly or indirectly through or together with PATTERSON, REYES, GALLAGHER, KATINDOY and others, MARSHALL guided and controlled the AFFILIATED/ASSOCIATED COMPANIES (TRANSPAC, APC, SALVTUG, CABTUG, PACLOG, CHIPAC S.A., AIS, CHIPAC and ISLNAVCO),⁶⁴ in supplying the vessels, management, accounting, administrative support, cargo solicitation and other services necessary for the operation of the Guam/Saipan barge service by OCEANIA/ISLNAVCO, in the beginning, and, later, by OCEANIA, after GALLAGHER's sudden departure at the end of July, 1977.

51.⁶⁵ In order to avoid the unpleasant consequences of being found to have engaged in a course of conduct subject to section 15 without

⁶² OCEANIA would limit this sentence to a matter of speculation on the part of SCREEN. However, ROBINSON also believed that SAISHIP would be dealt a "crippling financial blow" if the loan had been called at that time (Tr. 1574).

⁶³ OCEANIA claims that ROBINSON disagreed with only that portion of the letter referring to OCEANIA's profitability. OCEANIA is wrong. ROBINSON testified that his disagreement stemmed from a belief that letters should not be "written in anger" because they serve no useful purpose (Tr. 1577). As to profitability of OCEANIA, ROBINSON first tried to leave the record with the impression that OCEANIA was profitable when the letter was sent (Tr. 1575-76). Afterwards, he testified that OCEANIA "turned the course" late in 1977 even though as late as September, 1978, OCEANIA had not paid one-half of its charter hire obligations. (Tr. 1581.)

⁶⁴ ISLNAVCO did not appear as one of the AFFILIATED/ASSOCIATED COMPANIES in the cast, *supra*, in order to permit a more orderly presentation of the events and not because of a rationally formed belief that it or GALLAGHER was independent of MARSHALL. Cf., Appendix.

⁶⁵ In order to simplify what is obviously an involved factual situation, I will no longer adhere to the numerical sequences of findings proposed by SAISHIP and responded to by OCEANIA. This depar-

Continued

prior Commission approval authorizing such conduct, from the early stages of the proceeding onward ROBINSON/OCEANIA sought to deflect inquiries which might lead to ties between them and MARSHALL or AIS and to minimize⁶⁶ some connections that could not be ignored. Thus, as seen, ROBINSON explained the agency of OCEANIA in Saipan as a space charter on AIS vessels, adding that "No other contractual relationship existed during the period but a close informal relationship was maintained from a mutual interest in cargo movements within the Western Pacific in 1977."⁶⁷ He also denied any knowledge of AIS and its affiliations, other than recognizing AIS to be a carrier operating from Far East ports to Guam, where ISLNAVCO was its agent, saying, "I do not have first hand knowledge of its affiliates."⁶⁸ ROBINSON made this statement despite his having obtained the brochure showing AIS' affiliations when he visited MARSHALL in Manila in January, 1977,⁶⁹ and despite the many communications in OCEANIA's file written by MARSHALL, REYES, PATTERSON and others on letterheads of AIS and its affiliates showing that those affiliations existed. There is other evidence to establish that ROBINSON knew AIS was part of the group shown in the brochure. E.g., Ex. 156 is the draft of the letter prepared by attorney Cushnie in response to the Commission's Office of Agreements' letter of June 6, 1977. The letter was prepared for GALLAGHER's signature and was reviewed by ROBINSON, who redrafted it because it was too "lengthy and not necessarily giving a clear statement."⁷⁰ Among other things, the draft said, "We have had prior dealings with [PACLOG] and [AIS], as well as other companies *in that group*." (Emphasis supplied.) Exhibit 156 was introduced on ROBINSON's re-direct examination. He was asked about the truth or inaccuracy of the statements in that draft. Responding, he identified the statements which he thought were not correct, but he did not include the cited sentence in that category.⁷¹ See, also, reference to Ex. 96, *infra*.

Although there was no great consistency in OCEANIA's effort to divorce itself from a MARSHALL/AIS connection, as all too frequently the evidence introduced even on direct or re-direct examination of ROBINSON was on a collision course with this goal, the effort had two major areas of concentration, in addition to those others previously

ture from the format previously followed does not constitute a rejection of SAISHIP's proposals 51 through 55 or agreement with OCEANIA's responses, as the substance of most of SAISHIP's proposals 51 through 55 has been adopted elsewhere in my findings.

⁶⁶ ROBINSON was obliged to admit he minimized the AIS relationship. (Tr. 1760-61.)

⁶⁷ Ex. 24 p. 18, Ex. 2 App. 55.

⁶⁸ *Id.*

⁶⁹ Ex. 16, Tr. 2176-77.

⁷⁰ Tr. 1960.

⁷¹ Tr. 1957-64.

mentioned. First, because the fact that it was a condition of the charter that ISLNAVCO was required to be the "managing agent" and to receive 40 percent of the profit for that service, it became necessary to prevent linking PACLOG, the charterer, with AIS/MARSHALL. Second, and this developed later on, some explanation had to be given to bring down MARSHALL's pervasive interest in OCEANIA, the barge operation and the TM-644/*Endurance* linkage.

The first ploy developed early, during discovery, and continued thereafter. Initially, during discovery responses OCEANIA insisted that charter hire payments were being made to the owners of the barge for the use of the barge and tugs. Pushed into identifying the "owners," OCEANIA answered that payments were being made to PACLOG. Nudged further, OCEANIA specified that AKSHIP had paid PACLOG \$48,000 during 1977-78 for voyages 1 through 15.⁷² Bearing in mind that no payments were made for charter hire until AKSHIP was made AIS' and OCEANIA's agent in Guam, and assuming, as OCEANIA asks us to do, that the revenue payments made by AKSHIP went for charter hire, it must be found that there is no evidence that PACLOG received any charter hire payments at any time and that under ROBINSON's and REYES' explicit instructions, issued before interrogatories were answered and before ROBINSON testified, charter hire payments were made by AKSHIP, on behalf of OCEANIA, to AIS, or to CHIPAC for AIS.⁷³

The second stratagem called for ROBINSON to deny that MARSHALL had any control or management function over any of the AFFILIATED/ASSOCIATED COMPANIES and to explain MARSHALL's extravagant interest in the demise of SAISHIP in terms of benevolent friendship as well as self interest, i.e.—protecting commissions he (MARSHALL) would earn from brokering the charter between PACLOG and OCEANIA.⁷⁴

ROBINSON agreed that the rate of commission for this kind of brokerage was 2-½%, which would amount to \$80 per voyage.⁷⁵ ROBINSON had earlier described MARSHALL as only a "ship broker," independent of PACLOG.⁷⁶ Still earlier, in his prepared testimony, ROBINSON had also described PACLOG as a "ship broker."⁷⁷

⁷² Ex. 2 Apps. 20-C and 20-I), Tr. 1089, 1147, 1155, 1351-53.

⁷³ See No. 44, *supra*.

⁷⁴ Tr. 1135-37.

⁷⁵ *Id.*, Tr. 1221.

⁷⁶ Tr. 989-90

⁷⁷ Cf. Ex. 24 p. 6 where ROBINSON says, "Since I did not know [PACLOG], and they, in turn, did not know me, but had previous contacts with [GALLAGHER], a condition of this charter was that [ISLNAVCO] be named the managing agent for [OCEANIA] on Guam," with Tr. 1222, where ROBINSON testified, "Well, in the first place, it was that [MARSHALL] insist [sic] on the knowledge that [MARSHALL] had, of his personal acquaintance, I guess, with [GALLAGHER] that required us, [OCEANIA], to employ [GALLAGHER] as managing agent for us to obtain the equipment. . . ."

MARSHALL was not merely a "ship broker," as ROBINSON would have us believe. MARSHALL controlled and managed AIS and the other AFFILIATED/ ASSOCIATED COMPANIES. It was MARSHALL that made PACLOG's decision to purchase the TM-644 on behalf of TRANSPAC from the builder at the price offered by the builder.⁷⁸ MARSHALL was the president of TRANSPAC.⁷⁹ It was MARSHALL, who, on November 23, 1976, on CABTUG letterhead, told KATINDOY to expect the importation of the *Pitti* into Guam service and to share this knowledge with GALLAGHER.⁸⁰ It was MARSHALL who wrote at will on AIS letterhead and who, in July 1977, commanded PATTERSON, AIS' president, to leave Hong Kong, come to Saipan and then go to Washington to resolve "the mess" OCEANIA and ISLNAVCO had gotten into with the Commission.⁸¹ It was MARSHALL who rebuked PATTERSON for "glaringly poor AIS liason [sic]" in expressing his embarrassment to ROBINSON over HAP's failure to inform ROBINSON about the itinerary of a particular voyage of the *Endurance*.⁸² It is MARSHALL who regularly decided whether and under what circumstances the *Endurance* would call at Saipan and informed PATTERSON, REYES, KATINDOY, ROBINSON (and GALLAGHER before August 1, 1977) of those decisions.⁸³ It was MARSHALL who ordered GALLAGHER to bring updated ISLNAVCO records to Hong Kong to reconcile ISLNAVCO/AIS accounts.⁸⁴ It is MARSHALL who decides which attorney to hire to represent OCEANIA and ISLNAVCO.⁸⁵

It is MARSHALL to whom ROBINSON apologetically sends TM-644 voyage reports and monthly statements.⁸⁶ It is MARSHALL who, in his 73rd TRANSPAC letter in 1977, tells PATTERSON to act on the "continuing need for OCEANIA to contact MATSON/USL State-

⁷⁸ Exs. 65, 66.

⁷⁹ Ex. 29, in which ROBINSON, by letter dated January 10, 1977, confirmed the arrangements for the charter, was addressed to MARSHALL at the latter's Philippine P.O. Box 1914, as President of TRANSPAC. Nevertheless, he testified that he knew of no relationship between MARSHALL and TRANSPAC. He said that when he wrote that letter to "Dear Don" as president, ". . . that is just a title I pulled out of the air." (Tr. 991.) On another occasion, he was asked why he addressed a letter Ex. 185, to MARSHALL at AIS at the Manila P.O. Box. He replied, "I really don't have [any] recollection of why that address appears on it. I think that when I send letters to Mr. Marshall I just addressed it to Mr. Marshall and leave it to my secretary to fill in the address." (Tr. 2225-26.)

⁸⁰ Ex. 253. This letter was DIM's 61st CABTUG letter in 1976.

⁸¹ Ex. 24 App. 23.

⁸² Ex. 164. MARSHALL's remarks are handwritten on a copy of the telex. The telex, itself, is from ROBINSON to MARSHALL, dated September 27, 1977, and is further evidence of the AIS/OCEANIA linkage. In it, ROBINSON states that if the *Endurance* will not call Saipan for a Manila booking, the cargo will be sent by the TM-644.

⁸³ E.g., Exs. 76, 83, 93, 105, 108, 120, 121.

⁸⁴ Ex. 67.

⁸⁵ Ex. 24 App. 23.

⁸⁶ Ex. 31. See Ex. 80, telex to ROBINSON from DIM demanding those reports. See, also, Ex. 78, DIM telex to ROBINSON, January 13, 1978, pressing ROBINSON for TM-644 voyage reports requested by REYES.

side *Shippers* towards nominating the TM-644.”⁸⁷ It is MARSHALL who publicly rebukes PATTERSON, concerning his comments on the TM-644 RORO conversion, and ROBINSON and KATINDOY because MARSHALL is “getting weary of the ‘yes-but’ responses to our ‘can-do’ initiative.”⁸⁸ It is MARSHALL, to whom KATINDOY defers, who makes CABTUG business decisions.⁸⁹

It is MARSHALL who is disturbed over HAP’s and KATINDOY’s and ROBINSON’s failure to alert SALVTUG about a towing job performed by LUSTVECO (Ex. 191), apparently a competitor of SALVTUG after LUSTVECO was “requisitioned by the Philippine Government in April 1975.” Prior to that time MARSHALL was president of LUSTVECO. Ex. 193. It is MARSHALL who instructs ROBINSON and KATINDOY concerning public relations for the TM-644 service. (Ex. 192.)

It is MARSHALL who oversees ROBINSON and PATTERSON and who passes upon their rate making agreements for the AIS (*Endurance*) and OCEANIA (TM-644) through movements. (See, e.g., Exs. 47, 60, 90, 94, 107, 112, and 118).⁹⁰

It is MARSHALL who receives ROBINSON’s “my grateful thanks” for furnishing the “cavalry” (accountant ALAVA, whose supervisor is REYES), for two weeks of free accounting service for OCEANIA on Saipan. (Ex. 194, Tr. 2177-78.)

It is MARSHALL who deplanes from a through flight—United States to Manila—at Guam to deal with the OCEANIA/ISLNAVCO crisis brought on by GALLAGHER’s sudden departure. (Tr. 979-80.)

It is MARSHALL who directed the intermingling of AIS and OCEANIA monies located on Guam to pay OCEANIA’s Guam commercial port expenses. (Exs. 95, 96, 138-144. Note, in Ex. 96 ROBINSON makes the admission that *Endurance* and TM-644 “have same owner”). It is MARSHALL who refers to AIS (*Endurance*, voyage 5) and INCO funds in Guam as “our collectibles.” *Id.*

And when it seems that the MARSHALL/ROBINSON enterprise is about to attain the goal of displacing SAISHIP in the Guam/NMI trade, they both exult. ROBINSON’s telex of September 26, 1978, advises DIM that the “Fatted Calf [is] ready and waiting.” He explained this cryptic remark by adding that he was happy about a telex he received from AKSHIP that day telling him that SAISHIP had to cancel its weekly trip due to lack of business. (Ex. 81.) To MAR-

⁸⁷ Ex. 35.

⁸⁸ Ex. 61. MARSHALL’s 12th TRANSPAC letter in 1978. Copies of this letter to HAP at CABTUG were sent to ROBINSON, KATINDOY, REYES and persons at PACLOG and CHIPAC.

⁸⁹ Ex. 64.

⁹⁰ HAP also met with ROBINSON to discuss commodity rates filed by OCEANIA, as a result of which, those rates were reduced. (Ex. 111.)

SHALL, the news of the cancellation was rhapsodic. He replied thankfully, ". . . cancellation is *sweet music*."

52. The testimony of Kenneth D. Jones, a shipper, falls far short of showing that he would have entered the trade between Guam/Saipan/Tinian in competition with SAISHIP, had OCEANIA/ISLNAVCO not entered the trade. His primary reason for considering such entry was to obtain two trips a week from Tinian. From April 1977 to the time he testified in 1978, Jones was not served twice a week, yet he took no steps of probative value to institute a competitive service.

53. The operation of the TM-644 during its first 78 voyages resulted in the diversion from SAISHIP of \$267,755.11 net, after payment of expenses. Diversions from voyage 78 to the close of the hearing cannot be computed on this record.⁹¹ (Ex. 30.)

54. To the extent that OCEANIA's proposed additional findings—56 through 82—are not incorporated in these findings, they are rejected.

A BRIEF OVERVIEW OF THE FACTS

The Administrative Procedure Act requires rulings on each of the proposed findings presented in the briefs submitted by the parties.⁹² The most practical and convenient means for discharging that duty in this case was following the numerical sequence for proposed findings of fact employed by both SAISHIP and OCEANIA in their briefs. The obvious drawback to this format is found in the preceding detailed and involved individual findings, which, standing alone, may sometimes appear as confusing as the separate pieces of a picture jigsaw puzzle. The purpose of this section is to put those pieces together so that the entire picture may be appreciated.

Knowing that SAISHIP's weakened financial condition made it vulnerable to a competing common carrier tug and barge service, GALLAGHER and ROBINSON, in late 1976, conceived a plan to exploit that weakness to their mutual advantage. But the two of them did not have the means to do it. Two ingredients were needed to bring the plan to fruition. ROBINSON possessed one, through OCEANIA. He could provide the entry assurance, available only to TT/NMI citizens or corporations. Neither one could provide the capital to finance the contemplated operation, the other ingredient. However, GALLAGHER knew someone who could—MARSHALL.⁹³

⁹¹ At the prehearing conference it was established and agreed by the parties that the formula for measuring damages would be gross revenues diverted less variable expenses that SAISHIP would have incurred in moving the cargo carried by OCEANIA or OCEANIA/ISLNAVCO. (Ex. 30.) Ex. 2 pp. 13 and 90 shows that SAISHIP's variable costs based on 1977 experience were 47.29% of gross revenues. The validity of that figure is not in controversy.

⁹² 5 U.S.C. 557(c); See *Mediterranean Pools Investigation*, 9 F.M.C. 264, 267 (1966).

⁹³ It is not known how long GALLAGHER and MARSHALL had known each other. But, in late 1976, ISLNAVCO was AIS' Guam agent and its electronic terminal and call signs were used by CABTUG, as appears in the brochure of the AFFILIATED/ASSOCIATED COMPANIES.

In January 1977, shortly after negotiations began, an accord was reached. It is neither relevant nor material to determine whether the agreement was a partnership, a joint venture or some other arrangement. It is sufficient to recognize it as an agreement to work together toward a common objective. The twofold purpose of the agreement was to eliminate SAISHIP as a competitor in the Guam/Saipan trade and to control most, if not all, traffic between the United States, Australia, the critical FAR EAST ports of Hong Kong, MANILA and those in Taiwan and Guam, on the one hand, and Saipan, on the other hand.

Although the purposes and many of the terms of the agreement are evident, some portions are not clear, due in part to the fact that most of the evidence concerning the agreement was introduced by SAISHIP through ROBINSON, a hostile witness, or was obtained from OCEANIA, by way of discovery.⁹⁴

Essentially, because MARSHALL provided the financial support and, thus, was undertaking the greater risk, he retained control of the entire operation and became entitled to the greater reward. He retained control of the vessels, though they were under charter to OCEANIA, through CABTUG. He kept control of the service through ISLNAVCO,⁹⁵ which, from that time forward, if it was not one before, became one of the AFFILIATED/ASSOCIATED COMPANIES. MARSHALL's financial reward would come from the combination of charter hire payments from the profit percentage he allocated to ISLNAVCO⁹⁶ and from OCEANIA's participation in the AIS' *Endurance* service to Saipan.

The agreement caused problems almost as soon as the tug and barge went into operation due, primarily, to the fact that OCEANIA, the holder of the entry assurance, did not appear to be the carrier in the trade. The manifestations of those problems were the law suit in Saipan, the inquiry by the Commission and the inquiry by the NMI Govern-

⁹⁴ Greater light could have been shed on the agreement and its terms had GALLAGHER, KATINDOY, MARSHALL, REYES or PATTERSON testified. GALLAGHER, of course, disappeared. MARSHALL, REYES and PATTERSON were beyond the jurisdictional reach of the subpoena. KATINDOY simply did not obey the Commission's process.

⁹⁵ ISLNAVCO, the "operator" of the charter in its own name, held out to be the common carrier in the trade, filed the tariff with the Commission, issued bills of lading, and entered into common carrier agreements with mainland United States carriers.

⁹⁶ The agreement between OCEANIA and ISLNAVCO allocates forty percent of the profits to ISLNAVCO, but does not specify OCEANIA's share nor does it provide for the distribution of losses. Presumably OCEANIA would have been entitled to sixty percent of the profits. But this is not entirely certain: During a line of questioning on cross-examination, ROBINSON was asked if OCEANIA was not better off because of GALLAGHER's disappearance and the elimination of ISLNAVCO's participation; ROBINSON's responses indicated he had not realized that the departure of ISLNAVCO theoretically would allow OCEANIA to retain one hundred percent of the profits thereafter, if the OCEANIA/ISLNAVCO agreement truly reflected the universe of ROBINSON's commitment to MARSHALL.

ment. OCEANIA successively successfully resisted the injunction action and the two inquiries by satisfying all concerned that it was the common carrier in the trade. Those inquiries were not terminated, however, until OCEANIA filed its own tariff and ISLNAVCO canceled its tariff. It is evident that the Commission did not get the benefit of all the relevant facts from PATTERSON and ROBINSON when it terminated its informal section 15 inquiry.

When ISLNAVCO ceased to be a factor, AKSHIP became the Guam agent for the tug and barge and the AIS service. It took its instructions for remitting freight revenues, from both operations, from MARSHALL and REYES. This meant that AKSHIP sent its paper work for AIS and OCEANIA to REYES in Manila and the revenues to AIS or CHIPAC in Hong Kong. It also meant that AIS and OCEANIA revenues could be commingled to pay off Guam port expenses incurred by either of them.⁹⁷

In defending this proceeding, OCEANIA/ROBINSON knew well in advance of the hearing that SAISHIP would attempt to prove a section 15 relationship between OCEANIA and AIS, as well as one between OCEANIA and ISLNAVCO. In a variety of ways, including withholding of documents sought by way of discovery and "equivocal" testimony by ROBINSON, OCEANIA attempted to prevent the disclosure of the full dimensions of the OCEANIA/AIS accord.

THE STATUTES INVOLVED

As pertinent, section 15 of the Shipping Act, 1916, provides:

SEC. 15. Every common carrier by water, or other person subject to this Act, shall file immediately with the Commission a true copy, or, if oral, a true and complete memorandum, of every agreement with another such carrier or other person subject to this Act, or modification or cancellation thereof, to which it may be a party or conform in whole or in part, fixing or regulating transportation rates or fares; giving or receiving special rates, accommodations, or other special privileges or advantages; controlling, regulating, preventing, or destroying competition; pooling or apportioning earnings, losses, or traffic; allotting ports or restricting or otherwise regulating the number and character of sailings between ports; limiting or regulating in any way the volume or character of freight or passenger traffic to be carried; or in any manner providing for an exclusive, preferential, or cooperative working arrangement. The term "agreement" in this section includes understandings, conferences, and other arrangements, but does not include maritime labor agreements or any provisions of such

⁹⁷ OCEANIA could and did draw directly on some of the revenues collected by AKSHIP from time to time.

agreements, unless such provisions provide for an assessment agreement described in the fifth paragraph of this section.

* * *

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

As pertinent, section 18(b)(1) of the Shipping Act, 1916, provides:⁹⁸

From and after ninety days following enactment hereof every common carrier by water in foreign commerce and every conference of such carriers shall file with the Commission and keep open to public inspection tariffs showing all the rates and charges of such carrier or conference of carriers for transportation to and from United States ports and foreign ports between all points on its own route and on any through route which has been established. Such tariffs shall plainly show the places between which freight will be carried, and shall also state separately such terminal or other charge, privilege, or facility under the control of the carrier or conference of carriers which is granted or allowed, and any rules or regulations which in anywise change, affect, or determine any part or the aggregate of such aforesaid rates, or charges, and shall include specimens of any bill of lading, contract of affreightment, or other document evidencing the transportation agreement. Copies of such tariffs shall be made available to any person and a reasonable charge may be made therefor. . . .

DISCUSSION

I. THE RELIEF SOUGHT IS WITHIN THE SCOPE OF THE COMPLAINT

OCEANIA's opening argument in its answering brief is referred to as a "preliminary procedural argument." In it, OCEANIA contends that because the complaint does not name any of the AFFILIATED/ASSOCIATED COMPANIES⁹⁹ as respondents, SAISHIP is barred

⁹⁸ In 1977, the trade between Guam and Saipan was in the foreign commerce of the United States.

⁹⁹ For the purposes of this contention, only, it will be assumed that ISLNAVCO is not included in this category.

from obtaining a cease and desist order against OCEANIA or ISLNAVCO and that SAISHIP should not be permitted to seek reparation against the AFFILIATED/ASSOCIATED COMPANIES in another docketed Commission proceeding based upon any finding in this proceeding.

OCEANIA's argument goes this way: The Commission's Rules of Practice and Procedure require that a complaint name "each carrier or person against whom complaint is made" and provide, further, that "reparation will not be awarded . . . upon a new complaint by or for the same complainant which is based upon a finding in the original proceeding;"¹⁰⁰ those Rules also require that necessary and proper parties be named and joined in a complaint and that if the complaint relates to more than one carrier or other person subject to the Shipping Act, 1916, all carriers or other persons against whom a rule or order is sought shall be made respondents;¹⁰¹ SAISHIP seeks an order requiring OCEANIA and ISLNAVCO to cease and desist from carrying out the agreement with the AFFILIATED/ASSOCIATED COMPANIES, but it has not named any of them as respondents in this proceeding; SAISHIP filed another complaint, in Docket No. 79-71, on July 6, 1979, against most of those companies;¹⁰² therefore, SAISHIP is not entitled to the cease and desist order and should not be permitted to seek reparation in the other complaint proceeding based on any finding in this proceeding.

In urging that SAISHIP is not entitled to the type of cease and desist order it seeks, OCEANIA is correct, but not for the reasons given. In arguing that SAISHIP should not be permitted to seek reparation against any of the respondents in Docket No. 79-71 not named in this proceeding, OCEANIA erroneously implies that SAISHIP has asked for such relief.

With respect to the cease and desist order contention, it should be observed that the order sought by SAISHIP would run against only those respondents named in the complaint even though the order might affect relationships with others not named in the complaint. It should also be noted that the instant complaint is broad enough to have allowed proof of the relationships between OCEANIA, ISLNAVCO and the nonrespondent AFFILIATED/ASSOCIATED COMPA-

¹⁰⁰ 46 C.F.R. 502.62.

¹⁰¹ 46 C.F.R. 502.44.

¹⁰² SAISHIP's complaint names AIS, CABTUG, SALVTUG, CHIPAC, CHIPAC S.A., TRANSPAC, PACLOG, ISLNAVCO and OCEANIA as respondents. Docket No. 79-71 has been held in abeyance pending the outcome of this proceeding.

NIES, within the framework of the allegations of violation of section 15 of the Shipping Act.¹⁰³

Nevertheless, whether SAISHIP would have been entitled to the issuance of any cease and desist order has become a moot issue. Any such order would have to be predicated on a continuing agreement between OCEANIA (since ISLNAVCO is no longer a carrier) and another carrier or other person subject to the Act. Inasmuch as AIS canceled its tariff, shortly after the last brief was filed, it, too, is no longer a carrier. Because on this record, any common carrier status of the AFFILIATED/ASSOCIATED COMPANIES, individually or together, is derived from AIS, it would be inappropriate to consider the issuance of a cease and desist order of the type requested. Of course, this ruling would not bar SAISHIP from seeking such relief upon a proper showing in Docket No. 79-71.

Insofar as the reparation contention is concerned, SAISHIP simply has not requested that it be permitted to seek reparation from the respondents named in Docket No. 79-71 based upon any finding in this proceeding. However, to allay OCEANIA's concern, it is ruled that any findings made in this proceeding concerning any respondent in Docket No. 79-71, save OCEANIA or ISLNAVCO,¹⁰⁴ shall not be binding on any respondent in that proceeding.

II. THE BURDEN OF PROOF HAS
BEEN SUSTAINED BY SAISHIP

A: INFERENCES

Generally prefacing its initial substantive argument¹⁰⁵ OCEANIA warns that "The burden of proof can not be carried by inference." After having made that broad generalization, OCEANIA acknowledges, nevertheless, that in administrative proceedings, as in the courts, inferences may be drawn so long as they are reasonable and based upon evidence of record rather than mere speculation. *West Coast Line, Inc.*

¹⁰³ There is nothing of record to show that at the time the complaint was filed that SAISHIP was aware of the AIS connection with OCEANIA/ ISLNAVCO. Indeed, as found, OCEANIA tried very hard to keep SAISHIP from learning the full extent of the relationship. In any event, because SAISHIP gave ample advance notice to OCEANIA that it would introduce evidence showing violations of section 15 arising from the AIS connection, it is proper to rule that the complaint is conformed to the proof.

Moreover, even if SAISHIP had known of the other connections its complaint would not have been defective. It was SAISHIP's option to choose which if any tortfeasor to sue. See *Roberto Hernandez, Inc. v. Arnold Bernstein Schiffahrtsgesellschaft, M.B.H.*, 2 U.S.M.C. 62, 66 (1939); *Wainwright v. Kraftco Corp.*, 58 F.R.D. 9, 11-12 (N.D. GA. 1973); *Walker Distributing Co. v. Lucky Lager Brewing Co.*, 223 F.2d 1, 8 (9 Cir. 1963); *Port Commission of City of Beaumont, Texas v. Seatrail Lines, Inc.*, 2 U.S.M.C. 500, 501 (1941).

¹⁰⁴ With respect to OCEANIA or ISLNAVCO, the related principles of res judicata and collateral estoppel shall govern the extent to which these findings are binding.

¹⁰⁵ This section will also cover the second substantive argument made by OCEANIA concerning the nature of proof to show section 15 relationships.

v. *Grace Line, Inc.*, 3 F.M.B. 585, 595 (1951); *Alcoa Steamship Co., Inc. v. Cia. Anonima Venezolana*, 7 F.M.C. 345, 361 (1962). OCEANIA, of course, is correct in its statement, but in the circumstances of this proceeding, another guiding principle is apposite.

In a sense, that SAISHIP has introduced evidence showing a conspiracy to violate section 15, and OCEANIA contends that SAISHIP's presentation is devoid of any proof of that conspiracy. It can be said that much, but not all, of the evidence was circumstantial and that ROBINSON, the only witness having direct knowledge of the agreement, did not admit the existence of any plan or scheme to accomplish a violation of section 15. But it is well settled that this does not prevent the trier of the fact from drawing reasonable inferences in those circumstances. *United States v. Polin*, 323 F.2d 549, 559, 560 (3 Cir. 1963). In the *Polin* case, a jury found the defendant guilty of conspiracy to violate section 7 of the Interstate Commerce Act, 49 U.S.C. 5(4) and the Criminal Code, 49 U.S.C. 1001. In sustaining the jury's right to draw inferences where *all* of the evidence was circumstantial and no witness admitted to a plot to commit an offense, the court held, 323 F.2d at 558:

[4] All of the evidence presented was circumstantial, none of the witnesses having admitted the existence of any plans or schemes to accomplish the offenses charged. However, it is fundamental that the offense of conspiracy is rarely provable by direct evidence and that conviction thereof may be based upon circumstantial evidence. *Delli Paoli v. United States*, 352 U.S. 232, 236, n. 4, 77 S.Ct. 294, 1 L.Ed.2d 278 (1956).

The Supreme Court and this Commission have recognized that this principle is applicable to section 15 proceedings. The existence and the substance of an agreement may be proven through inferences from circumstantial evidence that are "reasonable in light of human experience generally or when based on the Commission's special familiarity with the shipping industry. . . ." *Federal Maritime Commission v. Aktiebolaget Svenska Amerika Linien*, 390 U.S. 238, 249 (1968). In *Unapproved Section 15 Agreement—North Atlantic Spanish Trade*, 7 F.M.C. 337 (1962), the wisdom of the Commission's ruling, 7 F.M.C. at 342-43, is particularly appropriate:

[C]onsidering the penalty prescribed by law for illicit anti-competitive activity, it is not to be expected that proof of such activity will be obtained either easily or in abundance. In such cases the solid evidence may consist of no more than a few contemporaneous memoranda or other documents. These, however, are far greater weight than oral testimony given at some later date by those who are under investigation and whose "explanations" of the documents simply cannot be squared with their contents. . . .

Here, of course, there was abundant, well-nigh overwhelming, documentation of the section 15 relationship between OCEANIA and AIS and the inferences contained therein are the exception rather than the rule.

B: SECTION 15 RELATIONSHIPS

Briefly, section 15 requires that certain specified kinds of agreements between two or more common carriers by water or other persons subject to the Act be filed with and approved by the Commission prior to implementation of the agreement. Thus, there must be both subject matter and personal jurisdiction in order that section 15 be invoked.

Ship agents are neither carriers nor other persons subject to the Act and, therefore, agreements between agents and common carriers are not subject to section 15, as OCEANIA points out, citing *United States Gulf Atlantic and India, Ceylon and Burma Conference (Agreement No. 7620)*, 2 U.S.M.C. 749 (1945). Bearing this distinction in mind, SAISHIP has proved an agreement between two common carriers, OCEANIA and AIS, during all of the period covered by the complaint, and between those two carriers and a third carrier, ISLNAVCO, for a part of that period. Those agreements concerned section 15 subject matter.

III. APPLYING THE FACTS TO THE LAW

**A: SAISHIP HAS ESTABLISHED THE VIOLATION
OF SECTION 18(b)(1) BY OCEANIA AND IS
ENTITLED TO RELIEF FOR THAT VIOLATION**

OCEANIA makes a very brief preliminary argument with regard to its violation of section 18(b)(1) during the period from April 5, 1977, through July 2, 1977, when, admittedly, it operated as a common carrier in the Guam/NMI trade without having an effective tariff on file with the Federal Maritime Commission.¹⁰⁶ OCEANIA's entire argument is this: "Because [SAISHIP] has apparently abandoned its allegations as to the violations of the other sections of the Shipping Act mentioned in its Complaint (i.e. . . . 18), OCEANIA's effort in this brief is directed toward dispelling the conspiratorial allegations of a continuing, unfiled Section 15 agreement."

There is no reasonable or sound basis for OCEANIA's conclusion that SAISHIP has abandoned its right to relief for violation of section 18. Indeed, SAISHIP's proposed finding No. 55 explicitly proposes a finding of a section 18 tariff violation by OCEANIA.

¹⁰⁶ See, e.g., Answering Brief, p. 70, n. 67.

B: OCEANIA'S RELATIONSHIP WITH
ISLNAVCO CREATED PERSONAL AND
SUBJECT MATTER JURISDICTION
UNDER SECTION 15

OCEANIA's argument that its relationship with ISLNAVCO was not subject to section 15 is divided into three parts. They are (a) the agreement with ISLNAVCO (FMC 10306) was not subject to section 15; (b) joint advertising does not create a joint service subject to section 15; and (c) ISLNAVCO's activities do not make it a person subject to the Act.

I shall not dwell too long on this argument for the obvious reasons (1) that the agreement between ISLNAVCO and OCEANIA did not have a life of its own but was merely a part of the arrangements made by ROBINSON and MARSHALL for OCEANIA and AIS, respectively; and (2) that it is primarily based upon the invalid proposition that ISLNAVCO was only an agent and not a common carrier by water.

In support of its claim that ISLNAVCO was merely an agent, OCEANIA submits that ISLNAVCO is in a situation similar to that of Kerr Steamship Co., Inc. in *Agreement No. 7620, supra*. In that case Kerr's status was found to be that of an agent and not a carrier even though Kerr had established "tariffs of rates" and did certain other things that were then (in 1945, prior to the time that section 18(b)(1) became a part of the Shipping Act) apparently consistent with common carriage.¹⁰⁷ However, Kerr's holding out did not involve an "undertaking to carry [continuing], for a certain period of time at least, subsequent to the receipt of the goods for the purpose of transportation."¹⁰⁸ Inasmuch as Kerr signed dock receipts and bills of lading for *known principals*, the Commission held that Kerr's undertaking ceased "before the act of water transportation commerce and before common carrier liability attaches."¹⁰⁹ Here, not only did ISLNAVCO sign the bills of lading without naming another as principal, it held itself out as the carrier through advertising and through tariff publication to perform a through transportation service, and it entered into agreements with common carriers, other than OCEANIA, to perform a through common carrier service.

Clearly, ISLNAVCO was no mere agent. ISLNAVCO was a common carrier in every sense of the term and its agreement to conduct a common carrier service with OCEANIA was subject to section

¹⁰⁷ 2 U.S.M.C. at 751.

¹⁰⁸ *Id.* at 752-53.

¹⁰⁹ *Id.* at 753.

15. *In the Matter of Agreement 9597*,¹¹⁰ 12 F.M.C. 83 (1968); *Puget Sound Tug & Barge v. Foss Launch & Tug Co.*, 7 F.M.C. 43 (1962).

OCEANIA'S RELATIONSHIP WITH AIS
CREATED PERSONAL AND SUBJECT MATTER
JURISDICTION UNDER SECTION 15

The facts clearly disclose that under the arrangement agreed upon by ROBINSON and MARSHALL OCEANIA and AIS would work together to eliminate SAISHIP from the Guam/NMI trades. Among the things necessary to achieve this end MARSHALL provided OCEANIA with the tug and barges, financial, managerial and administrative support through the various AFFILIATED/ ASSOCIATED COMPANIES. In addition AIS and OCEANIA fixed and regulated rates for cargo transhipped exclusively from the *Endurance* to the TM-644.¹¹¹

Thus at least four of the activities which require approval under section 15 were covered in the agreement between OCEANIA and AIS, both of which are common carriers subject to the personal jurisdiction of section 15. See *Uiterwyk, supra; Puget Sound Tug & Barge v. Foss Launch & Tug Co., supra*.

The Commission's approval of the OCEANIA/AIS agreement was neither sought nor obtained.

IV. EQUITABLE CONSIDERATIONS AND DAMAGES

In its Answering Brief, OCEANIA attempts to sidestep its agreement made at the prehearing conference concerning the measure of damages. It contends that SAISHIP's computation of damages based on revenues diverted less variable expenses that SAISHIP would have incurred is invalid because there is no record support for assuming SAISHIP would have moved all the cargo to the NMI. It is OCEANIA's contention that Mr. Jones, a Tinian shipper, would have entered the trade if OCEANIA had not. Mr. Jones' testimony does not support a finding to that effect.

¹¹⁰ Hereafter this case will be referred to as *Uiterwyk*.

¹¹¹ Citing a definition of transshipment in a Commission regulation, 46 C.F.R. 522.2(6), OCEANIA claims that there was no transshipment agreement between OCEANIA and AIS. The definition provides that a transshipment agreement is "an agreement between a common carrier of freight by water serving a port of origin and a common carrier of freight by water serving a port of destination to establish a joint through rate in which both participate between ports." OCEANIA continues by pointing out that movement of cargo on the basis of a combination of local rates cannot be a joint through rate. Consequently, OCEANIA concludes, that the movement of cargo to Guam via the *Endurance* and then on to Saipan by a combination of local rates cannot be considered a transshipment agreement. OCEANIA is mistaken on both the facts and the law. The cargo did not move in a combination of local rates. It moved under the through rate, under AIS' tariff, without the addition of even the Guam port costs, pursuant to the agreement of ROBINSON, MARSHALL and PATTERSON. Moreover, the Commission has consistently held movements conducted in this fashion to be transshipments. See *Transshipment and Through Billing ARRANGEMENT Between East Coast Ports of South Thailand and United States Atlantic and Gulf Ports*, 10 F.M.C. 199 (1966); *Transshipment and Apportionment Agreements From Indonesian Ports to U.S. Atlantic and Gulf Ports*, 10 F.M.C. 183 (1966).

It is clear that SAISHIP suffered the pecuniary loss computed under the agreed formula because of OCEANIA's entry in the trade in violation of section 15.¹¹²

Finally, OCEANIA urges that the Commission exercise its discretionary authority under principles of equity and justice and thus deny any reparation to SAISHIP. The short answer to this prayer is that the equities simply do not favor OCEANIA. The damage done to SAISHIP was not inadvertent. It was inflicted by design and with zest. To ROBINSON, SAISHIP was a Fatted Calf, waiting to be feasted on. To Marshall, news of SAISHIP's troubles was a happy event—SAISHIP's "cancellation is *sweet music*," he rejoiced.

CONCLUSION AND ORDER

It is found that during the period from April 5, 1977, through July 28, 1977, inclusive, that OCEANIA and ISLNAVCO jointly conducted a water carrier service between Guam and the NMI, except for the period between June 21, 1977, through July 2, 1977, inclusive, when operations were temporarily suspended. Inasmuch as OCEANIA did not have an effective tariff on file with the Commission during the period from April 5, 1977 through July 2, 1977, OCEANIA was operating as a common carrier in violation of section 18(b)(1) of the Shipping Act, 1916, from April 5, 1977 through June 20, 1977, inclusive.

It is found that the relationship between OCEANIA and ISLNAVCO, during the period from April 5, 1977 through July 28, 1977, constituted an agreement requiring approval under section 15 of the Shipping Act, 1916. It is further found that this agreement was implemented and continued in effect without prior approval by the Commission in violation of section 15 of the Shipping Act, 1916.

It is found that the relationship between OCEANIA and the AFFILIATED/ASSOCIATED COMPANIES¹¹³ during the period

¹¹² OCEANIA charges that SAISHIP did nothing to mitigate its losses. OCEANIA suggests that SAISHIP could have done so by improving its service to meet competition or pass through to shippers any savings resulting from the reduction in its charter hire. This argument must fall. It is indeed ironic for OCEANIA to assert that SAISHIP, whose struggle to maintain a precarious economic viability was wrought about by OCEANIA's mischief, did not try to mitigate its losses. But, SAISHIP did attempt to do what OCEANIA suggests it did not do. Early on it sought to acquire a new barge to replace the one provided by Dilmar, only to be rebuffed by KATINDOY's demands which far exceeded the terms for the same kind of barge which MARSHALL ultimately furnished to OCEANIA. Moreover, even if SAISHIP could have improved its service or could have passed on savings to customers resulting from the reduction in the Dilmar charter hire (but there has been no satisfactory showing that SAISHIP lost business for those reasons) it is simply not wise to believe that SAISHIP could have retained any of the traffic directed to OCEANIA from Australian or Far East ports by AIS or from United States ports by Trans Trans.

¹¹³ In the light of the immediate previous finding for the purpose of this finding it is not necessary to include ISLNAVCO in the group of AFFILIATED/ASSOCIATED COMPANIES. Of course, AIS is included.

SAIPAN SHIPPING COMPANY V. ISLAND NAVIGATION & 985
OCEANIA LINE

from April 5, 1977 through February 4, 1979, constituted an agreement requiring approval under section 15 of the Shipping Act, 1916. It is further found that this agreement was implemented and continued in effect without prior approval by the Commission in violation of section 15 of the Shipping Act, 1916.

ORDER

It is ordered that:

1. OCEANIA shall pay SAISHIP by way of reparation for violation of section 15 of the Shipping Act, 1916, the sum of \$267,755.11, for cargo diversion¹¹⁴ caused by the first 78 voyages of the TM-644.

2. OCEANIA shall pay SAISHIP by way of reparation for violation of section 15 of the Shipping Act, 1916, for cargo diversion caused by voyages of the TM-644 subsequent to voyage number 78 and through February 4, 1979, an amount to be determined, in accordance with the procedures established in Rules 251 and 252 of the Commission's Rules of Practice and Procedure, 46 C.F.R. 502.251 and 502.252.

3. OCEANIA shall pay SAISHIP by way of reparation for violation of section 18(b)(1) of the Shipping Act, 1916, an amount to be determined, pursuant to Rules 251 and 252 of the Commission's Rules of Practice and Procedure, for cargo diverted by voyages of the TM-644 prior to July 3, 1977. Recovery under this provision may take place only if SAISHIP is unable to effectuate recovery for those voyages under paragraphs 1 or 4 of this Order.

4. ISLNAVCO shall pay SAISHIP by way of reparation for violation of section 15 of the Shipping Act, 1916, an amount to be determined, pursuant to Rules 251 and 252 of the Commission's Rules of Practice and Procedure, for cargo diverted by voyages of the TM-644 from April 5, 1977 through July 28, 1977, inclusive. This liability of ISLNAVCO is joint and several with that of OCEANIA under paragraph 1 of this Order and recovery is governed by the law of damages affecting joint and several liability.

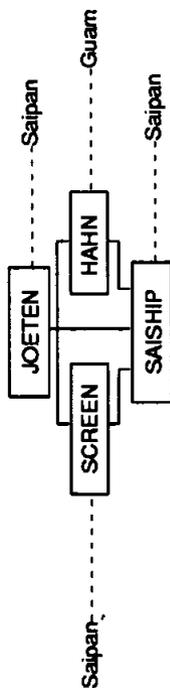
(S) SEYMOUR GLANZER
Administrative Law Judge

¹¹⁴ See Fact No. 53 and n. 91.

APPENDIX

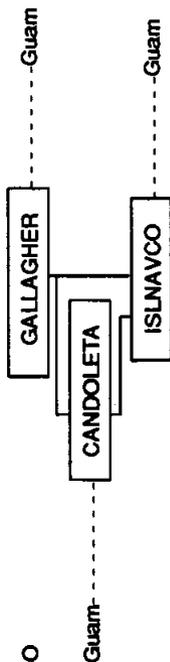
PROFILE TO ACCOMPANY SKETCH OF CAST

1. COMPLAINANT; SAISHIP



Common carrier
by tug and barge
in Guam/NMI trade.

2. RESPONDENT; ISLNAVCO



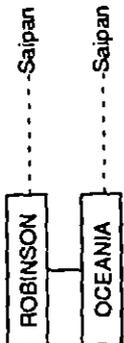
Common carrier
until cancellation of
tariff on July 29, 1977.

One of the AFFILIATED/ASSOCIATED COMPANIES (per Fact No. 50).

Per condition imposed by MARSHALL/PACLOG, on ROBINSON/OCEANIA's charter of tug and barge, ISLNAVCO was manager and operator of OCEANIA/ISLNAVCO's Guam/NMI barge service until about August 1, 1977, when GALLAGHER disappeared from Guam and ISLNAVCO ceased to function.

(Continued)

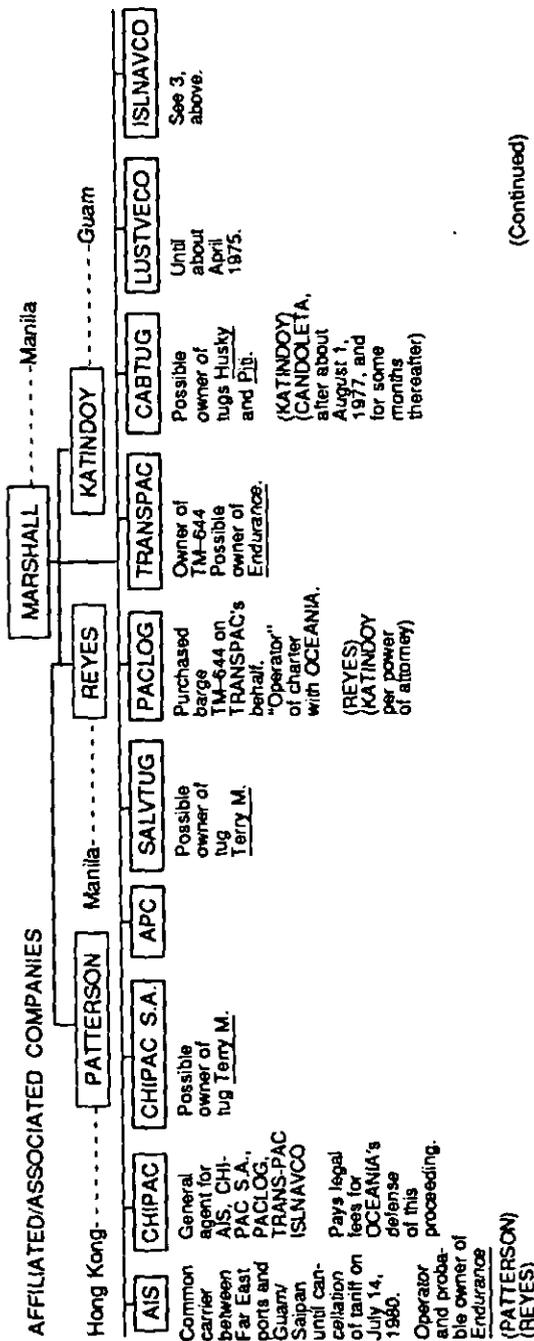
3. RESPONDENT; OCEANIA



Common carrier by tug and barge in Guam/NMI trade.

"Charterer" of barge TM-644 and tug Terry M from PACLOG, acting for TRANSPAC, probable owner of barge.

4. AFFILIATED/ASSOCIATED COMPANIES



(Continued)

5. OTHERS

A:

AKSHIP

Guam agent for
AIS and OCEANIA
after GALLAGHER

(Anderson)

B:

ITS

Washington, D.C.
tariff filing
agent and watch-
ing service for
AIDS, OCEANIA
and ISLNAVCO.

Fees paid by
CHIPAC or AIS for
those services.

FEDERAL MARITIME COMMISSION

DOCKET NO. 81-71

AGREEMENT NO. 10405 - NEW YORK OCEAN FREIGHT
FORWARDER DISCUSSION GROUP

NOTICE

May 5, 1982

Notice is given that no appeal has been taken to the March 31, 1982 order of discontinuance in this proceeding and that the time within which the Commission could determine to review has expired. No such determination has been made and accordingly, the order has become administratively final.

(S) FRANCIS C. HURNEY
Secretary

FEDERAL MARITIME COMMISSION

DOCKET NO. 81-71

AGREEMENT NO. 10405 - NEW YORK OCEAN FREIGHT
FORWARDER DISCUSSION GROUP

AGREEMENT WITHDRAWN; PROCEEDING DISCONTINUED

Finalized May 5, 1982

On March 19, 1982, the Commission denied Proponents' motion requesting an indefinite suspension of this proceeding and advised Proponents that in lieu thereof, they were free to withdraw the agreement which is the subject of this proceeding without prejudice to subsequent resubmission. In response to this ruling of the Commission, Proponents, by letter of March 25, 1982, have requested that their agreement, which was submitted for approval, be withdrawn without prejudice.

Accordingly, there is nothing before the Commission to litigate and the proceeding is discontinued without prejudice to resubmission of the agreement, as the Commission indicated.

(S) NORMAN D. KLINE
Administrative Law Judge

FEDERAL MARITIME COMMISSION

DOCKET NO. 80-60

FAR EASTERN SHIPPING COMPANY

POSSIBLE VIOLATIONS OF SECTIONS 16, SECOND
PARAGRAPH,

18(b)(3), AND 18(c) SHIPPING ACT, 1916

NOTICE

May 7, 1982

Notice is given that no exceptions have been filed to the April 1, 1982 initial decision in this proceeding and the time within which the Commission could determine to review that decision has expired. No such determination has been made and, accordingly, that decision has become administratively final.

(S) FRANCIS C. HURNEY
Secretary

FEDERAL MARITIME COMMISSION

DOCKET NO. 80-60

FAR EASTERN SHIPPING COMPANY

POSSIBLE VIOLATIONS OF SECTIONS 16, SECOND
PARAGRAPH, 18(b)(3), AND 18(c), SHIPPING ACT, 1916

Settlement of a proceeding seeking to determine whether Respondent's rating practices violated certain provisions of the Shipping Act, 1916, and if so, to determine whether penalties should be assessed for such violations, approved. Respondent ordered to pay \$375,000, together with interest accumulated thereon in an escrow account, pursuant to the terms of the settlement agreement.

Steven B. Chameides and John F. Dorsey for Respondent, Far Eastern Shipping Company.

John Robert Ewers, Joseph B. Slunt, Alan Jacobson, Polly Haight Frawley and Janet Katz as Hearing Counsel.

INITIAL DECISION ¹ OF SEYMOUR GLANZER, ADMINISTRATIVE LAW JUDGE

Finalized May 7, 1982

This proceeding was instituted by Order of Investigation and Hearing, served September 10, 1980, to determine whether the Respondent, Far Eastern Shipping Company (FESCO), had violated sections 16, Second paragraph, 18(b)(3) and 18(c) of the Shipping Act, 1916, 46 U.S.C. 815, Second paragraph, 817(b)(3) and 817(c), by engaging in certain rating practices and, if so, to determine whether penalties should be assessed for those violations. In particular, the Order required the determination of the following issues:

- (1) whether FESCO violated section 16, second paragraph, by permitting any person to obtain transportation for property at less than the rates and charges then established in its tariffs on file with the Commission by any unjust or unfair device or means between May 1, 1979 and March 31, 1980, inclusive;
- (2) whether FESCO violated section 18(b)(3) by charging, demanding, collecting or receiving a greater or less 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, or by rebating, refunding

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

or remitting in any manner or by any device any portion of the rates or charges specified in its tariffs on file with the Commission between May 1, 1979 and March 31, 1980, inclusive;

(3) whether FESCO violated section 18(c)(1) by charging rates which have been suspended by the Commission between May 1, 1979 and March 31, 1980, inclusive; and

(4) whether penalties should be assessed against FESCO if it is found to have violated section 16, second paragraph, section 18(b)(3), or section 18(c), and, if so, the amount of such penalties.²

PROCEDURAL BACKGROUND TO THE SETTLEMENT

On September 17, 1980, one week after the Order was served, Hearing Counsel served its interrogatories and requests for production of documents on Respondent. Two days later, on September 19, 1980, Respondent served similar discovery and inspection requests upon Hearing Counsel.

At the first of several prehearing conferences, held on September 28, 1980, the scope of the proceeding was settled, a further prehearing conference was scheduled, and a target date for the hearing was set.

On October 20, 1980, Hearing Counsel served Respondent with answers to its interrogatories and documents in response to its request for production of documents. On October 31, 1981, Respondent answered Hearing Counsel's interrogatories and produced approximately ten thousand documents in response to Hearing Counsel's request for production of documents. These documents related to over seventeen hundred cargo shipments transported by Respondent in the Philippines/United States Pacific Coast inbound trade between May 1, 1979 and March 31, 1980. They included bills of lading, freight manifests, freight correctors and documentation showing payment of freight charges.

At the second prehearing conference, on November 12, 1980, the parties presented a status report, after which another prehearing conference was scheduled for January 21, 1981.

On December 31, 1980, the parties met. At that meeting, they discussed alleged rating errors pertinent to the documents furnished to

² Implicitly, the reference to assessment of penalties invokes provisions of section 32 of the Shipping Act, 1916, 46 U.S.C. 831, which provides in pertinent part:

(e) Notwithstanding any other provision of law, the Commission shall have authority to assess or compromise all civil penalties provided in this Act: *Provided, however,* That, in order to assess such penalties a formal proceeding under section 22 of this Act shall be commenced within five years from the date when the violation occurred.

The Shipping Act provides that for violation of section 16, Second paragraph, the civil penalty shall be "not more than \$25,000 for each . . . violation." Section 16 (penultimate paragraph), 46 U.S.C. 815. The civil penalty for violation of section 18(b)(3) (other than for refunds or rebates) shall be "not more than \$5,000 for each day such violation continues." Section 18(b)(6), 46 U.S.C. 817(b)(6).

Respondents by Hearing Counsel during the discovery process. In addition, Hearing Counsel provided information regarding other rating matters which it considered germane to the issues after reviewing documents relating to approximately one hundred fifty shipments.

A motion to postpone the January 21, 1981, prehearing conference to March 2, 1981, was granted on Hearing Counsel's showing that additional time was needed to review the multitude of documents discovered. Hearing Counsel explained that, mechanically, it took one month to copy and collate those documents by individual voyage, and that the process of reviewing the documents entailed having the Commission's tariff analysts familiarize themselves with Respondent's tariffs as well as Respondent's repetitive rating practices in order to enable them to develop a readily understandable system of recording alleged rating errors which Hearing Counsel could then use to inform Respondent of the positions it would take on the matters of fact and law to be presented at the hearing.

Thereafter, between January 9, 1981, and March 2, 1981, the parties met frequently to discuss specific shipments which Hearing Counsel believes were misrated by Respondent. It was during these meetings that settlement discussions were initiated.

At the March 2, 1981, prehearing conference, a further status report was presented. It was shown that additional discovery was needed and would require two months to complete. Based on those factors, a prehearing schedule was fixed and a hearing was set to commence on July 13, 1981.

A request to suspend the procedural schedule established at the March 2, 1981, prehearing conference was granted on April 30, 1981, when the parties reported that the settlement discussions were beginning to bear fruit and that they wished to devote their efforts to settlement negotiations rather than preparing for what appeared to be a very lengthy trial.

During the next months, the parties met on numerous occasions³ to reach an agreement. Following an oral understanding, in principle, the parties devoted their efforts to the preparation of a detailed written agreement setting forth its terms. In midsummer, 1981, the oral settlement agreement was reduced to writing. Upon receipt of appropriate authorization, counsel for both parties executed the proposed settlement agreement on September 28, 1981.⁴ The original of the proposed settle-

³ At the request of the parties, I was present, informally, at some of those meetings. In order to hasten the settlement process, once it became clear that settlement was in the offing, some meetings were made formal. Thus, technically, portions of those meetings were conducted as part of the "hearing." Those formal sessions took place on August 18, 1981, September 9, 1981, October 19, 1981, and November 19, 1981. The hearing was closed *sine die* on the latter date.

⁴ An informational copy was presented to me at that time.

ment agreement entitled "Proposed Settlement of Civil Penalties,"⁵ together with the parties' evidentiary stipulation and their individual concurrent memoranda in support of the settlement were filed on November 17, 1981.

THE STIPULATION⁶

Hearing Counsel and FESCO hereby stipulate and agree that the following statements are not admissions of fact nor waivers of any rights under law by either Hearing Counsel or FESCO. Hearing Counsel and FESCO stipulate and agree that the following statements are made pursuant to a settlement agreement entered into by the parties and are part of the settlement discussions and negotiations of the parties leading to the conclusion, execution and confirmation of the settlement of the above-referenced proceeding. Pursuant to Rule 502.91 of the Commission's Rules of Practice and Procedure (46 C.F.R. 502.91), these statements may not be used or considered in this proceeding or in any subsequent proceeding, either before the Federal Maritime Commission or any other governmental agency or court, except as such statements are offered in support of the confirmation and acceptance of the proposed settlement agreement submitted by the parties.

Hearing Counsel, at a hearing in the above referenced proceeding, would offer evidence of acts by FESCO which Hearing Counsel believe violated section 16, second paragraph, Shipping Act, 1916 (the "Act") on 46 occasions and section 18(b)(3) of the Act on 35 occasions. FESCO, at said hearing, would offer evidence it believes shows that it did not commit the acts alleged by Hearing Counsel, and that if such acts were committed by FESCO, that such acts did not violate the Act on those occasions cited by Hearing Counsel.

Hearing Counsel would further offer evidence to show that the above mentioned alleged violations relate to shipments aboard the PUTIVL voyage 41, the ROMAS voyage 9, the ZHUKOV voyage 27, and the IOGANSON voyage 30, from the Philippines to the United States. Specifically, Hearing Counsel would offer evidence relating to the following shipments:

I. *Cottage Craft Products—Alleged Violations of Section 16, Second Paragraph*

- | | |
|----------------|-------------------------|
| 1. B/L: | M/OAK/DT-1 ⁷ |
| B/L Date: | June 21, 1979 |
| Vessel Voyage: | PUTIVL 41 |

⁵ Should this decision become the decision of the Commission, see n. 1 *supra*, pursuant to 46 C.F.R. 505.3, the Proposed Settlement of Civil Penalties is attached as an Appendix and made a part of this decision.

⁶ The Stipulation is dated November 5, 1981, and was executed by counsel for the parties.

⁷ FESCO bills of lading numbers indicate the port of loading and the port of discharge and if OCP or landbridge, the final destination.

FEDERAL MARITIME COMMISSION

- | | | |
|----|--|---|
| 2. | B/L: | M/OAK/DT-2 |
| | B/L Date: | June 27, 1979 |
| | Vessel Voyage: | PUTIVL 41 |
| 3. | B/L: | M/OAK/DT-3 |
| | B/L Date: | July 2, 1979 |
| | Vessel Voyage: | PUTIVL 41 |
| 4. | B/L: | M/OAK/DT-4 |
| | B/L Date: | July 3, 1979 |
| | Vessel Voyage: | PUTIVL |
| 5. | B/L: | M/OAK/DT-1 |
| | B/L Date: | December 11, 1979 |
| | Vessel Voyage: | ROMAS 9 |
| 6. | B/L: | M/OAK/DT-1 |
| | B/L Date: | October 1, 1979 |
| | Vessel Voyage: | IOGANSON 30 |
| 7. | B/L: | M/OAK/DT-3 |
| | B/L Date: | October 11, 1979 |
| | Vessel Voyage: | IOGANSON 30 |
| 8. | B/L: | M/OAK/DT-4 |
| | B/L Date: | October 15, 1979 |
| | Vessel Voyage: | IOGANSON 30 |
| 9. | B/L: | M/OAK/DT-5 |
| | B/L Date: | October 19, 1979 |
| | Vessel Voyage: | IOGANSON 30 |
| | B/L description
for shipments
1-9: | Assorted Philippine Made Cottage Craft Products |

Hearing Counsel would offer witnesses that would testify that shipments 1-9 each contained an assortment of Philippine products including furniture, baskets, brooms and figurines. Documentary evidence would include bills of lading, packing lists and commercial invoices.

Such testimony would be that: (1) FESCO rated each shipment, in its entirety, under its FMC Tariff No. 23, Item No. 490, furniture made of bamboo, buri, rattan, alone or in combination, in bales or in crates, and that FESCO charged and collected freight according to that rating; (2) the non-furniture cargo (woven articles, handicrafts) in each shipment should not have been rated as furniture, but rather as handicrafts and woven articles, under FESCO Tariff No. 23, Items 570 and 1070, respectively; (3) if each shipment had been rated as furniture, handicrafts and woven articles, the charge would have in each instance

exceeded that charged and collected by FESCO; (4) FESCO's tariff required the shipper to furnish FESCO a list and description of the contents of the goods shipped; (5) it was common knowledge in the trade that furniture was often mixed in containers with handicrafts and woven articles; and (6) FESCO knew or should have known the actual contents of each of these shipments.

FESCO would offer testimony of shippers from the Philippines where these shipments originated that: (1) the term "cottage crafts" is a generic term used in the Philippines to refer to buri and rattan furniture products; (2) the term "cottage crafts" was the cargo description which was provided to FESCO's agents at the time the sealed containers containing this merchandise were delivered for shipment; (3) FESCO's agents were informed that the shipments were the types of buri and rattan furniture normally described as "cottage crafts"; (4) the cargo was as described; and (5) the description of the cargo given to FESCO's agents was consistent with the descriptions which they provided to the Philippines customs authorities in their applications for permission to export these commodities.

FESCO's agents from the Philippines would testify that: (1) the cargo tendered to them pursuant to these bills of lading was described as "cottage crafts," a term understood by FESCO's agents to refer to buri and rattan furniture, and that the cargo was manifested as such; (2) the shipper's export declarations conformed with the descriptions given to FESCO in the shipper's bills of lading, satisfying FESCO's requirements under the tariff, if any, for independent verification of the nature of the shipments; and (3) if any products other than buri and rattan furniture were included in these shipments, the amount of such products was only incidental to the shipment and the shipment would still have been properly rated as buri and rattan furniture.

FESCO would also show that any packing lists and commercial invoices which might be submitted as evidence by Hearing Counsel to attempt to prove that products other than buri and rattan furniture were included in these shipments do not correspond with the shipments covered by these bills of lading, but rather refer to other bills of lading.

II. *Pro-rating Per Container Rates—Alleged Violations of Section 18(b)(3)*

- | | | |
|-----|------------------|---------------------------------------|
| 10. | B/L: | C/SAV-2 |
| | Vessel Voyage: | PUTIVL 41 |
| | B/L Description: | woven articles and rattan accessories |
| 11. | B/L: | C/SAV-3 |
| | Vessel Voyage: | PUTIVL 41 |
| | B/L Description: | woven articles and rattan accessories |

- | | | |
|-----|--|---|
| 12. | B/L:
Vessel Voyage:
B/L Description: | C/SAV-4
PUTIVL 41
woven articles, rattan accessories and handi-
crafts |
| 13. | B/L:
Vessel Voyage:
B/L Description: | C/SAV-2a
PUTIVL 41
rattan accessories |
| 14. | B/L:
Vessel Voyage:
B/L Description: | C/STL-1
PUTIVL 41
rattan furniture, display items, baskets |
| 15. | B/L:
Vessel Voyage:
B/L Description: | C/STL-1A
PUTIVL 41
rattan furniture |

Hearing Counsel would offer witnesses that would testify that: (1) for shipments 10-15 FESCO charged and collected freight based, in part, on a pro-rated per container rate for the rattan portion of the shipments; (2) neither of FESCO's applicable tariffs (FMC No. 23 for local and OCP and FMC No. 29 for landbridge) had provisions allowing FESCO to pro-rate the per container rate for rattan items; and (3) had FESCO properly rated each shipment, on the basis of weight or measure commodity rates, it would have charged a different amount than that actually charged and collected.

FESCO would offer the testimony of tariff experts that: (1) FESCO's tariff rules for the rating of mixed container loads of merchandise were properly applied to the shipments listed above; (2) these rules provided that the transportation charges for mixed container loads would be calculated at the rate applicable on each commodity therein; (3) when the only rate for a commodity is a container load rate, such as was the case for rattan furniture, such a rate may be pro-rated to apply to a mixed container load shipment made up of such a commodity, unless such pro-rating of a container rate is precluded by the tariff; (4) no prohibition on pro-rating of container rates was to be found in either of FESCO's tariffs involved herein; (5) FESCO's interpretation of the proper application of its tariffs with respect to this issue results in a uniform and consistent rate level for all its shippers; and (6) the interpretation suggested by Hearing Counsel would have resulted in some shippers paying more and other shippers paying less than the transportation charges collected by FESCO under its more reasonable and evenhanded interpretation. FESCO would also offer the testimony of shippers that the description of the cargo given to FESCO's agents was consistent with the description which they provided to the Philippines customs authorities in their application for permission to export these

commodities, and these representations would be confirmed by FESCO's agents.

III. *Buri/Rattan Furniture and Accessories/Fillers—Alleged Violations of Section 16, Second Paragraph*

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|-----|------------------|---|
| 16. | B/L: | C/DLS-1 |
| | B/L Date: | July 2, 1979 |
| | Vessel Voyage: | PUTIVL 41 |
| | B/L Description: | Buri furniture and accessories |
| 17. | B/L: | C/DLS-2 |
| | B/L Date: | July 5, 1979 |
| | Vessel Voyage: | PUTIVL 41 |
| | B/L Description: | Buri Furniture and fillers |
| 18. | B/L: | C/DLS-3 |
| | B/L Date: | July 5, 1979 |
| | Vessel Voyage: | PUTIVL 41 |
| | B/L Description: | Buri furniture and accessories |
| 19. | B/L: | M/SW-2 |
| | B/L Date: | July 5, 1979 |
| | Vessel Voyage: | PUTIVL 41 |
| | B/L Description: | Buri/rattan furniture and accessories |
| 20. | B/L: | M/SW-3 |
| | B/L Date: | July 5, 1979 |
| | Vessel Voyage: | PUTIVL 41 |
| | B/L Description: | Buri/rattan furniture and accessories |
| 21. | B/L: | M/LB/TA-1 |
| | B/L Date: | December 12, 1979 |
| | Vessel Voyage: | ROMAS 9 |
| | B/L Description: | Buri/rattan furniture and accessories |
| 22. | B/L: | M/OAK-1 |
| | B/L Date: | November 15, 1979 |
| | Vessel Voyage: | ZHUKOV 27 |
| | B/L Description: | Buri wicker furnitures with assorted woven accessories as loose fillers |
| 23. | B/L: | L/LA-1 |
| | B/L Date: | October 25, 1979 |
| | Vessel Voyage: | ZHUKOV 27 |
| | B/L Description: | Buri rattan: wares and accessories |
| 24. | B/L: | M/LB/DT-1 |
| | B/L Date: | November 13, 1979 |
| | Voyage: | ZHUKOV 27 |
| | B/L Description: | Buri furniture and accessories |
| 25. | B/L: | C/LA-1 |
| | B/L Date: | October 29, 1979 |
| | Vessel Voyage: | ZHUKOV 27 |
| | B/L Description: | Buri furniture and accessories |

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| 26. | B/L: | C/LA-2 |
| | B/L Date: | October 29, 1979 |
| | Vessel Voyage: | ZHUKOV 27 |
| | B/L Description: | Buri/rattan wares and accessories |
| 27. | B/L: | C/LA-5 |
| | B/L Date: | October 30, 1979 |
| | Vessel Voyage: | ZHUKOV 27 |
| | B/L Description: | Buri furniture and accessories |
| 28. | B/L: | M/LB/TA-1 |
| | B/L Date: | November 13, 1979 |
| | Vessel Voyage: | ZHUKOV 27 |
| | B/L Description: | Buri/rattan furnitures and accessories |

Hearing Counsel would offer witnesses that would testify that shipments 16-28 each contained furniture, baskets, woven articles or other assorted handicrafts. Documentary evidence would include bills of lading, packing lists and commercial invoices.

Such testimony would be that: (1) FESCO rated each shipment, in its entirety, under its FMC Tariff No. 23, Item No. 480, furniture made of bamboo, buri, rattan, alone or in combination, in bales or in crates, and that FESCO charged and collected freight according to that rating; (2) the non-furniture cargo (woven articles and handicrafts) in each shipment should not have been rated as furniture, but rather as handicrafts and woven articles under FESCO Tariff No. 23, Items 570 and 1070, respectively; (3) if each shipment had been rated as furniture, handicrafts and woven articles, the charge would have in each instance exceeded that charged and collected by FESCO; (4) FESCO's tariff required the shipper to furnish FESCO a list and description of the contents of the goods shipped; (5) it was common knowledge in the trade that furniture was often mixed in containers with handicrafts and woven articles; and (6) FESCO knew or should have known the actual contents of each of these shipments.

FESCO would introduce as witnesses various furniture manufacturers from the Philippines who would testify that the term "accessories" as used in the bill of lading descriptions which they provided to FESCO for their products referred to various accoutrements and appointments which invariably accompany buri and rattan furniture and which are considered as part of such furniture by persons in the trade, and that while the addition of the word "accessories" was not generally necessary for most customers, some customers preferred or insisted on the inclusion of this term in the description of their shipments as evidence that the expected components had been included with the merchandise.

FESCO's tariff experts would also testify that FESCO's tariff items for buri and rattan furniture would not properly be rated under handicrafts, woven articles or any other item descriptions in FESCO's tariffs.

FESCO would also offer the testimony of various shippers and FESCO's agents that: (1) each of the above shipments was tendered to FESCO in a sealed container and that the shippers verified that the containers contained the merchandise described in their shipping documents; and (2) the descriptions provided to FESCO's agents were consistent with the descriptions contained in the shippers' export declarations and that this was confirmed by FESCO's agents.

FESCO would also show that any documentary evidence which might be introduced by Hearing Counsel was produced here in the United States by the consignee of the cargo and was not an independent and objective appraisal of the merchandise, nor were such documents known to FESCO at the time the shipment was rated or delivered.

IV. *Mixed Containerloads FMC 29—Alleged Violations of Section 18(b)(3)*

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|-----|------------------|---|
| 29. | B/L: | M/BAL-5 |
| | B/L Date: | July 5, 1979 |
| | Vessel Voyage: | PUTIVL 41 |
| | B/L Description: | Buri furniture, basketwares and articles |
| 30. | B/L: | M/PH-3 |
| | B/L Date: | December 11, 1979 |
| | Vessel Voyage: | ROMAS 9 |
| | B/L Description: | General Housewares (Rattan furniture and accessories) |
| 31. | B/L: | M/PH-4 |
| | B/L Date: | December 11, 1979 |
| | Vessel Voyage: | ROMAS 9 |
| | B/L Description: | Buri furniture, basketwares |
| 32. | B/L: | M/NJ-3 |
| | B/L Date: | December 12, 1979 |
| | Vessel Voyage: | ROMAS 9 |
| | B/L Description: | Rattanwares |
| 33. | B/L: | M/NY-6 |
| | B/L Date: | November 13, 1979 |
| | Vessel Voyage: | ZHUKOV 27 |
| | B/L Description: | Buri furniture, giant fan |
| 34. | B/L: | M/MOA-1 |
| | B/L Date: | November 15, 1979 |
| | Vessel Voyage: | ZHUKOV 27 |
| | B/L Description: | Buri furniture accessories |
| 35. | B/L: | M/NY-3 |
| | B/L Date: | November 13, 1979 |

	Vessel Voyage:	ZHUKOV 27
	B/L Description:	Buri furniture accessories
36.	B/L:	C/PHI-2
	Vessel Voyage:	IOGANSON 30
	B/L Description:	Buri furniture and accessories
37.	B/L:	C/PHI-3
	Vessel Voyage:	IOGANSON 30
	B/L Description:	Rattan furniture and wares
38.	B/L:	C/SAV-1
	Vessel Voyage:	IOGANSON 30
	B/L Description:	Buri furniture and accessories
39.	B/L:	C/HTN-4
	Vessel Voyage:	IOGANSON 30
	B/L Description:	Rattan furniture and wares

Hearing Counsel would offer witnesses who would testify that shipments 29-39 each contained an assortment of furniture, basketwares, woven articles and handicrafts. Documentary evidence would include bills of lading, packing lists and commercial invoices.

Such testimony would be that: (1) FESCO charged and collected a flat per container rate for each of these shipments; (2) under FESCO's applicable Tariff No. 29, Rule 90(1), a mixed volume or containerload shipment must be charged at the highest straight volume or containerload rate that would be applicable to any article in the shipment; and (3) the highest applicable rate fell under Tariff Item No. 12850, woven articles, producing freight charges in excess of those charged and collected by FESCO.

FESCO would offer witnesses who would testify that: (1) cargoes described immediately above as "buri furniture and accessories" or "rattan furniture and accessories" were not mixed shipments of commodities as alleged by Hearing Counsel but were shipments of buri furniture (or rattan furniture) with their normal accoutrements and appointments and were properly rated as such; (2) with respect to the shipments of mixed commodities, the proper application of FESCO's Tariff No. 29, Rule 90(1) requires a calculation of the transportation charge for each individually rated item, in accordance with the rules then applicable for minimum rates and other restrictions, as if the quantity of that item contained in that shipment were tendered alone, and the greatest of those amounts would then be selected as the applicable rate for the mixed commodity load; (3) in each instance cited by Hearing Counsel, FESCO's tariff rules were correctly applied; and (4) if such mixed commodities had been rated in accordance with the method advanced by Hearing Counsel, some of the shipments would have been assessed total charges above those assessed by FESCO while

others would have been assessed charges below those assessed by FESCO, but the difference between these alternative assessments would not have been significant.

V. *Buri Furniture and Other Items, FMC 23—Alleged Violations of Section 16, Second Paragraph*

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|-----|------------------|---|
| 40. | B/L: | M/OAK/CHI-6 |
| | B/L Date: | July 5, 1979 |
| | Vessel Voyage: | PUTIVL 41 |
| | B/L Description: | Buri furniture and Philippine basketwares |
| 41. | B/L: | M/OAK/CHI |
| | B/L Date: | December 13, 1979 |
| | Vessel Voyage: | ROMAS 9 |
| | B/L Description: | Philippine made Buri furniture and basketwares |
| 42. | B/L: | M/LB-2 |
| | B/L Date: | December 12, 1979 |
| | Vessel Voyage: | ROMAS 9 |
| | B/L Description: | Assorted buri furnitures, fans, and rattan coat hangers |
| 43. | B/L: | M/LA-8 |
| | B/L Date: | December 12, 1979 |
| | Vessel Voyage: | ROMAS 9 |
| | B/L Description: | Buri furniture, handwoven articles |
| 44. | B/L: | M/LA-7 |
| | B/L Date: | December 12, 1979 |
| | Vessel Voyage: | ROMAS 9 |
| | B/L Description: | General Merchandise (assorted buriwares) |
| 45. | B/L: | MNL/SLT-3 |
| | B/L Date: | December 13, 1979 |
| | Vessel Voyage: | ROMAS 9 |
| | B/L Description: | General merchandise, buri furniture |
| 46. | B/L: | M/LB/CHI-1 |
| | B/L Date: | November 11, 1979 |
| | Vessel Voyage: | ZHUKOV 27 |
| | B/L Description: | Furniture, buri/rattan |
| 47. | B/L: | M/SEA/CHI-1 |
| | B/L Date: | November 12, 1979 |
| | Vessel Voyage: | ZHUKOV 27 |
| | B/L Description: | Buri furniture and midrib basket |
| 48. | B/L: | M/OAK/DT-2 |
| | B/L Date: | November 13, 1979 |
| | Vessel Voyage: | ZHUKOV 27 |
| | B/L Description: | Buri Furnitures, handwoven articles |
| 49. | B/L: | C/CHI-1 |
| | B/L Date: | October 30, 1979 |
| | Vessel Voyage: | ZHUKOV 27 |
| | B/L Description: | Buri furnitures, handwoven articles |

50. B/L: C/CHI-2
 B/L Date: October 30, 1979
 Vessel Voyage: ZHUKOV 27
 B/L Description: Buri furniture and wares
51. B/L: C/LA-4
 B/L Date: October 30, 1979
 Vessel Voyage: ZHUKOV 27
 B/L Description: Buri furniture and wares
52. B/L: M/LA-7
 B/L Date: November 13, 1979
 Vessel Voyage: ZHUKOV 27
 B/L Description: Buriwares
53. B/L: M/LA-10
 B/L Date: November 14, 1979
 Vessel Voyage: ZHUKOV 27
 B/L Description: Assorted rattan furnitures
54. B/L: M/LA-11
 B/L Date: November 14, 1979
 Vessel Voyage: ZHUKOV 27
 B/L Description: Buri furnitures, handwoven articles
55. B/L: M/LA-13
 B/L Date: November 15, 1979
 Vessel Voyage: ZHUKOV 27
 B/L Description: Rattan furniture and Philippine handicrafts
56. B/L: M/LB-1
 B/L Date: November 14, 1979
 Vessel Voyage: ZHUKOV 27
 B/L Description: Rattan-buri furniture, assorted baskets
57. B/L: C/KNC-1
 B/L Date: October 30, 1979
 Vessel Voyage: ZHUKOV 27
 B/L Description: Buri furniture
58. B/L: M/OAK/DT-6
 B/L Date: October 19, 1979
 Vessel Voyage: IOGANSON 30
 B/L Description: Buri furniture, plastic elephant and lion, handwoven articles
59. B/L: M/LA-4
 B/L Date: October 15, 1979
 Vessel Voyage: IOGANSON 30
 B/L Description: Buri furniture, woven articles
60. B/L: M/LA-7
 B/L Date: October 19, 1979
 Vessel Voyage: IOGANSON 30
 B/L Description: Buri Furniture and cocomidrib basket

61. B/L: M/LA-10
B/L Date: October 19, 1979
Vessel Voyage: IOGANSON 30
B/L Description: Buri furniture, handwoven articles
62. B/L: M/OAK/OH-1
B/L Date: October 17, 1979
Vessel Voyage: IOGANSON 30
B/L Description: Buri furniture and stuffing merchandise
63. B/L: M/SF-1
B/L Date: September 30, 1979
Vessel Voyage: IOGANSON 30
B/L Description: Buri, fan

Hearing Counsel would offer witnesses that would testify that shipments 40-63 each contained an assortment of furniture and baskets or other woven articles or craft products. Documentary evidence would include bills of lading, packing lists and commercial invoices.

Such testimony would be that: (1) FESCO rated each shipment, in its entirety, under its FMC Tariff No. 23, Item No. 490, furniture made of bamboo, buri, rattan, alone or in combination, in bales or in crates, and that FESCO charged and collected freight according to that rating; (2) the non-furniture cargo (woven articles, handicrafts) in each shipment should not have been rated as furniture, but rather as handicrafts and woven articles under FESCO Tariff No. 23, Items 570 and 1070, respectively; (3) if each shipment had been properly rated the proper charge would have in each instance exceeded that charged and collected by FESCO; (4) FESCO's tariff required the shipper to furnish FESCO a list and description of the contents of the goods shipped; (5) it was common knowledge in the trade that furniture was often mixed in containers with handicrafts and woven articles; and (6) FESCO knew or should have known the actual contents of each of these shipments.

FESCO would present the testimony of witnesses, both shippers and FESCO's agents from the Philippines, and documentary evidence which would show that: (1) the commodities carried in most of these shipments were buri and rattan furniture and that they were rated as such; (2) other shipments were composed predominantly of buri and rattan furniture and that other items which might have been described in the bills of lading made up such an insubstantial portion of these shipments that they could not properly be rated; (3) had these items been rated, the charges assessed would have differed both above and below those imposed by FESCO to such an insignificant amount that there was no requirement to so rate the shipments; and (4) Hearing Counsel's assertion that these items, if shipped in an amount sufficient to justify the selection of an applicable rate, would have been rated as handicrafts and woven articles is wrong, and that most such commod-

ities would have incurred rates below those imposed. FESCO would further show that the invoices alleged by Hearing Counsel to show merchandise was carried which was other than buri and rattan furniture were prepared by consignees of the cargoes here in the United States and are not documents of intrinsic trustworthiness and were not known to FESCO's agents.

VI. Failure to Assess Minimum Rate—Alleged Violations of Section 18(b)(3)

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|-----|------------------|---------------------|
| 64. | B/L: | M/PH-1 |
| | B/L Date: | July 2, 1979 |
| | Vessel Voyage: | PUTIVL 41 |
| | B/L Description: | Beer |
| 65. | B/L: | M/NY-1 |
| | B/L Date: | November 8, 1979 |
| | Vessel Voyage: | ZHUKOV 27 |
| | B/L Description: | Used aircraft tires |

Hearing Counsel would offer witnesses who would testify concerning shipments 64-65. Such evidence would be that FESCO Tariff No. 29, Rule 6(B)(2) requires a minimum charge of \$1,700 per container; and (2) in each of these shipments FESCO charged and collected less than that minimum requirement.

FESCO would present witnesses who would testify that: (1) the minimum per container rate was not applicable in these instances; and (2) if such minimum rates were applicable, the difference in the total transportation charges collected was not significant.

VII. Rating Errors—Alleged Violations of Section 18(b)(3)

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|-----|------------------|-----------------------------------|
| 66. | B/L: | L/LA-2 |
| | B/L Date: | December 3, 1979 |
| | Vessel Voyage: | ROMAS 9 |
| | B/L Description: | Buri/rattan furniture and baskets |
| 67. | B/L: | M/LA-12 |
| | B/L Date: | November 14, 1979 |
| | Vessel Voyage: | ZHUKOV 27 |
| | B/L Description: | Assorted woven articles |

Hearing Counsel would offer witnesses who would testify that shipments 66-67 were rated under Tariff Item No. 1070, woven articles, at \$59.25 per cubic meter. Such testimony would also show that the rate under Tariff Item No. 1070 at the time of these shipments was \$59.50 per cubic meter.

FESCO would offer testimony of witnesses, supported by documentary evidence, that: (1) when these shipments were rated, the rate used by FESCO's agents was the rate then in effect; (2) the rate assessed by FESCO's agents, if not current, had expired less than ten days previous to the date these bills of lading were rated and that, in such instances, the assessed rate was not materially different from the new rate; and (3) the extent of any undercharge was \$13.25 on one shipment totaling \$3,900.00, and \$6.63 on another shipment totaling \$1,700.00.

VIII. Rating Errors—Alleged Violations of Section 18(b)(3)

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| 68. | B/L: | M/LA-1 |
| | B/L Date: | November 6, 1979 |
| | Vessel Voyage: | ZHUKOV 27 |
| | B/L Description: | Starkist brand chunk light tuna |
| 69. | B/L: | M/LA-3 |
| | B/L Date: | November 7, 1979 |
| | Vessel Voyage: | ZHUKOV 27 |
| | B/L Description: | Starkist brand chunk light tuna |
| 70. | B/L: | M/LA-6 |
| | B/L Date: | November 13, 1979 |
| | Vessel Voyage: | ZHUKOV 27 |
| | B/L Description: | Starkist brand chunk light tuna |
| 71. | B/L: | M/LA-8 |
| | B/L Date: | November 14, 1979 |
| | Vessel Voyage: | ZHUKOV 27 |
| | B/L Description: | Starkist brand chunk light tuna |
| 72. | B/L: | M/LA-9 |
| | B/L Date: | November 14, 1979 |
| | Vessel Voyage: | ZHUKOV 27 |
| | B/L Description: | Food stuffs bottled canned and preserved |

Hearing Counsel would offer witnesses who would testify that shipments 68-72 were rated under FESCO Tariff No. 23, Item No. 460, at \$57.50 per cubic meter. Such testimony would be that the rate under Tariff Item No. 460 applicable to these shipments was \$57.75 per cubic meter.

FESCO would offer testimony that: (1) when these shipments were rated, the rate used by FESCO was the rate then in effect; (2) the rate assessed by FESCO's agents, if not current, expired less than ten days prior to the date these bills of lading were rated and that, in such instances, the assessed rate was not materially different from the new rate; and (3) the extent of any undercharge was \$46.00 on shipments totaling \$11,400.00.

IX. Additional Rating Errors—Alleged Violations of Section 18(b)(3)

73. B/L:	M/OAK/CHI-1
B/L Date:	November 14, 1979
Vessel Voyage:	ZHUKOV 27
B/L Description:	Bulk dried banana chips

Hearing Counsel would offer witnesses who would testify that: (1) this shipment of banana chips was rated at \$53.25 per cubic meter and that FESCO charged and collected pursuant to that rating; and (2) this shipment should have been rated under FESCO Tariff No. 23, Item 82, Banana chips, at \$53.80 per cubic meter.

FESCO would offer testimony that: (1) its agents assessed the proper rate for banana chips in effect at the time and collected the proper amount due; (2) the rate assessed by FESCO's agents, if not current, had expired less than ten days prior to the date these bills of lading were rated and that the assessed rate was not materially different than the new rate; and (3) the total difference between the rate alleged by Hearing Counsel to be proper and the rate assessed by FESCO was 25 cents per cubic meter, resulting in a total difference of \$29.00 on total charges of over \$3,000.00.

74. B/L:	M/OAK/MM
B/L Date:	November 14, 1979
Vessel Voyage:	ZHUKOV 27
B/L Description:	Buri rattan baskets and bath accessories and woven baskets of banana palm and seagrass

Hearing Counsel would offer witnesses who would testify that: (1) this shipment of woven articles was rated at \$54.25 per cubic meter and that FESCO charged and collected freight revenues pursuant to that rating; and (2) this shipment should have been rated under FESCO Tariff No. 23, Item No. 1070, woven articles, at \$54.50 per cubic meter.

FESCO would offer testimony that: (1) FESCO's agents assessed the proper rate for woven articles in effect at the time and collected the proper amount due; (2) the rate assessed by FESCO's agents, if not current, expired less than ten days prior to the date these bills of lading were rated and that the assessed rate was not materially different than the new rate; and (3) the difference between the rate assessed by FESCO's agents and the rate alleged by Hearing Counsel to be proper resulted in a total difference of only \$13.25 on total charges of \$3,100.00.

X. *Application of Bunker Surcharge Rule—Alleged Violations of Section 18(b)(3)*

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| 75. | B/L: | M/OAK/PF-1 |
| | B/L Date: | November 14, 1979 |
| | Vessel Voyage: | ZHUKOV 27 |
| | B/L Description: | Buri and rattan furnitures |
| 76. | B/L: | M/NO-1 |
| | B/L Date: | November 13, 1979 |
| | Vessel Voyage: | ZHUKOV 27 |
| | B/L Description: | "Syskrin" sewing box, semi KD |

Hearing Counsel would offer witnesses who would testify that shipments 75 and 76 were incorrectly rated by FESCO in that FESCO incorrectly applied Rule 440, Tariff No. 29, pertaining to bunker surcharges, and thereby collected more revenue than was due under its tariff.

FESCO would offer the testimony of tariff experts to show that: (1) the bunker surcharge was properly assessed in each instance; or alternatively, (2) the bunker surcharge was imposed in these circumstances only on this voyage, the first voyage after the bunker surcharge rule was first adopted, and no other voyage shows evidence of the imposition of a bunker surcharge under the same circumstances.

XI. Minimum Charge Problems—Alleged Violations of Section 18(b)(3)

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| 77. | B/L: | M/NY-5 |
| | B/L Date: | November 12, 1979 |
| | Vessel Voyage: | ZHUKOV 27 |
| | B/L Description: | Philippine light chunk tuna in brine |
| 78. | B/L: | M/NY-7 |
| | B/L Date: | November 14, 1979 |
| | Vessel Voyage: | ZHUKOV 27 |
| | B/L Description: | Knife blocks |
| 79. | B/L: | M/Bal-1 |
| | B/L Date: | November 7, 1979 |
| | Vessel Voyage: | ZHUKOV 27 |
| | B/L Description: | Woven Bread Baskets |

Hearing Counsel would offer witnesses who would testify that: (1) for shipments 77-79 FESCO applied FMC Tariff No. 29, Rule 6(B)(2), a minimum charge per container, and additionally assessed a bunker surcharge pursuant to Rule 440; and (2) under FESCO's tariff, a bunker surcharge should not have been assessed in addition to the minimum charge per container under Rule 6(B)(2).

FESCO would offer the testimony of tariff experts to show that: (1) the bunker surcharge was properly assessed in each instance; or alternatively, (2) the bunker surcharge was imposed in these circumstances

only on this voyage, the first voyage after the bunker surcharge rule was first adopted, and no other voyage shows evidence of the imposition of a bunker surcharge under the same circumstances.

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| 80. | B/L: | M/NY-4 |
| | B/L Date: | November 10, 1979 |
| | Vessel Voyage: | ZHUKOV 27 |
| | B/L Description: | Rufina Patis |
| | | |
| 81. | B/L: | M/NY-8 |
| | B/L Date: | November 14, 1979 |
| | Vessel Voyage: | ZHUKOV 27 |
| | B/L Description: | Canned Food and Food stuffs |

Hearing Counsel would offer witnesses who would testify that: (1) for shipments 80 and 81 FESCO applied a per container rate of \$1,700 and additionally assessed a bunker surcharge of \$159 and \$162 respectively; (2) these shipments should have been rated under Tariff Item No. 11030, foodstuffs, at \$58.75 per cubic meter plus a bunker surcharge; and (3) had the shipments been rated as foodstuffs, the charges would have been below those charged and collected by FESCO.

FESCO would offer the testimony of tariff experts that: (1) the minimum per container rate of \$1,700 plus a bunker surcharge were properly assessed on the shipments above; or alternatively, (2) the bunker surcharges were imposed in these circumstances only on this voyage, the first voyage after the bunker surcharge rule was first adopted, and no other voyage shows evidence of the imposition of a bunker surcharge under the same circumstances.

XII. Additional Evidence

FESCO would offer the testimony of liner shipping industry experts and regulatory experts that: (1) rating errors of the nature alleged by Hearing Counsel in this proceeding are experienced by all liner shipping companies; (2) the complicated nature of tariffs, a result largely due to regulatory resistance to the idea of FAK rates, and the great amount of time and expense involved in training tariff clerks, results inevitably in errors in the rating of ocean freight shipments; (3) the level of rating errors is generally higher on inbound shipments from countries where such tariffs are otherwise little known and where English is not the first language of the shipping agents and their tariff clerks; and (4) the level of rating errors, if any, experienced by FESCO is similar to the level experienced by most other ocean liner carriers, including U.S. flag carriers.

FESCO would also offer the testimony of its agents and company officials that FESCO conducts a rigorous auditing program to insure the proper assessment of rates and to improve the standard of perform-

ance of its agents and tariff clerks. The testimony of industry and regulatory experts would also be that the auditing and review procedures carried out by FESCO at this time were comparable to industry wide standards and could be expected to keep rating errors down to an acceptable level.

THE STIPULATION AND THE PROPOSED SETTLEMENT: A SUMMARY

A: THE STIPULATION

Because the parties are not in agreement on the material facts, the stipulation takes the form of an agreement as to the nature of the evidence each would seek to introduce at a hearing.

Thus, Hearing Counsel would attempt to show 81 violations of the Shipping Act resulting from shipments carried by FESCO from the Philippines to the United States during the calendar year 1979. Two types of violations are involved. First, Hearing Counsel would try to establish that on 46 occasions, Respondent knew, or should have known, that the amounts it charged and collected were not the proper charges under Respondent's applicable tariffs—FMC No. 23 (for local and OPC shipments) or FMC No. 29 (for minibridge shipments)—and that this conduct allowed persons to receive transportation at less than proper tariff rates by unfair and unjust means and devices in violation of section 16, Second paragraph. Second, Hearing Counsel would endeavor to prove that on 35 occasions, Respondent failed to make proper charges under the applicable tariffs in violation of section 18(b)(3).

For its part, FESCO would attempt to introduce evidence showing that it did not commit those violations.

B: THE MAXIMUM CIVIL PENALTY UNDER THE APPLICABLE STATUTES

The maximum civil penalty for a violation of section 16, Second paragraph, is \$25,000 per offense. For a violation of section 18(b)(3), of the type here involved, the maximum penalty is \$5,000.⁸ Consequently, if it were to be found that Respondent had committed all 81 violations, the maximum civil penalty which could be assessed in this proceeding is \$1,325,000.

C: THE PROPOSED SETTLEMENT

Rather than litigate the merits of the case, Hearing Counsel and FESCO entered into a proposed settlement agreement.

⁸ See n. 2, *supra*.

Insofar as the civil penalty is concerned, Respondent's undertaking⁹ requires FESCO, within 10 days of service of an initial decision accepting and approving the settlement, to pay into an escrow account at a commercial bank in London, England, the sum of \$375,000 in Eurodollar deposits or its equivalent for a term of one month and to roll over the deposit and accumulated interest each month thereafter until acceptance and approval of the settlement agreement by the Commission. Following such approval, the bank shall pay to the Commission the sum of \$375,000, together with all interest accumulated thereon until the end of the monthly term during which such approval occurs. However, on its own initiative, the Respondent elected to accelerate the escrow deposit and to allow it to earn interest applicable to the settlement at an earlier date.¹⁰

Respondent also agrees,¹¹ in the event it should reestablish its containership service to or from the United States, to undertake to discourage, prevent and eliminate misratings and charging and collecting other than its proper tariff rates and charges. The measures Respondent is required to take to achieve this goal include: (1) making a review of its managerial procedures, and modifying them, to the extent necessary, to safeguard against the occurrence of practices by Respondent, its officers, directors, employees and agents which would result, directly or indirectly, in rebating or allowing any person any reduction in tariff rates and charges, and (2) causing to be written into every agency or terminal contract and into every interchange or other water-connecting carrier agreement entered into for service in United States trades, a requirement that FESCO's agents, terminal operators and connecting carriers, in the discharge of such contracts, will make no payment of a rebate, remittance or allowance in violation of sections 16 or 18 of the Shipping Act.

Respondent further agrees¹² to allow Commission investigators and attorneys unimpeded access to its vessel voyage manifests, bills of lading, and shippers' packing lists or other documentation which show the actual weight or measure of cargo tendered, and to allow Commission investigators unimpeded access to all containers and trailers in FESCO's custody in the United States.

⁹ Settlement Agreement, par. 1.

¹⁰ See letter dated November 17, 1981, from counsel for Respondent to Hearing Counsel in which the former advises the latter:

Pursuant to paragraph 1 of the Proposed Settlement of Civil Penalties executed by the parties to the above proceeding on September 28, 1981 and submitted to the Hearing Officer on this date, Fesco has established with the Moscow Narodny Bank of London, London, England, an escrow account for the proposed settlement payment and placed as of November 13, 1981 the sum of \$375,000 in such account.

¹¹ Settlement Agreement, par. 3.

¹² *Id.*, par. 4 and 5.

The Commission agrees,¹³ for the future, not to seek civil penalties from Respondent arising from acts, practices or violations of section 16, Second paragraph, section 18(b)(3) or section 18(c) of the Shipping Act, which Respondent committed or may have committed in any United States trade prior to September 30, 1980. However, the immunity thus conferred does not extend to violations of the cited section of the Shipping Act committed as part of a concerted course of illegal conduct¹⁴ which involves misrating practices different than the variety identified at page 1 (shown by example) of the Order of Investigation and Hearing in United States trades other than the Philippines to United States trade.

The Commission agrees that within 30 days of a final Commission Order approving the settlement, Respondent may retrieve all copies of its documents in the Commission's possession, other than documents which have become a part of the record, that it produced during discovery. Respondent shall, however, maintain the retrieved documents in Washington, D.C., through December 31, 1985, and shall allow Commission representatives unimpeded access to them and removal of specified documents upon the request of such representatives.

DISCUSSION

Independently, Hearing Counsel and FESCO submit¹⁵ that the proposed settlement meets well-settled criteria for approval of agreements settling administrative enforcement claims and, thus, merits approval. I agree.

Generally, the parties urge that the settlement lies comfortably within a zone of reasonableness determined after a thorough analysis of accepted standards for settlement of assessment proceedings and a full evaluation of the range of Respondent's conduct over an extensive period of time in a particular trade. The settlement is neither a coercive attempt to exact exorbitant punishment nor a profligate cession of "public rights," *Atlas Roofing Co., Inc. v. Occupational Safety and Health Review Commission*, 442 U.S. 430, 450 (1977), to the alleged wrongdoer. The amount of the monetary penalty is substantial and its magnitude is perceived as having a strong deterrent effect upon the Respondent and others under regulation. In addition, the non-monetary conditions appear to be adequate safeguards ensuring Respondent's cooperation and compliance with regulation in the future.

¹³ *Id.*, par. 2.

¹⁴ A concerted course of illegal conduct is defined in par. 2 as a series of at least fifteen related violations of the Shipping Act, 1916, occurring within a 180-day period and evidencing a design or plan to contravene the intents and purposes of the Shipping Act, 1916.

¹⁵ See Hearing Counsel's Memorandum in Support of Proposed Settlement and FESCO's Respondent's Memorandum in Support of Proposed Settlement.

CRITERIA FOR SETTLEMENT

When section 32(e) became a part of the Shipping Act, 1916,¹⁶ the Commission promulgated rules and regulations implementing that section.¹⁷ Under those rules the "criteria for compromise, settlement or assessment" might "include, but need not be limited to those which are set forth in 4 C.F.R. Parts 101-105."¹⁸ The criteria referred to are government-wide standards developed and published by the Comptroller General of the United States and the Attorney General of the United States under authority of section 3 of the Federal Claims Collection Act of 1966, 31 U.S.C. 952.

Those governmental standards, particularly those set forth in 4 C.F.R. 103, were a part of this Commission's program for collection of civil penalties even before the enactment of section 32(e). *Eastern Forwarding International, Inc.—Independent Ocean Freight Forwarder Application—Possible Violations, Section 44, Shipping Act, 1916*, 23 F.M.C. 206 (1980), Initial Decision, administratively final, September 8, 1980. "They continue to provide valuable assistance to the Commission as an aid in determining the amount of penalty in assessment proceedings and in determining whether to approve proposed settlements in assessment proceedings." *Eastern Forwarding International, Inc., supra*, 23 F.M.C. 213; *Behring International, Inc.—Independent Ocean Freight Forwarder License No. 910*, 23 F.M.C. 973 (1981), Initial Decision, adopted June 30, 1981. Those standards recognize: that settlement may be based upon a determination that the agency's "enforcement policy in terms of deterrence and securing compliance, both present and future, will be adequately served by acceptance of the sum to be agreed upon;"¹⁹ that "the amount accepted in compromise . . . may reflect an appropriate discount for the administrative and litigative costs of collection having regard for the time it will take to effect collection;"²⁰ the value of setting claims on the basis of pragmatic litigative probabilities, i.e., the ability to prove a case for the full amount claimed either because of legal issues involved or a bona fide dispute as to facts;²¹ and that penalties may be settled "for one or for more than one of the reasons authorized in this part."²²

¹⁶ The provisions of section 32(e) appear in Public Law 96-25, section 10. P.L. 96-25 was enacted June 19, 1979.

¹⁷ General Order No. 30, 46 C.F.R. Part 505, Compromise Assessment, Settlement and Collection of Civil Penalties Under the Shipping Act, 1916, and the Intercoastal Shipping Act, 1933.

¹⁸ 46 C.F.R. 505.

¹⁹ 4 C.F.R. 103.5.

²⁰ 4 C.F.R. 103.4.

²¹ 4 C.F.R. 103.3.

²² 4 C.F.R. 103.7.

A: ENFORCEMENT POLICY

Primary importance was attached to the Commission's enforcement policy by Hearing Counsel in conducting the settlement negotiations with Respondent. Achieving the goals of that policy called for a mix of monetary and non-monetary factors.

Monetarily, the settlement had to be substantial—meaning that it had to be sufficiently great so that the Respondent would not benefit financially from its wrongful conduct. Moreover, a substantial penalty would also have the desired deterrent effect on Respondent and others because it would serve as a disincentive to future unlawful activity. Hearing Counsel assert that the \$375,000 penalty does just that. The penalty “indicates the Commission's clear determination that malpractices and misratings will not be tolerated. It conforms to the Commission's ongoing enforcement program and is further evidence to the industry that violations of the Shipping Act will result in substantial penalties.”

The non-monetary terms of the settlement also serve the Commission's enforcement policy. These provisions require Respondent to review its managerial procedures and to modify them to comply with the Shipping Act. It further requires Respondent to ensure that its agents, terminal operators and connecting carriers also comply with the provisions of the Shipping Act. As an aid to Commission oversight of Respondent's future operations, should there be any, the settlement agreement requires Respondent to allow Commission representatives unimpeded access to shipping documents and all containers and trailers in its custody in the United States. Hearing Counsel deems the latter conditions to be necessary because Commission representatives have not always been afforded such access in the past.

B: COST OF COLLECTION

There is involved in this proceeding a broad investigation of a major ocean carrier's tariff and rating practices. The alleged violations which Hearing Counsel would try to prove concern shipments which originated at diverse places in the Philippines and were consigned to points throughout the United States. Thus, the geographic scope, alone, presages a protracted evidentiary hearing.

Hearing Counsel explain that they have already undergone the burdensome experience of reviewing over ten thousand documents provided by Respondent during discovery. Just the initial review required the efforts of three attorneys, two law clerks and four staff representatives on almost a full-time schedule. As a direct consequence of the review, personnel in the Commission's field offices in New York, San Francisco, Los Angeles, and New Orleans were assigned to obtain additional evidentiary material.

Yet, even as the proposed settlement was filed, Hearing Counsel had not completed discovery and other preparations for trial. Hearing Counsel estimate that to be ready for a hearing they would be required to devote hundreds of additional hours of attorney's time and that they would need the services of many staff and field representatives to obtain additional documentary material and to interview witnesses nationwide.

Hearing Counsel forecast that for their direct case they would require several weeks of hearing. Witnesses they expect to call are located in such cities as New York, Philadelphia, Savannah, Dallas, Los Angeles, San Francisco, Seattle and Chicago. Thus, they foresee substantial monetary outlays over and above the cost of time to be spent by attorneys and other Commission personnel. Hearing Counsel anticipate that Respondent's rebuttal would require additional weeks of hearing entailing still further cost.

Respondent expresses similar concern. It estimates a hearing lasting about twelve weeks. FESCO amplifies this perception by referring to certain specifics, as follows: the testimony of many fact and expert witnesses would be required; these witnesses are not centrally located; many reside in the Philippines, and the rest are scattered throughout the United States; there would be extensive documentary evidence, consisting of manifests, bills of lading, packing lists, invoices, customs declarations and tariffs; the taking of testimony on pertinent evidentiary matters would be complicated by the fact that many knowledgeable witnesses are no longer readily available; the termination of FESCO's container service to the United States and the accompanying closure of many offices of FESCO's former agents have resulted in a loss of key personnel previously involved in the rating, classification and documentation of cargo carried by FESCO on voyages such as the ones in issue here; many witnesses would have to testify through interpreters, which would further complicate and add expense to the hearing process.

Hearing Counsel express further concern. Because many of Respondent's witnesses reside in the Philippines, they perceive a possibility of sessions in Guam and, perhaps, extraterritorially, should a sovereign state consent thereto.

Another benefit would accrue from approval. The need for extensive briefing before an initial decision, possible exceptions and judicial review would be obviated.²³

²³ It should be noted that by September 30, 1980, Respondent terminated regular service in the Philippines to United States trade and it is no longer serving any United States trade. Assuming that Hearing Counsel were to prevail on the merits, there remains the possibility, absent voluntary payment, that collection of an assessment could be difficult. In this connection, although not raised by FESCO as a consideration, it remains open to speculation whether the fact that Respondent is a state-owned carrier could escalate the issue of involuntary collection to a diplomatic level.

Both parties urge, therefore, that the settlement they propose is appropriate in the light of the expense each would be exposed to in litigating the issues. Hearing Counsel stress that the settlement agreement is fair and serves a valid regulatory purpose and, because the Commission's resources, in terms of both time and budgetary constraints, are limited, it is desirable that the settlement be approved so that the Commission's resources may be devoted more advantageously to other pressing matters.

C: LITIGATIVE PROBABILITIES

Hearing Counsel and Respondent have demonstrated good faith disagreement over both relevant facts and applicable legal principles, thus, litigative probabilities are relevant considerations in determining the reasonableness of the proposed settlement agreement.

As seen, the proposed settlement is not based on a disclosure of wrongdoing on the part of Respondent. While it is Hearing Counsel's view that Respondent might acknowledge certain inadvertent misratings, they recognize that Respondent has steadfastly denied committing any malpractices. Therefore, Hearing Counsel consider that one of their tasks would involve proving a measure of willfulness on Respondent's part. Although Hearing Counsel express confidence that at a hearing they would prevail on the merits, they recognize that whenever facts are in dispute, there is an element of risk in achieving that result.

Hearing Counsel note that this proceeding presents particularly difficult problems in marshalling the evidence. The persons with the best first-hand knowledge of the transactions in question, i.e., the shippers and Respondent's agents, are largely located in the Philippines, presenting great and possibly insurmountable logistical problems. Other potential witnesses such as consignees and Respondent's employees and agents in this country, have interests that do not necessarily coincide with Hearing Counsel's and, therefore, may not be effective witnesses in support of Hearing Counsel's case.

Hearing Counsel also foresee that at a hearing novel issues of law would be presented. For example, in certain instances, Hearing Counsel would attempt to show that Respondent's disregard of cargo descriptions shown on bills of lading when rating those shipments under applicable tariff provisions constituted willful acts enabling persons to receive transportation at less than applicable tariff rates. Hearing Counsel state that the law is not settled in this particular area, and though they believe that this is willful conduct in violation of section 16, Second paragraph, the outcome of this or any other novel legal issue cannot be predicted with certainty.

The vagaries of litigative probabilities also warrant approval of the settlement.

CONCLUSION

It is manifest that the settlement is fair to Respondent and advantageous to the Government. It conforms to the standards for settlement recognized by the Attorney General, the Comptroller General, and this Commission. It is separately supportable under the Commission's enforcement policy by consideration of the cost of litigation and by consideration of litigative possibilities. Together, those considerations make a persuasive case for approval. I am satisfied that the terms of the settlement, both monetary and non-monetary, represent a fair balance between the costs and uncertainty of continued litigation and the potential penalty that could be assessed at the conclusion of the proceeding.

ORDER

It is ordered that the settlement agreement entitled "Proposed Settlement of Civil Penalties" be approved. It is further ordered that the terms and conditions of the settlement agreement are incorporated in this ordering Paragraph as if more fully set forth herein. It is further ordered that the voluntary acceleration of the escrow deposit with the resultant accumulation of interest from November 17, 1981, be deemed to modify otherwise inconsistent provisions of paragraph 1 of the settlement agreement.

(S) SEYMOUR GLANZER
Administrative Law Judge

APPENDIX
BEFORE THE FEDERAL MARITIME COMMISSION

FAR EASTERN SHIPPING COMPANY
POSSIBLE VIOLATIONS OF SECTIONS
16, SECOND PARAGRAPH, 18(b)(3), DOCKET NO. 80-60
AND 18(c), SHIPPING ACT, 1916

PROPOSED SETTLEMENT OF CIVIL PENALTIES

This Proposed Settlement Agreement has been entered into between the Bureau of Hearings and Field Operations (Bureau) and Respondent Far Eastern Shipping Company (Fesco). It is submitted to the presiding Administrative Law Judge for approval pursuant to Rule 162 of the Commission's Rules of Practice and Procedure, 46 C.F.R. 502.162, and section 505.3 of the Commission's General Order 30, 46 C.F.R. 505.3, and is to be incorporated into the Final Order in this proceeding if so approved.

WHEREAS, by Order of Investigation and Hearing served September 10, 1980, the Commission instituted the present proceeding to determine whether Fesco had violated sections 16, second paragraph, 18(b)(3), and 18(c) of the Shipping Act, 1916, 46 U.S.C. 815 and 817, and whereas, that Order includes the issue of whether civil penalties should be assessed for any violations of sections 16 and 18 of the Shipping Act, 1916, so found;

WHEREAS, the Order of Investigation and Hearing alleges that Fesco may have engaged in a variety of misrating practices in 1979 and 1980, which may have violated sections 16, second paragraph, and 18(b)(3) and (c), of the Shipping Act, 1916;

WHEREAS, Fesco has made available to the Bureau documents which the Bureau believes indicate that Fesco engaged in specific conduct which may be violative of sections 16, second paragraph, and 18(b)(3) and (c) of the Shipping Act, 1916, but Fesco denies that such conduct violated that Act;

WHEREAS, Fesco is not currently offering containership service to or from the United States, has terminated the practices which are the basis of the Commission's allegations in this proceeding, and has instituted and indicated its willingness and commitment to maintain measures designed to eliminate, discourage, and prevent these practices by Respondent or its officers, employees and agents should it reestablish its containership service to or from the United States;

WHEREAS, the parties in order to avoid the delays and expense which would be occasioned by further litigation of the issues specified in the Order of Investigation and Hearing, are desirous of settling expeditiously the issues raised by the Order of Investigation and Hearing; and

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

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

1. Within ten (10) days of acceptance and approval of this Settlement Agreement by the presiding Administrative Law Judge and service of an initial decision, Fesco shall pay into an escrow account to be established by Fesco at a commercial bank at London, England ("the Bank") the sum of Three Hundred and Seventy-Five Thousand (\$375,000) Dollars, which sum shall be placed in Eurodollar Deposits or its equivalent for a one month term, and rolled over each month until approval and acceptance of the Settlement Agreement by the Federal Maritime Commission. Upon the approval and acceptance of this Settlement Agreement by the Federal Maritime Commission and its incorporation into the Final Order in this proceeding, the Bank shall pay at the end of the Eurodollar Deposit monthly term such sum of \$375,000 with all accrued interest to the Federal Maritime Commission; but in the event the settlement is not approved and accepted by the Federal Maritime Commission, such sum of \$375,000 with all accrued interest shall be returned to Fesco.

2. Upon acceptance of this Agreement in writing by the Commission this instrument shall forever bar the commencement or institution of any civil or administrative action or other claim for recovery of civil penalties from Fesco based upon acts, practices or violations of sections 16, second paragraph, and 18(b)(3) and (c) of the Shipping Act, 1916, which Fesco committed or may have committed prior to September 30, 1980, but not including any violations of the Shipping Act, 1916, committed as part of a concerted course of illegal conduct of a type not described in the Order of Investigation and Hearing in FMC Docket No. 80-60 in any United States trade other than the trade from the Philippines to the United States. As used in this Agreement, a "concerted course of illegal conduct" is a series of at least fifteen (15) related violations of the Shipping Act, 1916, occurring within a 180-day period and evidencing a design or plan to contravene the intents and purposes of the Shipping Act, 1916. It is understood by Fesco that this Agree-

ment shall not serve as a bar or defense to any criminal prosecution or civil litigation by the Commission or any other department or agency of the United States Government for other violations of law by Fesco.

3. Fesco agrees, in the event it should reestablish its containership service to or from the United States, to undertake to discourage, prevent, and eliminate misratings and the practice of charging and collecting other than its proper tariff rates and charges by measures including, but not limited to:

a. Review of its administration and procedures, and modification of such to the extent necessary to safeguard against the occurrence of practices by Fesco, its officers, directors, employees and agents which would result, directly or indirectly, in rebating, remitting or allowing to any person, in violation of sections 16 and 18 of the Act, any reduction of Fesco's tariff rates and charges on file with the Commission;

b. Fesco will cause to be written into every agency or terminal contract and into every interchange or other water connecting carrier agreement which is hereafter entered into for service in trades with the United States, a requirement that its agents, terminal operators, and connecting carriers, in the discharge of such contract, will make no payment of a rebate, remittance, or allowance in violation of sections 16 or 18 of the Act;

4. Fesco shall, upon reasonable notice, allow investigators and/or attorneys of the Commission unimpeded access to its vessel voyage manifests, bills of lading, and shippers' packing lists or other documentation which show or reflect the actual weight or measure of cargo tendered, and other related documents; provided, however, that prior to allowing such access or providing such documents, Fesco shall have received from Commission Investigators and/or attorneys an oral statement identifying the documents to be inspected and stating the reasons or alleged violations for which they seek access to the documents and the basis for believing any violations have occurred. Commission Investigators and/or attorneys shall have the right to make notes from and handcopy any such documents at the time such access is provided. In addition, after Commission investigators and/or attorneys have been allowed such access, Fesco shall provide copies of such documents specifically requested by the Commission investigators and/or attorneys, within ten (10) days of the request. Requests for access to documents and copies thereof shall not be made on a discriminatory basis. Such requests shall be in conformance with the nature, methods and procedures utilized by Commission investigators and/or attorneys in making such requests of U.S. and other common carriers serving the United States trades. This paragraph is specifically limited to documents located in the United States, its Districts, Territories, and possessions, and pertaining to shipments moving in the foreign commerce of the United States.

5. Fesco shall, upon reasonable notice, allow investigators of the Federal Maritime Commission unimpeded access to all containers and trailers in Fesco's custody in the United States, or any of its Districts, Territories, or possessions, and shall allow Commission investigators to open, inspect and record the contents of such containers and trailers; provided however, that prior to allowing such access, Fesco shall have received from Commission investigators an oral statement identifying the containers and trailers to be inspected and stating the alleged violations or reasons for which they seek access to the containers and trailers and, where appropriate, the basis for believing such violations occurred. Such requests shall not be made on a discriminatory basis. Such requests shall be in conformance with the nature, methods and procedures utilized by Commission investigators in making such requests of U.S. and other common carriers and shall not unreasonably interfere with Fesco's normal business operations.

6. If Fesco breaches any provision of paragraphs 3, 4 and 5 of this Agreement, except as otherwise provided by changes in the applicable law, prior to January 1, 1990, and if such noncompliance shall not have been corrected, or explained to the Commission's satisfaction, within thirty (30) days after written notice to Fesco by the Commission, the Commission shall have the right to seek to have the breach rectified, but the Commission shall not rescind this Agreement, nor shall Fesco be relieved of its future obligations as contained in those paragraphs.

7. In the event changes in law or other circumstances occur during the term of this Agreement which Fesco believes warrant modification or mitigation of the requirements or conditions imposed on Fesco by this Agreement, Fesco may petition for this purpose.

8. This Agreement does not constitute an admission by Fesco that it has engaged, directly or through its officers, directors, employees, agents or affiliates, in acts or practices resulting in violations of the Shipping Act, 1916.

9. The undersigned represent that they are properly authorized and empowered to execute this Agreement on behalf of Fesco and the Commission, respectively, and to fully bind Fesco and the Commission to all the terms and conditions contained herein.

10. Fesco acknowledges that it has voluntarily signed this Agreement and states that no promises or representations have been made to it other than the agreements and considerations herein expressed.

11. To the extent that this Agreement or any of its provisions do not conform with the Commission's General Order 30 (46 C.F.R. 505.1 *et seq.*) establishing the procedures for compromising and settling claims pursuant to Public Law 92-416, the parties hereby waive application of such provisions.

12. The parties agree that within thirty (30) days of the Commission's Final Order approving this Agreement, Fesco is entitled to retrieve all

copies of Fesco documents in the Commission's possession with the exception of documents submitted into the record of FMC Docket No 80-60, that were produced by Fesco during discovery in FMC Docket No. 80-60; provided however, that Fesco shall maintain such documents in Washington, D.C., through December 31, 1985, and upon reasonable notice to Fesco's agent or attorney, allow Commission representatives unimpeded access to such documents and allow the removal of such documents specifically requested by the Commission representatives. The Bureau shall be notified of the identity and address of the custodian of the documents, and any changes thereto.

13. This Agreement shall take effect upon entry of a final Commission Order terminating FMC Docket No. 80-60.

Far Eastern Shipping Company FEDERAL MARITIME COMMISSION

By: (s) Steven B. Chameides

By: (s) JOHN ROBERT EWERS

Director

Bureau of Hearings and Field Operations

Date: 28 September 1981

(S) ALAN J. JACOBSON

Hearing Counsel

(S) POLLY HAIGHT FRAWLEY

Hearing Counsel

Pursuant to Telex Authority DLD/VV/5207

(S) JANET F. KATZ

Hearing Counsel

DATE: 9-28-81

FEDERAL MARITIME COMMISSION

(46 C.F.R. 524; DOCKET NO. 81-40)

EXEMPTION OF EXCLUSIVE EQUIPMENT INTERCHANGE AGREEMENTS FROM THE FILING AND APPROVAL REQUIREMENTS OF SECTION 15 OF THE SHIPPING ACT, 1916

May 12, 1982

ACTION: Final Rule

SUMMARY: This exempts from the filing and approval requirements of section 15 of the Shipping Act, 1916, exclusive equipment interchange agreements covering the exchange of empty containers, chassis, LASH/SEABEE barges and related equipment between two or more persons subject to the Act. The Commission has determined that this exemption will not substantially impair effective regulation of common carrier practices, result in unjust discrimination or be detrimental to commerce.

DATE: Effective June 16, 1982.

SUPPLEMENTARY INFORMATION:

Section 35 of the Shipping Act, 1916 (46 U.S.C. § 833a) allows the Commission to exempt any class of agreements between persons subject to the Act, or any specified activity of such persons from any requirement of the Act, where it finds that such exemption will not substantially impair effective regulation by the Commission, be unjustly discriminatory, or be detrimental to commerce. Under this authority, the Commission previously gave notice (46 F.R. 32459-32460) that it proposed to amend 46 C.F.R. Part 524 to exempt exclusive equipment interchange agreements from the filing and approval requirements of section 15 of the Act (46 U.S.C. § 814).

Carriers often find that they have an imbalance of equipment, *i.e.*, a surplus of equipment at one location and a scarcity at another location. One remedy for this imbalance is for a carrier to move empty equipment from one location to another location. A second remedy is to lease the necessary equipment from another carrier. While the second alternative may render the same result as the first, the time required to obtain Commission approval of other than nonexclusive arrangements may make them commercially unacceptable to the parties. This exemption will afford carriers additional flexibility to meet and respond, in a

timely manner, to the problems of equipment imbalance. Participants in such arrangements should also be able to make more effective use of expensive equipment with resultant benefits to shippers and consignees.

Six responses to the notice of proposed rulemaking were filed on behalf of 24 conference/rate agreements and 2 independent carriers. The Japan/Korea-Atlantic & Gulf Freight Conference, the Japan-Puerto Rico & Virgin Islands Freight Conference, the Trans-Pacific Freight Conference of Japan/Korea, the parties to the 8900 Lines Rate Agreement and both independents, Sea-Land Service, Inc. and American President Lines, Ltd. (APL), support the rule.

Sea-Land's support is premised on the availability of section 15 approval for such arrangements at the request of interested parties, something which is already provided by 46 C.F.R. § 524.7. APL favors the exemption but requests that it be further enlarged to include the interchange of loaded containers made in connection with a nonexclusive transshipment agreement. The Commission is presently considering a rulemaking to exempt nonexclusive transshipment agreements from the filing requirements of section 15 and APL's request will be considered in this context.

The 8900 Lines suggest that the title of 46 C.F.R. Part 524 be modified to reflect the fact that it exempts both "nonexclusive transshipment agreements" and "exclusive equipment interchange agreements." This has already been accomplished. In Docket No. 80-34, *Exemption of Nonexclusive Transshipment Agreements From Section 15 Approval Requirements*, the title of 46 C.F.R. Part 524 was amended to read: "Exemption of Certain Agreements From the Requirements of Section 15, Shipping Act, 1916."¹

Eleven conferences responding as the North European Conferences (NEC) support adoption of the rule, but suggest that the language of the rule be modified to make it clear that any equipment involved in an exclusive interchange agreement could be used by the receiving carrier to transport its own cargo. The final rule has been so modified.

Nine conferences responding as the Associated Latin American Freight Conferences (ALAFc) oppose the rule.² Their objection is that the rule will not confer antitrust immunity upon the parties to the exclusive equipment interchange agreement unless the agreement is filed with the Commission for approval. They contend that an exempted agreement should be immune from the antitrust laws. This argument has heretofore been expressly rejected by the Commission in Docket No. 81-18, *Exemption of Agreements Covering the Collection, Compilation*

¹ The final rule in Docket No. 80-34 exempted only nonexclusive equipment interchange agreements.

² Sea-Land, a member of five ALAFc conferences, disassociated itself from these comments.

and Exchange of Credit Information, 24 F.M.C. 795 (1982). Nothing presented herein persuades the Commission to alter its position.

THEREFORE, pursuant to sections 15, 35 and 43 of the Shipping Act, 1916 (46 U.S.C. §§ 814, 833a and 841a) and 5 U.S.C. § 553, 46 C.F.R. Part 524 is amended by revising paragraph (b) of section 524.2 *Definitions*, to read as follows:

(b) An equipment interchange agreement is an agreement between two or more common carriers by water for the exchange of empty containers, chassis, empty LASH/SEABEE barges, and related equipment, which provides only for the transportation of the equipment as required, payment therefor, management of the logistics of transferring, handling and positioning equipment, its use by the receiving carrier, its repair and maintenance, damages thereto, and liability incidental to the interchange of equipment, and no other subject.

By the Commission.

(S) FRANCIS C. HURNEY
Secretary

FEDERAL MARITIME COMMISSION

DOCKET NO. 82-5
BELCO PETROLEUM CORPORATION

v.

COMPANIA PERUANA DE VAPORES
(PERUVIAN STATE LINE)

NOTICE

May 17, 1982

Notice is given that no appeal has been taken to the April 12, 1982 dismissal of the complaint in this proceeding and that the time within which the Commission could determine to review has expired. No such determination has been made and accordingly, the dismissal has become administratively final.

(S) FRANCIS C. HURNEY
Secretary

FEDERAL MARITIME COMMISSION

DOCKET NO. 82-5

BELCO PETROLEUM CORPORATION

v.

COMPANIA PERUANA DE VAPORES (PERUVIAN STATE
LINE)

John J.C. Martin of Arsham & Keenan for Complainant.

Bert I. Weinstein of Haight, Gardner, Poor & Havens for Respondent.

JOINT MOTION GRANTED FOR APPROVAL OF SETTLEMENT AND FOR DISMISSAL OF PROCEEDING

Finalized May 17, 1982

In a joint motion served March 26, 1982 (received March 30, 1982), the parties in this proceeding request approval of a settlement entered into by them in this complaint case. The parties set forth in the motion the following agreed upon facts.

THE FACTS

1. Belco Petroleum Corporation (Belco), complainant in this proceeding, is a corporation in the business of exploration and production of crude petroleum and natural gas.

2. Compania Peruana de Vapores (CPV) is a common carrier by water in the commerce of the United States, and participated in the trade in question as a member of the Atlantic & Gulf/West Coast of South America Conference (the Conference).

3. At all times in question Belco was an industrial contract shipper with the Conference, under Contract No. 10361, in effect since September 9, 1965.

4. For the shipment subject of the dispute in this complaint case Belco's freight forwarder prepared the documents for ocean carriage and, in particular, providing for shipment to Talara, Peru, under Conference tariff item 1050 which provides an industrial contract rate schedule.

5. Belco's complaint alleges that it was entitled to ship the cargoes subject of this proceeding at lower rates than those charged under tariff item 1050, pursuant to Conference tariff item 1036A, which states:

Talara Oilwell and Production Project

Shipments of proprietary material and equipment to Talara or Paita will be assessed base rate of \$132.00 W/M plus all additional charges. Heavy lift charges as per tariff scale will be applicable on the weight basis (2,000 lbs.). Extra length charges will be applicable as per tariff scale W/M as cargo is freighted. Bills of lading shall be claused as set forth in Rule 50.*

*Rule 50 states:

In order to identify the cargo which is covered by this tariff rule, it is understood and agreed shipper will arrange to have the following notation placed on each Bill of Lading:

“The Shipper shown in this Bill of Lading certifies that the cargo described hereon is forwarded pursuant to the terms and conditions of tariff item No. _____ and that he is aware that the Shipping Act of 1916 declared it to be a violation of law, punishable by a penalty, for a shipper to utilize an unfair device or means to obtain transportation at less than the applicable rates.”

Further, it is understood and agreed that the shipper shall submit a freight copy of all such Bills of Lading or Bill of Lading and due bill to the Conference Chairman on a timely and confidential basis.

6. For the shipment subject of this action Belco paid ocean freight of \$57,800.11. Belco alleges it should have paid only \$50,342.47 for this shipment, under item 1036A.

7. For further reference, the bill of lading subject of this Docket is attached to the complaint.

8. In consequence of the aforesaid, were Belco to satisfy its burden of proof as to the qualification of the cargo for the item 1036A rate, it would be entitled to reparation of \$7,457.64.

9. But the point of genuine dispute between the parties, and the principal basis for CPV's denial of Belco's claim for reparations, concerns whether this shipment, which was shipped over two years ago, in fact might have qualified for the lower rate at the date of shipment.

In reparation cases, where the shipper or its freight forwarder misdescribes cargo, resulting in inadvertent overcharges, the shipper has the burden of proof to show that the cargo in fact qualified at the time of shipment for the lower rate. *See, e.g., Abbott Laboratories v. Moore-McCormack*, Docket No. 274(I), 17 F.M.C. 191 (1973). The shipment subject of this proceeding is now over two years old. Under tariff item 1036A, Belco would have the heavy burden of proving that this old shipment consisted of “proprietary material and equipment” for use at

Talara oilwell and production projects. Those are the facts critical to the resolution of these disputes.

The reasons for the parties entering into a settlement of these cases are fully stated in the parties' Joint Affidavit, but to summarize: saving of legal expense; avoidance of impairing good commercial relations; saving the expense of finding proof and furnishing witnesses on the merits of the dispute; and saving the expense and avoiding the difficulty of ascertaining the evidence as to these shipments.

In *Organic Chemicals v. Atlantraffic Express*, Docket Nos. 78-2, 78-3, 21 F.M.C. 1083 (1979), the Commission laid down the rule for permitting settlements of these kinds of cases:

1. A signed agreement is submitted to the Commission;
2. The parties file with the settlement agreement an affidavit setting forth the reasons for the settlement and attesting that the settlement is a *bona fide* attempt by the parties to terminate their controversy and not a device to terminate their controversy and not a device to obtain transportation at other than the applicable rates and charges or otherwise circumvent the requirements of the Shipping Act, 1916, or of the Intercoastal Shipping Act, 1933, as amended, as the case may be;
3. The complaint on its face presents a genuine dispute and the facts critical to the resolution of the dispute are not reasonably ascertainable.

As a general matter the law favors settlements, and under the Commission's guidelines the settlement of the parties is fully justified and should be approved, especially so because of the fact that the evidence and witnesses necessary to resolve the dispute as to the qualification of this shipment for the item 1036A rate are not reasonably ascertainable.

The settlement of the \$7,457.64 claimed by Belco for \$6,711.88, or for 90% of the amount claimed, is justified by comparison to other settlements approved by the Commission, and is most reasonable, especially so when the likely legal costs, man-power costs and executive time, and risks of litigation are considered. *See, e.g., Forte International v. Seatrain*, Docket No. 80-24, 23 F.M.C. 27 (1980), 60% settlement; *Ellenville v. FESCO*, Docket No. 80-9, 23 F.M.C. 707 (1981), 80% settlement; *Terfloth v. APL*, Docket No. 78-20, 22 F.M.C. 81 (1979), 64% settlement; *Del Monte v. Matson*, Docket No. 79-11, 22 F.M.C. 365 (1979), 62% settlement. The Administrative Law Judge, and the Commission, are of course familiar with the settlement between these parties, just approved, in Docket Nos. 81-56 and 81-67 (for 82-1/2% of the amount claimed), which involved the same issues.

Set forth in full is the joint affidavit:

JOINT AFFIDAVIT

We, the undersigned Alejandro Moreno, New York Representative of Compania Peruana de Vapores, and Vincent A. Merola, Controller of Belco Petroleum Corporation, each first severally sworn, depose and say for and on behalf of our respective corporations:

(1) The parties have entered into a settlement of the claims subject of FMC Docket No. 82-5 to terminate this dispute. The amicable settlement of this case will avoid the substantial costs of further litigation which, based upon the estimates of our attorneys, could be most substantial, especially in view of the sum in controversy; the parties desire to continue to maintain the good commercial relations which exist between them, and to avoid the disruptions inevitably caused by litigation; further litigation, including searches for documents and information, and the attendance of witnesses for both sides would be disruptive to the normal commercial affairs of the parties, and would be a nonproductive use of expensive manpower and the valuable time of our executive and managerial personnel; and, in view of the uncertainties of litigating and the difficulties of obtaining evidence as to the shipment subject of this dispute, the settlement of this genuine dispute between the parties is most desirable.

(2) This settlement is a bona fide attempt by the parties to terminate this controversy and is not a device to obtain transportation at other than the applicable rates and charges or otherwise circumvent the requirements of the Shipping Act, 1916.

Sworn to before me this
25th day of March, 1982

(S) ALEJANDRO MORENO
New York Representative

(s) Joseph S. Labell
Notary Public

Sworn to before me this
22 day of March, 1982

(S) VINCENT A. MEROLA
Controller

(s) Mary Haig
Notary Public

The parties submitted the following Agreement of Settlement and Mutual Release:

AGREEMENT OF SETTLEMENT AND MUTUAL RELEASE

IT IS HEREBY AGREED by and between the undersigned, Belco Petroleum Corporation ("Belco"), Complainant in Federal Maritime Commission Docket No. 82-5, and Compania Peruana de Vapores ("CPV"), Respondent in said Docket, that said Docket shall be terminated by mutual accord on the terms and conditions set forth herein and for the reasons set forth in the accompanying Joint Affidavit of the parties:

1. CPV shall pay to Belco the sum of Six Thousand, Seven Hundred and Eleven Dollars and 88/100 cents (\$6,711.88).

2. Belco shall, in consideration of CPV's payment as provided in paragraph 1 above, withdraw its complaint in Federal Maritime Commission Docket No. 82-5, with prejudice to further pursuing the claim subject of said Docket.

3. Neither Belco nor CPV, nor any successor in interest of either such party, shall initiate any new claims against the other party arising in connection with the shipment subject of the complaint in this proceeding except for enforcement of any provision of this Agreement.

4. It is understood and agreed that this Agreement of Settlement and Mutual Release is in full accord and satisfaction of all disputed claims in said Docket.

5. This Agreement shall be submitted for approval to the Federal Maritime Commission and shall become effective and binding upon the parties when final approval is obtained, at which time CPV shall pay to Belco the sum provided in paragraph 1.

6. It is further understood and agreed that this Agreement of Settlement and Mutual Release is in no sense to be understood as constituting any admission of liability by either party or of any admission of any violation of law by either party.

7. This Agreement of Settlement and Mutual Release, constitutes the entire Agreement between the parties.

Dated: New York, New York
March 24, 1982

BELCO PETROLEUM CORPORATION

(S) VINCENT A. MEROLA
Controller

COMPANIA PERUANA DE VAPORES

(S) ALEJANDRO MORENO
New York Representative

DISCUSSION

Upon consideration of the above and the record herein, the Presiding Administrative Law Judge *finds and concludes* that the parties have made out a proper case for settlement and supplied facts and reasons in support which are found acceptable, and that the settlement should be approved. The parties have requested dismissal of this proceeding with prejudice.

Wherefore, it is ordered, subject to approval by the Commission as provided in its Rules of Practice and Procedure:

(A) The settlement is approved pursuant to the agreement of settlement and mutual release.

(B) The parties shall notify the Commission promptly upon their carrying out the terms of the settlement and mutual release.

(C) This proceeding is discontinued with prejudice.

(S) WILLIAM BEASLEY HARRIS
Administrative Law Judge

FEDERAL MARITIME COMMISSION

DOCKET NO. 73-17

SEA-LAND SERVICE, INC. AND GULF PUERTO RICO LINES,
INC. PROPOSED RULES ON CONTAINERS

DOCKET NO. 74-40

PUERTO RICO MARITIME SHIPPING AUTHORITY
PROPOSED ILA RULES ON CONTAINERS

REPORT AND ORDER ON REMAND

May 19, 1982

On March 2, 1982, the United States Court of Appeals for the District of Columbia Circuit issued an opinion in *Council of North Atlantic Shipping Associations v. Federal Maritime Commission*, 672 F.2d 171 (D.C. Cir.), cert. denied, 459 U.S. 830 (1982) (*CONASA*).¹ Therein, the Court reviewed the "Report and Order Adopting Initial Decision" in these proceedings finding unlawful a tariff rule of the Puerto Rico Maritime Shipping Authority (PRMSA) establishing a so-called "50-mile rule" pursuant to PRMSA's collective bargaining agreement with the International Longshoremen's Association (ILA). The Court unanimously upheld the determination that the tariff rule was subject to the Commission's jurisdiction. The Court, however, on its own motion remanded the record for a reconsideration of the "merits," i.e., the question of the violation of shipping statutes (Judge MacKinnon dissenting).

As explained by the Court, the remand was prompted by the Supreme Court's decisions in *FMC v. Pacific Maritime Association*, 435 U.S. 40 (1978) (*PMA*) and *NLRB v. International Longshoremen's Assn.*, 447 U.S. 490 (1980) (*ILA*). The Court observed, *PMA* "asserts the importance of labor policy in reaching substantive shipping law decisions," and *ILA* "discusses the role of collective bargaining in resolving the problems created by technological job displacement." (slip op. at 37). As explained below, labor factors were considered in reaching the Commission's earlier decision. Pursuant to the Court's order of remand, we have applied the teachings of *PMA* and *ILA* to the record of this proceeding and are convinced that neither requires any changes in the

¹ Citations to the Court's decision will reference page numbers from the slip opinion.

substantive scope of our earlier determinations made under the shipping statutes.

PMA held that the Commission possesses jurisdiction over some collective bargaining agreements, and that the imposition of collectively-bargained terms on those outside the collective bargaining unit removes a possible exemption from the Commission's jurisdiction for such agreements. See *PMA, supra*, at 61-62. See also *CONASA* slip op. at 26.² *PMA* says nothing about the process of applying the shipping laws to labor related conduct aside from the expressed need of the Commission to be sensitive to labor concerns in making such application. See *PMA, supra*, at 57, 63. See also slip op. of Judge MacKinnon, page 7.³

The Commission gave consideration to the role the collective bargaining process had played in resolving the problems created by technological job displacement⁴ and has been sensitive to labor policy in reaching its decision.

In *ILA* the Supreme Court dealt only with obligations under the National Labor Relations Act and refused to pass upon the lawfulness of the practices being examined under the shipping statutes, characterizing that issue as presenting "difficult and complex problems which are not properly before us." *ILA, supra* at 512; see *CONASA* slip op. at 19; slip op. at 7 of Dissent of Judge MacKinnon; see also October 20, 1980 Order of the Court in D.C. No. 78-1776 denying motion for summary reversal and remand to reconsider the Commission's jurisdictional holding in light of the Supreme Court's decision in *ILA*.⁵

The major significance of *ILA* is that a decision by the Supreme Court outlawing the rules would have obviated the necessity of continuing with these Shipping Act proceedings. Regardless of their lawfulness under the Shipping Act and related statutes, PRMSA's tariff rules could not have been implemented had the Supreme Court found the collective bargaining agreement from which they arose unlawful under the National Labor Relations Act. See slip op. at 20, note 81. See

² The Court noted that these proceedings are governed by the law as it was when *PMA* was decided and are not subject to the subsequently enacted Maritime Labor Agreements Act of 1980 (P.L. 96-325; 94 Stat. 1021). That Act restricted the Commission's involvement in certain aspects of the collective bargaining process. It expressly did not exempt from Shipping Act coverage rates, charges, or practices required to be set forth in the common carrier tariffs. See slip op. at 20-24. See also slip op. of Judge MacKinnon's dissent, at 1.

³ The Commission was aware of *PMA* in reaching its jurisdictional determination. See Report and Order at 10, note 7. J.A. 112a.

⁴ See Joint Appendix (hereinafter "J.A.") 45a; 47a-57a; 78a-81a; 110a-111a; 115a-116a. Because this Order is issued in response to a remand from the Court of Appeals, it will contain Joint Appendix references in D.C. No. 78-1776 for the convenience of the Court and the parties.

⁵ Actions lawful under the labor laws may still be unlawful under other statutes. See, e.g., *United Mine Workers v. Pennington*, 381 U.S. 657, 664-666 (1965); *Amalgamated Meat Cutters v. Jewel Tea Co.*, 381 U.S. 676, 684-687 (1965) (opinion of Justice White); *Volkswagenwerk v. FMC*, 390 U.S. 261, 312 (dissent of Justice Douglas). The question of the validity of the "50-mile rules" under the labor laws is still pending before the National Labor Relations Board.

also the Commission's September 8, 1978 motion in D.C. Cir. No. 78-1776 seeking a stay pending decision in *ILA*.

Moreover, the concern for balance between labor and transportation considerations expressed by the Supreme Court in *PMA* is consistent with and fortifies the decision in *New York Shipping Association v. F.M.C.*, 495 F.2d 1215, 1222 (2d Cir.), cert. denied, 419 U.S. 964 (1974). This case was well-known to the Commission at the time of its decision and in fact was discussed by the Commission⁶ and the Court.⁷ Thus, the portions of *PMA* of greatest concern to the Court in this proceeding do not dictate a different result than that which flowed from parallel reasoning of *New York Shipping Association*.

The Commission found, after consideration of labor concerns, that PRMSA's tariff rule on containers was unlawful under the shipping statutes because of its effects on various interests the Commission was created to protect.⁸ The Commission thoroughly discussed the genesis of the container rules in the negotiations between the carrier employer associations and the *ILA* and the consequences of their origin for purposes of regulation of PRMSA's related tariff rules under the shipping statutes.⁹

As the Commission explained, the 50-mile rule in the collective bargaining agreements arose as a result of labor displacement caused by the utilization of loaded containers for the transportation of cargo rather than the loading of that cargo piece by piece into a ship's hold. The *ILA*, in order to preserve what it claimed to be "work which historically was . . . performed at a waterfront facility by deepsea *ILA* labor,"¹⁰ attempted to require that all cargo be loaded into and unloaded from containers on the piers. The *ILA* was unsuccessful, and the union accepted compromises. In 1959 the union agreed to allow *NYSA* to use any containers it wished and imposed no requirement that it stuff and strip them. It accepted instead "royalty payments" on containers loaded away from the piers in the area of the port of New York.¹¹

In 1968 and 1971, the *ILA* negotiated agreements requiring the stuffing and stripping on the piers of containers holding cargo coming from or destined to points within 50 miles of a port, and imposing liquidated damages for the breach of that obligation.¹² The so-called "Dublin Supplement" which was incorporated into the 1974 collective bargaining agreement, prohibited carriers from releasing containers to consoli-

⁶ See J.A. 78.

⁷ See slip op. at 21, 36.

⁸ J.A. 34a-37a; 51a; 60a-63a; 63a-67a; 67a-70a; 109a-111a.

⁹ See generally J.A. 37a-38a; 45a; 47a-63a; 70a; 71a-81a.

¹⁰ J.A. 1529a.

¹¹ J.A. 50a-51a; 54a-55a; See also 752a-752a-3a; 718a-720a.

¹² J.A. 54a-55a; See also 726a-730a; 733a-734a; 849a-855a; 875a-877a.

dators within the 50-mile area and clarified the exceptions to the rules relating to shipper or consignee-owned cargoes.¹³

The Commission recognized the union's interest in attempting to prevent the loss of jobs and in fact treated the 50-mile rule in the collective bargaining agreements, for the purpose of its decision, as a "work preservation rule . . . lawful in and of itself."¹⁴ It was concerned, however, by what it found to be the unreasonable and discriminatory effects of PRMSA's tariff rule upon certain classes of shippers.

The tariff allowed free access to containers and movement over the piers of loaded containers without unloading and reloading for shippers large enough to ship and load full container loads of their own cargo. Small shippers not able to tender or receive full container loads, and even those tendering full container loads whose employees did not load or unload containers, were subject to the additional expense and delay of unloading and reloading on the piers. If containers were unloaded and reloaded on the piers, an additional "transfer charge" was assessed against the shippers. If the containers were not unloaded and reloaded on the piers, "liquidated damages" were imposed against them.

There was an exception to the stuffing and stripping limitation on inbound cargo for cargo warehoused for 30 days at normal warehouse charges. This exception caused certain shippers to experience expense and delay not imposed on other shippers. Consolidators and deconsolidators of cargo, some of which act as carriers with respect to the underlying shippers (non-vessel operating common carriers or NVOCCs), but all of whom are shippers in relation to the vessel operating carriers, were denied containers altogether.¹⁵ The Commission found that implementation of the rules had serious detrimental consequences, perhaps the most damaging of which were forcing one consolidator out of business at two ports, causing another to curtail its service and lose customers, and making another temporarily cease operations at a port.¹⁶

The PRMSA rules found to be unlawful violated common carrier obligations which are at the very heart of the Commission's regulatory responsibilities.¹⁷ The legal ground for the Commission's actions was twofold. First, the Commission held that requirements that loaded containers be stuffed and stripped on the piers, that containers not be given

¹³ J.A. 55a-56a; *See also* 737a-738a; 900a-905a; 1528a-1533a.

¹⁴ J.A. 70a.

¹⁵ J.A. 34a-37a; 51a; 60a; 63a-67a.

¹⁶ J.A. 60a-63a; *See also* J.A. 238a-281a; 461a-470a; 1412a-1420a; 1476a-1490a; 1491a-1493a.

¹⁷ The rules found unlawful by the Commission would have allowed a common carrier by water regulated by the Commission to refuse to handle, without unloading and reloading at an additional charge or the imposition of a penalty against shippers or consignees, certain cargo in containers coming from or destined to areas within 50 miles of a port. They also permitted the common carrier to refuse to make available containers to certain classes of shippers, although containers were given to other classes of shippers.

to consolidators, and that inbound cargo not delivered to a shipper operating its own warehouse be stuffed and stripped on the piers unless stored for 30 days prior to delivery, were unjust and unreasonable within the meaning of section 18(a) of the Shipping Act, 1916 and section 4 of the Intercoastal Shipping Act, 1933 (46 U.S.C. § 817 and § 845a). The basis for this finding was that: (a) there existed no transportation justification for the transfer on the piers of cargo already in containers into other containers, or the payment of a transfer charge for such service; (b) the assessment of penalties against shippers when containers were not stuffed and stripped bore no relationship to the cost of transportation or the handling of the container; (c) the rules were ambiguous on their face; and (d) the rules were discriminatory.¹⁸

Second, the Commission held that PRMSA rules: (a) unfairly treated and unjustly discriminated against consolidators by denying them transportation facilities (*i.e.*, containers) furnished other shippers, and making other transportation facilities (*i.e.*, piers) unequally available to shippers in violation of section 14, Fourth of the 1916 Act (46 U.S.C. § 812)¹⁹; and (b) unduly and unreasonably preferred certain shippers and consignees and unduly and unreasonably prejudiced and disadvantaged other shippers and consignees in violation of section 16, First of the 1916 Act (46 U.S.C. § 815) by permitting shippers or consignees who load or unload containers at their own facilities with their own employees to avoid restuffing and restripping on the piers, while requiring otherwise similarly situated shippers and consignees to have their containers restuffed and restripped on the piers and to pay an additional charge for such service.²⁰

The Commission complied with the considerations reflected in *ILA* and *PMA* by taking labor concerns into account throughout these proceedings.²¹ Although recognizing the importance of the "50 mile rule" to the union's claim of work preservation, the Commission ultimately relied upon the critical line of cases holding that a common carrier's duty to adhere to its tariffs is "almost an absolute one . . .", and that ". . . a common carrier may not bargain away its statutory obligations to the public and thereby relieve itself of such obligations." *Galveston Truck Line Corp. v. Ada Motor Lines, Inc.*, 73 M.C.C. 617, 626 (1957).²²

¹⁸ See J.A. 69a; 80a; 37a; 42a; 54a; 56a-57a; 64a; 67a; 108a; 111a.

¹⁹ See J.A. 67a-68a; 37a; 42a; 64a-66a; 109a-111a).

²⁰ See J.A. 68a; 75a; 64a-66a; 37a; 42a; 108a-111a). The Supreme Court has long held that a carrier may not discriminate among shippers tendering carload (or full-container) shipments on the basis of beneficial ownership. This is the precise violation in this case. *ICC v. Delaware, L. & W. R.R.*, 220 U.S. 235, 252 (1911).

²¹ J.A. 37a; 76a-77a, 111a-115a; 38a, 58a, 69a-70a, 109a-111a; 58a, 70a, 78a-81a, 115a-116a.

²² See J.A. 72a; 110a-111a. There must be a strong "justification" for practices which deviate from statutory obligations, the onus of which is on the carrier (*Carpenters' Union v. Labor Board*, 357 U.S.

Continued

The Commission cancelled PRMSA's tariff rules not simply because they would have been unlawful in the absence of their labor origin, but because, even considering that origin, the tariff rules still could not be justified.²³ The Commission reasoned:

... we agree with the Presiding Officer that the existence or not of a collective bargaining agreement which *affects* but is not *a part of* the transportation aspects of a shipper's relationship with his carrier, need not be given overwhelming priority or weight as a transportation factor by which to justify dissimilarity of treatment. We may agree that such an agreement is a factor to be considered. However, there are other factors. The mere existence of the collective bargaining agreement does not pre-empt those other factors or foreclose our consideration of them. For us to adopt the contentions of respondents would be tantamount to an acknowledgment by us that a common carrier by water or other person subject to our jurisdiction could escape our jurisdiction by the simple device of voluntarily (albeit with pressure from a union) entering into an agreement which obligates the common carrier to take actions which may be or are in clear violation of the Shipping Act. We do not view the impact of the National Labor Relations Act as permitting a common carrier to disregard entirely its statutory obligations when conducting and resolving labor/management negotiations (footnote omitted). We find that upon consideration of the transportation factors in the situation created by these rules, including the underlying ILA-CONASA agreement, the disparity of treatment under the rules is not adequately justified. (J.A. 110a-111a) (Emphasis in original.)

While the Commission recognized that PRMSA's tariff rules, given their discriminatory, unreasonable, and detrimental effects demonstrated on the record, could not be allowed to stand, it also acknowledged the need to "proceed cautiously" in dealing with such practices.²⁴ The

93, 110 (1958)), and for such justification there must be "compelling considerations." (*Carpenters' Union v. Labor Board*, 357 U.S., *supra*, at 109.) In general, "hot cargo" clauses of the type here in issue in collective bargaining agreements have been recognized as insufficient to justify a carrier's refusal to carry out its tariff obligations. See *Burlington Truck Lines v. U.S.*, 371 U.S. 156 (1962); *Carpenters' Union v. Labor Board*, 357 U.S. *supra*, at 109-111; *Merchandise Warehouse Co. v. ABC Freight For. Corp.*, 165 F. Supp. 67, 75 (S.D. Ind. 1958); *Galveston Truck Line Corp. v. Ada Motor Lines, Inc.*, 73 M.C.C., *supra*, at 625-630. In fact, even "peaceful picket lines coupled with union contractual provisions acquiesced in by the carriers" have been held not to excuse the carrier's obligation or to permit it to interfere with the rights of persons not parties to collective bargaining agreements. See *e.g.*, *Pickup and Delivery Restrictions, California, Rail*, 303 I.C.C. 579, 594 (1958). A strike by a carrier's own employees does not completely relieve it of its obligations under transportation law. *Railway Employees v. Florida E.C.R. Co.*, 384 U.S. 238, 244-245 (1966). A carrier must not refuse service to a particular shipper at the risk of a total labor shutdown forcing it out of business. See *Montgomery Ward & Co. v. Northern Pacific Term. Co.*, 128 F. Supp. 475, 518 (D.C. Ore. 1953).

²³ J.A. 109a-111a.

²⁴ See J.A. 78a. As the Commission noted, a pre-implementation approval requirement of the sort sanctioned by the Supreme Court in *PMA* was not involved here.

remedy fashioned by the Commission was limited to an order to cease and desist of the type recognized by the Supreme Court as proper in *Burlington Truck Lines v. U.S.*, *supra*.²⁵ Although this remedy bars certain particular methods of resolving labor/management conflicts, it in no way undermines the collective bargaining process itself. The Commission asserted no jurisdiction over any portion of the collective bargaining agreement. Thus, the Commission has shown proper sensitivity to the relevant labor concerns and that sensitivity is consistent not only with governing case law at the time of the Commission's decision but also with the Supreme Court's later decisions in *PMA* and *ILA*.

The proceedings in Docket Nos. 73-17 and 74-40, moreover, contain a full and complete factual record with respect to the issue of PRMSA's violation, and no party seeks further evidentiary hearings on this matter. PRMSA has never challenged the findings with respect to that violation, and the Court did not question the adequacy of the evidence supporting those findings on the original record under the law as it then stood. (See *CONASA* slip op. at 13, 14-17, 36).

Nearly four years have elapsed since the issuance of the Commission's decision in this case. Carriers no longer operate under the collective bargaining agreement which was the subject of that decision, and the Commission is now engaged in a broad scale proceeding examining the lawfulness of practices of numerous carriers including PRMSA arising out of the "50-mile rules" contained in the present (1980) collective bargaining agreements. On February 5, 1982, the Commission issued an "Interim Report and Order" in Docket No. 81-11 (February Order),²⁶ copies of which will be lodged with the Court together with this Order on Remand. The February Order asserts jurisdiction over the practices of those carriers imposing the "50-mile rules" against those who utilize their transportation services and refers the matter to an administrative law judge for evidentiary hearings on possible violations of the shipping statutes and the remedy to be applied to such violations.

Because the Commission's order in Docket Nos. 73-17 and 74-40 ran only against PRMSA and concerned activities pursuant to a collective bargaining agreement which is no longer in effect, and because there is pending a new proceeding dealing with the current collective bargaining agreement and the operations of many carriers, including PRMSA, the Commission believes that no further action is necessary or appropriate in these proceedings. They will accordingly be discontinued.

²⁵ PRMSA, in light of possible labor complications, was allowed to redraw its own tariff to correct the problem and additional time in which to make such corrections. J.A. 70a, 79a-81a; 115a-116a.

²⁶ On March 31, 1982, a petition for review of the February Order was filed with the Court of Appeals for the D.C. Circuit.

Following the Court's March 2, 1982 decision, two petitions were filed with the Commission in Docket Nos. 73-17 and 74-40. The American Trucking Associations, Inc. (ATA), seeks leave to intervene. CONASA, NYSA, and PRMSA, which are parties to these proceedings, and the ILA and several individual carrier respondents in Docket No. 81-11 ask (hereinafter, "CONASA Petition") that the Commission reconsider and clarify its February Order in Docket No. 81-11 and consolidate that proceeding with those here.²⁷

The Commission is of the opinion that Docket Nos. 73-17 and 74-40 have been correctly decided on a record amply supporting the result reached and by the application of the proper legal standards. The above analysis of our earlier decision in light of the *PMA* and *ILA* decisions does not alter this view. Moreover, there is no regulatory purpose to be served by investigating practices based upon provisions in a collective bargaining agreement which are no longer operative, particularly when current related carrier practices are now under investigation. Accordingly, ATA's Petition for leave to intervene and so much of CONASA's Petition as seeks to consolidate these proceedings with Docket No. 81-11 are denied. The request for modification and clarification of the February Order in Docket No. 81-11 is dealt with in a separate order served this date in that proceeding.

Nothing stated herein is to be construed as a prejudgment of any issues raised in Docket No. 81-11. The parties in that proceeding are free under the terms of the amended Interim Order to address the influence of *PMA* and *ILA* with respect to the record to be developed in that proceeding. This order is restricted to an analysis of *PMA* and *ILA* as they apply to the evidentiary record and decision of the Commission in Dockets 73-17 and 74-40.

THEREFORE, IT IS ORDERED, That the portions of the March 31, 1982 CONASA Petition requesting a consolidation of Docket Nos. 73-17 and 74-40 with the proceeding in Docket No. 81-11 are denied; and

IT IS FURTHER ORDERED, That ATA's petition for leave to intervene in Docket Nos. 73-17 and 74-40 is denied; and

IT IS FURTHER ORDERED, That these proceedings are discontinued.

By the Commission.*

(S) JOSEPH C. POLKING
Assistant Secretary

²⁷ The CONASA Petition had originally sought further evidentiary hearings in the remanded matter in these proceedings, but was subsequently amended to delete such request.

* Commissioner Richard J. Daschbach dissents.

FEDERAL MARITIME COMMISSION

DOCKET NO. 82-7

TRANS-PACIFIC FREIGHT CONFERENCE OF JAPAN/KOREA (AGREEMENT NO. 150-70 — MINORITY RATEMAKING)

Agreement permitting a minority of conference members to establish the conference rate on certain commodities found to be justified under the *Svenska* doctrine, provided the procedure is amended to remain in effect for a fixed period not to exceed thirty months.

Charles F. Warren, George Quadrino and David Dunn for the Trans-Pacific Freight Conference of Japan/Korea.

Roger W. Fones for the United States Department of Justice.

John Robert Ewers, Joseph B. Slunt and Charles L. Hunter for the Bureau of Hearings and Field Operations.

REPORT AND ORDER

May 20, 1982

BY THE COMMISSION: (ALAN GREEN, JR., *Chairman*; JAMES JOSEPH CAREY, RICHARD J. DASCHBACH AND JAMES V. DAY, *Commissioners*. THOMAS F. MOAKLEY, *Vice Chairman*, CONCURRING.)

The Commission instituted this proceeding on January 18, 1982 to consider the approvability under section 15 of the Shipping Act, 1916 (46 U.S.C. § 814) of a proposed amendment (Amendment No. 70) to the organic agreement of the Trans-Pacific Freight Conference of Japan/Korea (TPFC or Conference).

Fifteen ocean carriers currently participate in the Conference (Proponents).¹ Amendment No. 70 would provide a mechanism whereby as few as three of these carriers could accomplish a reduction in Conference rates for a particular commodity whenever the Conference was carrying less than 70% of the total market for that commodity.² This

¹ The Proponents serve the import trade from Japan and Korea to the United States Pacific Coast. Current TPFC members are: American President Lines, Ltd.; Barber Blue Sea Line; Hapag-Lloyd, A.G.; Japan Line, Ltd.; Kawasaki Kisen Kaisha, Ltd.; Korea Marine Transport Co., Ltd.; Korea Shipping Corporation; Lykes Bros. Steamship Company, Inc.; Mitsui O.S.K. Lines, Ltd.; A. P. Moller-Maersk Line; Nippon Yusen Kaisha; Showa Line, Ltd.; The East Asiatic Company, Ltd.; United States Lines, Inc.; and Yamashita-Shinnihon Steamship Co., Ltd.

² Conference ratemaking decisions are otherwise accomplished by majority vote. Amendment No. 70 rate reductions require a minimum of 30 days' notice. Section 18(b) of the Shipping Act, 1916 (46 U.S.C. § 817(b)) otherwise permits rate reductions to take effect immediately upon the filing of an

Continued

procedure would automatically expire after 15 months, but could be reactivated for periods of up to six months by majority vote of the member lines whenever necessary to "meet substantial nonconference competition."

The proceeding has been limited to the submission of opening and reply affidavits and legal memoranda. Oral argument was held on March 17, 1982. Amendment No. 70 was determined to be categorically exempt from the environmental analysis requirements of 46 C.F.R. Part 547 on March 3, 1982.

The United States Department of Justice (DOJ) and the Commission's Bureau of Hearings and Field Operations (Hearing Counsel), both of which oppose approval of the Agreement in its present form, are also parties to the proceeding.

PRELIMINARY MATTERS

Before addressing the substantive aspects of Amendment No. 70 it is necessary to dispose of Hearing Counsel's "Motion for Confidential Treatment" and DOJ's request for further evidentiary proceedings.

Hearing Counsel submitted as evidence the *aggregate* capacity and carryings of TPFC's six Japanese-flag members in TEU's for part of 1981. An aggregate capacity utilization percentage was obtained by dividing the carryings figure into the capacity figure. Hearing Counsel suggests that the disclosure of these figures would cause "irreparable competitive harm" to the six carriers involved, but provides no indication as to how such a result could occur. The ownership and capacity of ocean-going vessels is routinely available from public sources, e.g., Lloyd's Register of Ships, and there is no factual basis for concluding that an ocean carrier's total cargo carryings (expressed in TEU's or tons) represents a "sensitive business matter." Capacity utilization is, however, critical to an informed regulatory assessment of Amendment No. 70. Accordingly, Hearing Counsel's Motion will be denied.

DOJ objects to the unavailability of discovery in the instant proceeding and argues that Amendment No. 70 may not be unconditionally approved unless a full evidentiary hearing is provided.³ DOJ also states, however, that it is "not in a position" to present evidence or cross-examine witnesses, and has made no offer of proof or otherwise

FMC tariff. Amendment No. 70's procedural mechanisms, including the 69% market share trigger, are controlled by TPFC's chairman, who has sole authority to collect and interpret the necessary market statistics. Commodity market share percentages are based on carryings for the preceding quarter.

³ DOJ wrote Proponents' counsel on January 22, 1982 and requested copies of 11 categories of documents pertaining to the creation and proposed implementation of Amendment No. 70 and competitive conditions in the trade. This request was denied by proponents on the grounds that the Order of Investigation did not contemplate the use of discovery procedures in this proceeding.

identified material issues of fact which are in dispute.⁴ Moreover, DOJ's concerns about the competitive effects of Amendment No. 70 should be ameliorated by the Commission's decision to require deletion of the "reinstatement option."⁵

Further proceedings, and particularly an oral evidentiary hearing, are unnecessary under these circumstances. *United States v. Federal Communications Commission*, 652 F.2d 72, 89-92 (D.C. Cir. 1980). See *United States v. Federal Maritime Commission*, 15 S.R.R. 851 (D.C. Cir. 1978), vacated pending rehearing (March 31, 1981); *United States v. Federal Maritime Commission*, 584 F.2d 519, 536-537 (D.C. Cir. 1978); *Seatrains International, S.A. v. Federal Maritime Commission*, 584 F.2d 546, 550 (D.C. Cir. 1978). DOJ has had an adequate opportunity to raise any specific, relevant and substantial antitrust issues associated with Amendment No. 70. The present record is sufficient to allow the Commission to evaluate the competitive consequences of Amendment No. 70.⁶ Further hearings would not enhance the decision-making process and would merely delay the date of final administrative action. DOJ's request for further proceedings will therefore be denied.

BACKGROUND INFORMATION

Proponents' evidence consists of two affidavits from TPFC Conference Chairman Robert Grey and an affidavit from Douglas C. Tucker, a consulting economist, and attachments thereto.⁷ Hearing Counsel provided affidavits from Donna V. Dennis and Jay A. Copan, employees of the FMC's Office of Conferences and Office of Regulatory Policy and Planning, respectively. DOJ introduced no evidence. This record supports several relevant factual findings which are listed below.

1. Eleven nonconference lines operate almost 100 vessels, including 56 containerships, in the Japan and Korea/U.S. Pacific Coast trade (the Trade) and offer 32 sailings per month. Proponents consider Sea-Land

⁴ DOJ and Proponents do differ on whether the 69% trigger mechanism can operate to "signal" independent lines operating in the trade so as to create a *de facto* market division between them and the Proponents. As discussed further below, a market allocation scheme is unlikely to occur and no purpose would be served by further probing this point in an oral hearing. See generally *Castle v. Pacific Legal Foundation*, 445 U.S. 198, 220 (1980); *First National Bank of Arizona v. Cities Service Co.*, 391 U.S. 253, 289-290 (1968).

⁵ DOJ affirmatively favors "pure" (permanent and unrestricted) minority ratemaking because it would introduce additional price competition into intra-conference activities as well as the liner market as a whole. DOJ opposes Amendment No. 70's "69% trigger" and "reinstatement options" because they focus TPFC's attention on the level of independent competition and allegedly suggest an intention to eliminate such competition.

⁶ *Citizens for Allegan County, Inc. v. Federal Power Commission*, 414 F.2d 1125, 1128-1129 (D.C. Cir. 1969). See *City of Lafayette v. Securities and Exchange Commission*, 434 F.2d 941, 953 (D.C. Cir. 1971), *aff'd sub nom.*, *Gulf States Utilities Co. v. Federal Power Commission*, 411 U.S. 474 (1973).

⁷ The Grey affidavits were both signed and sworn to on March 10, 1982. Affidavit I was filed February 18, 1982 and Affidavit II on March 8, 1982. Affidavit I contains several statistical attachments.

Service, Inc., OOCL-Seapac, Neptune Orient Line and Hanjin to be their most serious competitors.⁸

2. The Trade has experienced especially strong rate competition during the past three years, largely as a result of excess vessel capacity.⁹ Although operating costs have increased steadily and significantly, TPF C has been forced to reduce its rates frequently and to such an extent that its revenue per ton of cargo carried in 1981 declined below the 1979 level.¹⁰ Sea-Land, Zim, OOCL and Hanjin have withdrawn from the Conference since 1979. Other lines have reduced their service or withdrawn from the trade entirely within the same period.¹¹

3. Trade conditions have improved since 1979, when some TPF C members may have experienced vessel utilization as low as 60%, but the current competitive environment unreasonably prevents carriers from making necessary improvements in their net revenue situation.¹² Although Proponents are not yet operating below marginal cost levels, they are not enjoying the type of economic results which trade conditions would otherwise produce and which would generate long-term investment and stability in the trade. Tucker Affidavit at 9, 10, 22. Copan Affidavit at 15-17. TPF C filed a general rate increase on April 1, 1980 (FMC Tariff No. 7, Supplement No. 3), which was postponed and then cancelled entirely because of rate competition. Grey Affidavit II at 2-3. A smaller group of rate increases took effect January 1, 1982 as the first stage of a planned "revenue recovery program" to increase rates to their June, 1979 level by early 1983 (FMC Tariff No. 7,

⁸ Proponents offer a full range of port-to-port and intermodal services directly to U.S. West Coast ports on essentially a weekly basis. Hoegh Line and Shipping Corporation of India offer specialized services and do not publish intermodal tariffs. Star Shipping A/S has a large number of vessels (36), but is primarily a breakbulk carrier, despite its publication of some interior point rates. The other independent lines are: Evergreen Marine Corporation (7 vessels); Hong Kong Islands Shipping Co., Ltd. (5 vessels); Yangming Marine Transport Corporation (7 vessels); and Zim Container Service (8 vessels). These carriers are less effective competitors of TPF C because their vessels call at both U.S. East and West Coast ports on the same voyage, or, in the case of Hong Islands Line, use relatively small vessels with only two sailings between Japan/Korea and California per month. Grey Affidavit I at 3-6, Appendices 1-3.

⁹ Copan Affidavit at 10-13; Tucker Affidavit at 5-7, 9; Grey Affidavit I at 4, 6.

¹⁰ TPF C lines averaged \$66.47 per revenue ton in 1979 and only \$49.01 for the first nine months of 1981. Grey Affidavit I at 4-9, Appendices 4-6. The 1981 figure is the lowest since 1975. Grey Affidavit II at 4-5. TPF C made 853 rate reductions on 279 commodities as a result of nonconference competition in the third quarter of 1981. *Id.* Some TPF C rates on major moving commodities were lower in 1981 than they were in 1976. Copan Affidavit, at 7-9, Schedules 4-8.

¹¹ Asia America Line; Seaway Express; CSC, Ltd.; United Yugoslav Line; Seaway Express; Ro-Lo Pacific; and Uni-Pacific Line have left the trade. Knutsen Line merged with East Asiatic Line. Phoenix Line was acquired by Kawasaki Kisen Kaisha. Seatrain Pacific Services was acquired by C. Y. Tung and merged into OOCL's operation. Evergreen and Yangming Lines offer only a combined U.S. Pacific and Atlantic Coast service where they previously offered separate services. Grey Affidavit I at 10-11, Appendix 7; Tucker Affidavit at 5-7; Grey Affidavit at 6-7.

¹² Grey Affidavit I at 6-9. Tucker Affidavit at 9-12. The six Japanese-flag carriers had vessel utilizations of 74% and 78% for the first and second quarter of 1981. Approximately 80% utilization is necessary for economically satisfactory operation of a modern containership service. Copan Affidavit at 10-13.

Supplement No. 3). TPFC believes these increases are in "serious jeopardy," however, and if the revenue recovery plan is unsuccessful, service reductions are likely. Grey Affidavit I at 6, 27; Grey Affidavit II at 4-5. Completion of the next two stages of TPFC's revenue recovery program is necessary, but will require additional carriers to join the Conference. Grey Affidavit I at 6.

4. TPFC has historically controlled over 75% of the liner trade, but carried only about 60% during 1981.¹³ Proponents do not seek a 70% share of total cargo or of each commodity listed in TPFC's tariff, but rather seek to induce carriers to join the Conference voluntarily and thereby curtail short-run price competition through collective ratemaking practices. Grey Affidavit at 19-21, 24-26. Sea-Land, Hanjin, OOCL and Zim collectively control about 21% of the trade and are the independent lines Proponents most desire to rejoin the Conference. *Id.*, Copan Affidavit at 5.

5. The purpose of Amendment No. 70 is to increase rates gradually, not to drive independent lines from the trade. Although some TPFC rates may initially decrease under minority ratemaking, the availability of this procedure should make it psychologically easier for a majority of Conference lines to vote for rate increases and discourage independent lines from cutting their rates in response to TPFC rate increases. Grey Affidavit II at 11-15. If Amendment No. 70 were approved, some major independent lines can be expected to rejoin the Conference. *Id.*, at 15. If more of the trade moved under Conference rates, destructive short term rate competition would be reduced and rates would eventually stabilize at levels beneficial to conference carriers, independent carriers and shippers. *Id.*, at 15-20; Tucker Affidavit at 16-17.¹⁴

6. Approval of Amendment No. 70 should increase TPFC's market share because additional lines would join the conference and not because the present independent lines would lose cargo. If Sea-Land, OOCL-Seapac, Neptune Orient, Hanjin and Zim all joined TPFC, the Conference's market share would exceed 80% and the 69% trigger would prevent the Proponents from aggressively using minority ratemaking to curtail independent competition. Copan Affidavit at 5-23; Grey Affidavit I at 24-26; Tucker Affidavit at 13-24.

¹³ Grey Affidavit I at 25-26 (TPFC's market share was 76% in 1978 and is presently about 60%); Tucker Affidavit at 7 (TPFC presently carries 63-65%); Copan Affidavit at 5, Schedules 1-3 (TPFC carried only 55% during the first half of 1981 if OOCL is excluded; OOCL resigned from TPFC on June 15, 1981).

¹⁴ Minority ratemaking should contribute towards an economically efficient market featuring lower long run average rates than would occur if vigorous competition continued. Independent competition would be preserved as a check against possible conference abuses and capital investment in the trade would be encouraged. Tucker Affidavit at 14-18; Copan Affidavit at 20-22.

POSITION OF THE PARTIES

A. *Proponents*

The Proponents claim they have provided sufficient evidence to support an informed conclusion to approve Amendment No. 70 under the *Svenska* doctrine.¹⁵ Approval would allegedly increase competition between the Conference lines and independent carriers and make conference membership more attractive to independents. Proponents also contend there is no legal impediment to Amendment No. 70's reinstatement option and describe DOJ's antitrust objections as "speculative, unproven, and untested theories."¹⁶

More specifically, Proponents allege that the affidavits of Messrs. Grey, Tucker and Copan establish that: (1) Amendment No. 70 should induce independent lines to join TPFC and thereby stabilize the trade, preventing probable service decreases and promoting long-run commercial benefits;¹⁷ (2) the 69% trigger and reinstatement option are both necessary to provide a mix of competitive flexibility and restraint necessary to achieve rate stability;¹⁸ and (3) Amendment No. 70 cannot cause a tacit market division or other reduction in competition between TPFC and independent lines and that such competition would continue even if major independents do join the Conference.¹⁹

B. *Hearing Counsel*

Hearing Counsel argues that minority ratemaking is subject to the *Svenska* doctrine because its intended effect is to decrease rate competi-

¹⁵ The *Svenska* doctrine is the proposition affirmed in *Federal Maritime Commission v. Aktiebolaget Svenska Amerika Linien*, 390 U.S. 238 (1968), whereby section 15 agreements which interfere with the policies of the antitrust laws will be disapproved as "contrary to the public interest" unless justified by evidence establishing that the agreement, if approved, will meet a serious transportation need, secure an important public benefit or further a valid regulatory purpose of the Shipping Act, 1916. The burden is on proponents of such agreements to come forward with the necessary evidence.

Proponents distinguish this case from the section 15 justification found wanting in *United States v. Federal Maritime Commission*, 15 S.R.R. 851 (D.C. Cir. 1980), vacated pending rehearing (March 31, 1981), because their justification is supported by detailed factual data. See 15 S.R.R. at 888.

¹⁶ Proponents cite the independent action and emergency rate provisions of Agreement Nos. 93, 2846, 5660 and 8210-8 as examples of analogous ratemaking activities triggered by special competitive circumstances, which have been approved by the Commission.

¹⁷ Proponents state that the industry's natural vulnerability to unchecked rate competition makes the likelihood of service disruptions "very real." Proponents alternatively suggest that any proposal to increase the market share of the conference is consistent with the purpose of the Shipping Act because section 522.2(a)(1) of the Commission's Rules defines a conference agreement as one among carriers which "may reasonably be expected to function as a dominant force in the subject trade." (46 C.F.R. § 522.2(a)(1)).

¹⁸ Proponents claim that without the reinstatement option TPFC would be unable to respond promptly to future crises and defeat the long-term confidence in Conference voting procedures necessary to induce existing TPFC members to raise their rates and induce independent lines to join the Conference.

¹⁹ Proponents argue that they would not and could not use Amendment No. 70 to act concertedly with independent lines or otherwise violate the antitrust laws. Independent lines would lack access to conference operating statistics and the statistics of other independent lines as well. Meaningful market share data are allegedly unavailable from shippers.

tion in the Trade, but believes Amendment No. 70 would be justified if the reinstatement option were deleted. Amendment No. 70 allegedly would not result in an agreement to divide the liner cargo market between Proponents and independent lines on a 70%/30% basis or prompt the Proponents to engage in predatory pricing, but if such anticompetitive conduct occurred, Proponents would have exceeded the scope of Amendment No. 70 and thereby violated the Shipping Act and the antitrust laws.²⁰ FMC decisions are cited for the proposition that agreements should not be disapproved simply because they could provide a vehicle for harmful unapproved conduct or the exact effects of approved conduct cannot be measured.²¹ According to Hearing Counsel, DOJ has presented no evidentiary support for its allegation that Amendment No. 70 is unnecessarily anticompetitive and has not controverted any material evidence offered by the Proponents.

Hearing Counsel contends that Amendment No. 70 would provide public benefits because: (1) the Trade is unstable and overtonnaged; (2) price competition among ocean carriers is disruptive and tends to cause carrier bankruptcies; (3) minority ratemaking would improve stability by attracting new conference members and encouraging all carriers to increase their rates to more reasonable levels; (4) a more stable Trade will improve the efficiency of the liner shipping industry and generally benefit commerce; and (5) vigorous "service competition" will continue to exist between conference and nonconference lines alike.²²

Hearing Counsel defends minority ratemaking and the 69% trigger mechanism as necessary to assure that TPFC can effectively react to destructive rate competition and thereby improve stability in the trade. No other procedural device would allegedly attract new conference members and permit rates to increase while still keeping intra-Conference competition within reasonable limits. Hearing Counsel does argue that approval of Amendment No. 70 should be conditioned on the deletion of the reinstatement option and the addition of quarterly re-

²⁰ Hearing Counsel claims Amendment No. 70 would not "signal" independents whenever TPFC's market share was below 70% because independent lines, *acting alone*, lack sufficient information regarding TPFC procedures and cargo carryings to know they were being signaled. Even if the signal were accurately received, Hearing Counsel believes such lines would lack sufficient market power to make a competitively meaningful response.

²¹ *Agreement No. 9955-1*, 18 F.M.C. 435, 470 (1975); *Agreement No. 10203*, 16 S.R.R. 859, 860 (1976); *Agreement No. 9903*, 11 S.R.R. 1056 (1970); *Agreement No. 134-21*, 8 F.M.C. 459, 460 (1965); *Agreement No. 8492*, 7 F.M.C. 511, 519 (1963).

²² Hearing Counsel cites passages from congressional committee reports on the Shipping Act, 1916, which state that conference agreements are intended to curb undesirable rate competition between ocean carriers. HOUSE MERCHANT MARINE AND FISHERIES COMMITTEE, REPORT ON STEAMSHIP AGREEMENTS AND AFFILIATIONS IN THE AMERICAN FOREIGN AND DOMESTIC TRADE, H.R. DOC. NO. 805, 63rd Cong., 2d Sess., Vol. IV, 416-417 (1914); SENATE COMMITTEE ON COMMERCE, STEAMSHIP CONFERENCE AND DUAL RATE CONTRACTS, S. REPT. NO. 860, 87th Cong., 1st Sess. 10-11 (1961).

porting requirements covering minority ratemaking activities during the initial 15-month period.²³

C. Department of Justice

DOJ does not oppose minority ratemaking in principle because it increases rate competition both within and without the Conference, but believes no justification has been presented for Amendment No. 70's 69% trigger and reinstatement option features.

DOJ objects to the fact that Amendment No. 70 offers minority ratemaking as a temporary measure to control independent competition rather than a permanent pro-competitive reform. According to DOJ, independent competition is itself a public benefit which should be preserved as a check on conference power; it cannot be cited as a "problem," the elimination of which justifies increased conference revenues. See H.R. DOC. NO. 805, *supra*, at 290-300; HOUSE MERCHANT MARINE AND FISHERIES COMMITTEE, HEARINGS IN THE INVESTIGATION OF SHIPPING COMBINATIONS UNDER H. RES. 587, 63rd Cong., 1st Sess., Vol. II, 1365-1367 (1913).

DOJ perceives the 69% trigger as an unnecessary signal to independent carriers that TPFC will accept a 70% market share, an anticompetitive effect allegedly aggravated by the reinstatement option.²⁴ The four existing section 15 agreements which allow conferences to invoke special ratemaking responses to difficult competitive conditions are distinguished from Amendment No. 70 by DOJ on the grounds they are independent action arrangements which create *intra-conference* competition where none otherwise existed.²⁵

DOJ argues that the Proponents have offered no explanation of why minority ratemaking is only desirable when TPFC's market share falls below 70% and claims less anticompetitive alternatives are available. DOJ reasons that minority ratemaking is less likely to provide excessive *intra-conference* competition than would an independent action provision because under the latter arrangement the member lines may seek price advantages over *each other*. Minority ratemaking, however, creates a uniform conference price directed exclusively at outside competi-

²³ Deletion of the reinstatement option is recommended because the novelty of minority ratemaking allegedly warrants close observation before being approved on a long-term basis. The quarterly reports recommended by Hearing Counsel would describe each instance when minority ratemaking is used to reduce a rate and list the commodity, the old and new rates, the carrier proposing the reduction, and the carriers which supported the proposal. Similar information would also be provided for rate reduction proposals governed by majority action.

²⁴ DOJ argues that imperfect knowledge of market conditions will not eliminate the trigger's capability for signaling TPFC's competitors and notes that both Hearing Counsel and Proponents expect the trigger to drive rates up for independent and conference lines alike—the anticompetitive effect usually associated with market division agreements.

²⁵ DOJ has seemingly abandoned the erroneous argument that the Commission lacks statutory authority to approve an agreement permitting carriers to vary their ratemaking procedures from time to time based upon the carriers' determination that certain competitive conditions are present.

tion and cannot divert cargo from other member lines. Assuming that ocean carrier rates are made with the objective of maximizing profits, DOJ alleges that competitive problems would not arise from allowing a minority of conference members an unrestricted opportunity to experiment with lower prices because rates which proved unprofitable could be raised again by majority vote.²⁶

DOJ also contends that the Trade is not suffering from true instability in rates or service and that the only "stabilization" which would result from Amendment No. 70 is increased carrier rates and revenues.²⁷ Thus, DOJ faults the evidence of Proponents and Hearing Counsel for not revealing the causes of the described rate reductions, including the role of declining demand on TPFPC pricing practices. DOJ describes aggressive price competition as the natural and desirable result of reductions in demand.

DOJ also objects to the absence of data which would permit a finding that present TPFPC earnings per revenue ton are comparatively low, and notes that Hearing Counsel's reference to trade press reports of poor profit performance by Sea-Land and American President Lines is unconnected to these carriers' operations in the instant trade. DOJ claims that no new capacity would have entered the Trade since 1978 if capacity utilization levels were chronically unprofitable.

Finally, DOJ finds no connection between the departure of six conference lines, four of which continued in the trade as independents and two of which were acquired by other TPFPC members, and the prospect of declining service levels.²⁸ Instead, DOJ argues that adequate service is available and that the existence of independent competition alone does not create "unstable" trading conditions. According to DOJ, Proponents have not met their burden of demonstrating that independent competition has reached a stage which hinders the realization of some important transportation need or public benefit.²⁹

²⁶ DOJ also suggests that the 69% trigger provision could be replaced by the less anticompetitive alternative of allocating each TPFPC member line a finite number of opportunities to sponsor minority ratemaking proposals over a given time period. Another suggested alternative is to make rates reduced by minority action apply only to the carriers voting for the reduction ("three-carrier independent action").

²⁷ DOJ does not believe the paced reduction of selected rates over a three-year period shown by the Tucker, Grey and Copan affidavits represents "rate instability."

²⁸ DOJ cites the Commission's 1980 *East Asia Trade Study* at 166, wherein Sea-Land affirmed its commitment to continued service in the trade after it left the Conference.

²⁹ DOJ states that only Hearing Counsel has attempted to explain why reduced independent competition would produce public benefits (see Copan affidavit at 11), but that the evidence does not show that marginal cost pricing has reached critical levels (see Tucker Affidavit at 12 and Copan Affidavit at 6 and 12).

DISCUSSION AND CONCLUSION

Amendment No. 70 will be approved for a *single fixed* term of between 15 and 30 months.³⁰ The reinstatement option, which would effectively extend minority ratemaking for an indefinite period, has not been justified and must be deleted as a condition of approval.

This decision is based upon uncontroverted evidence that rate levels in the Trade are depressed over past periods and carriers are being squeezed between increasing costs and stagnant revenues. Although the TPF C lines are probably not operating below marginal cost levels, they are encountering a level of price competition which has disrupted the ordinary equilibrium between conference and independent line rates.³¹ A pattern of rate cutting has developed between the major independents and the TPF C lines which continues even though trade conditions have improved to a point where rates would otherwise increase. This situation, if unchecked, would necessarily cause service disruptions and other undesirable trading conditions which the Shipping Act was intended to remedy.³²

It is the prospect of increased carrier revenues which most disturbs DOJ about Amendment No. 70. In an unregulated domestic industry, the antitrust laws prohibit concerted activities which would increase price levels or market shares, but traditional antitrust theory cannot be applied uncritically to the ocean shipping industry.³³ The Shipping Act, 1916, is premised on the existence of ocean carrier conferences, and not only permits, but requires that membership in such conferences

³⁰ If the present 15-month fixed term is sufficient to attract new conference members and curtail destructive rate competition, it may be retained. If the Proponents believe a longer fixed period is necessary to accomplish these objectives, they may submit a modified version of their agreement which contains a term of up to 30 months.

³¹ See Transcript of Oral Argument at 9-10. Independent and conference lines ordinarily coexist peacefully under circumstances where the independents' rates are slightly lower than their competitors'; active rate competition disrupts this equilibrium. See Tucker Affidavit at 17, 16-19; Grey Affidavit at 21, 25-26.

³² Individual users of ocean transportation services are quite sensitive to price advantages, but *total* demand for such services is relatively inelastic. See Copan Affidavit at 15-17. Rate competition may therefore provide short-term advantages to a low cost carrier, but will not increase the total amount of cargo moving in the trade. If other carriers attempt to match the reductions of a price-cutter, they will, all things being equal, simply receive less total revenue for performing the same services and incurring the same operating costs. The fixed costs of ocean carriers are very high in relation to other industries. *Id.*

³³ See generally *Federal Communications Commission v. RCA Communications, Inc.*, 346 U.S. 86, 98 (1953), regarding the need to evaluate competition in light of the "special considerations" of a particular regulated industry; *McLean Trucking Co. v. United States*, 321 U.S. 67, 87 (1944), regarding the need to balance competition against reliability of service and other transportation factors.

The keystone of the Shipping Act is the avoidance of unfair discriminations. Ocean carrier rates in foreign commerce are not subject to rate regulation *per se*. Although particular incidents of abuse may be corrected under section 15 and section 18(b)(5) of the Shipping Act, 1916 (46 U.S.C. §§ 814 and 817(b)(5)), there is no prohibition against pricing based upon what the market will bear. If ocean carriers are to weather periods of market decline, they must be allowed to recoup their losses during periods of market advance.

be openly available to all reasonably qualified lines. When trade conditions favor conference membership, an independent line such as Sea-Land may join a conference without separate section 15 approval and changes in conference market shares resulting from voluntary decisions to renew or resign from conference membership are not ordinarily matters of regulatory concern.³⁴ Thus, the commercial results (*i.e.* the increase in TPF's market share and enhanced ability to raise rates) expected from Amendment No. 70 could have as readily occurred without benefit of special section 15 procedures. Unfortunately, rate competition has reached a point in the Trade where it prevents carriers from independently responding to serious revenue needs.

The Proponents have responded to the problem of depressed rates and uncontrolled rate competition by amending their organic agreement in a manner which they believe will make conference membership attractive to several former member lines. If this effort is successful, the TPF's market share would increase to a point where the 69% trigger mechanism would minimize any possibility of minority ratemaking aggressively aimed at the remaining independent carriers. If Conference membership does not increase, there is no indication the present TPF's lines possess the means or the desire to escalate rate competition beyond its already overheated level. For these reasons, and those advanced by Proponents and Hearing Counsel, no market division arrangement would result from Amendment No. 70.

Other methods may exist for dealing with the demonstrated problem of undue rate competition and depressed rate levels. There is no indication, however, that the method chosen by the Proponents unnecessarily restricts competition in the Trade. The alternatives suggested by DOJ would merely escalate price competition between the Proponents and the independent lines, aggravating the carrier revenue problem which now exists and encouraging the Conference lines to increase their carryings by conquest rather than by accommodation.

A conference is not a single ocean carrier and does not compete as such. Its function is to minimize the harmful effects of rate competition. In so doing, conference members may and must consider the nature and extent of independent competition, although they may not conspire to drive independent lines from the trade. The purpose and probable effect

³⁴ Some trades have many independent lines. In others, all carriers belong to a conference. The percentage of the trade carried by conference lines is not subject to the type of analysis used to evaluate monopolies under section 2 of the Sherman Act (15 U.S.C. § 2) and other provisions of the anti-trust laws. The Shipping Act focuses on the basic fairness of the interaction between conference lines and independent lines and between conference lines and shippers, not the abstract competitive structure of the market. Conferences are not, by Commission rule or any other authority, entitled to or precluded from a particular market share or ratemaking role. The conference system is merely a means to the broader end of a healthy U.S. ocean-borne foreign transportation system and the procedural definitions found in section 322.2(a)(1) of the Commission's Rules provide no substantive support for measures designed to increase conference market shares.

of Amendment No. 70 is not to eliminate opportunities for independent lines to operate successfully. Instead, Amendment No. 70, as approved, should provide a respite from rate competition which has become harmful to all carriers in the trade, not just the TPFC lines.

Proponents have not, however, justified their proposal to make minority ratemaking a permanent feature of TPFC's organic agreement. The reinstatement option has a long-run effect upon the relationship between conference and independent lines which, at least on the present record, does not meet a particular transportation need or public benefit. It can be readily argued, of course, that any device which strengthens a conference's ratemaking role "stabilizes" ocean transportation services, but the fact remains that the Shipping Act also contemplates the preservation of independent line operations. The Commission has been assigned the role of balancing the divergent interests of stable service and competitive opportunity in the ocean transportation industry. We concur in DOJ's argument that minority ratemaking is most likely to contribute towards a reasonable balance of these interests if section 15 approval is not granted on an indefinite basis.

In the short run, the competitive position of independent lines would not be disrupted by allowing TPFC to overcome apparent limitations in its majority voting procedures which, in combination with adverse trading conditions, prompted four of its members to withdraw and prevent rates from rising to reasonable levels. Nonetheless, these majority voting problems have not been clearly identified and may cease during the 15-30 month term of Amendment No. 70, as approved. If they do continue, they should be directly and more closely examined in light of trading conditions as they then exist. A special mechanism intended to preserve higher rates on a long-term basis must be found contrary to the public interest in the absence of justifying evidence.

Finally, the Commission rejects Hearing Counsel's request for approval conditioned upon the submission of quarterly reports. The shortness of the minority ratemaking term and the immediacy of the rate level problems it is designed to meet limit the practical value of such reports. Should the Proponents later seek any further approval of a minority ratemaking proposal, however, information at least as detailed as that described by Hearing Counsel should be submitted as part of their justification for the new agreement.

THEREFORE, IT IS ORDERED, That pursuant to section 15 of the Shipping Act, 1916, Agreement No. 150-70 is disapproved effective July 1, 1982, unless on or before June 30, 1982 the Proponents file a complete and accurate copy of Agreement No. 150-70, signed by all parties thereto, which amends Article 31(e) to read as follows:

(e) *Effectiveness*. The procedures for taking rate initiative, as set forth in subsection (d) of this Article, shall be effective for a period of _____ [insert number between 15-

30] months from the date this Article is approved by the Federal Maritime Commission and shall automatically terminate upon the expiration of this period.

IT IS FURTHER ORDERED, That if the Proponents amend Agreement No. 150-70 as specified in the preceding ordering paragraph, the Agreement shall be approved effective on the date of filing; and

IT IS FURTHER ORDERED, That for purposes of this Order, a document is filed when it is actually received by the Secretary of the Federal Maritime Commission.

By the Commission.

(S) FRANCIS C. HURNEY
Secretary

Vice Chairman Moakley, concurring:

I would approve the agreement for the fifteen (15) month period requested by the proponents.

I find no mention in the record of the possibility of extending the agreement to thirty (30) months.

FEDERAL MARITIME COMMISSION

DOCKET NO. 81-52
ABBOTT HOSPITALS, INC.

v.

PUERTO RICO MARITIME SHIPPING AUTHORITY

DOCKET NO. 81-53
ABBOTT HOSPITALS, INC.

v.

TRAILER MARINE TRANSPORT CORPORATION

DOCKET NO. 81-61
ABBOTT LABORATORIES

v.

TRAILER MARINE TRANSPORT CORPORATION

NOTICE

May 25, 1982

Notice is given that no appeal has been taken to the April 15, 1982 dismissal of the complaints in these proceedings and that the time within which the Commission could determine to review has expired. No such determination has been made and accordingly, the dismissal has become administratively final.

(S) FRANCIS C. HURNEY
Secretary

FEDERAL MARITIME COMMISSION

DOCKET NO. 81-52
ABBOTT HOSPITALS, INC.

v.

PUERTO RICO MARITIME SHIPPING AUTHORITY

DOCKET NO. 81-53
ABBOTT HOSPITALS, INC.

v.

TRAILER MARINE TRANSPORT CORPORATION

DOCKET NO. 81-61
ABBOTT LABORATORIES

v.

TRAILER MARINE TRANSPORT CORPORATION

DISMISSAL OF PROCEEDINGS

Finalized May 25, 1982

These three cases arise out of a number of shipments made by Abbott Laboratories on vessels of respondents Trailer Marine Transport (TMT) and the Puerto Rico Maritime Shipping Authority (PRMSA). Since the cases involve the same issue and complainant they are hereby consolidated for the purposes of this order. These shipments of hospital kits moved in containers and the respondents calculated freight charges on the basis of 100% of the cubic capacity of the container rather than the actual measurement of the contents of the container. This resulted in alleged overcharges of \$91,358.46 by TMT and \$17,743.89 by PRMSA.

Preliminary investigation of the complaints by respondents led both to the conclusion that the allegations of Abbott were essentially correct and as a result of a conference telephone call on October 16, 1981, it was decided to proceed under Rule 93 of the Commission's Rules of Practice and Procedure which provides in relevant part:

If a respondent satisfies a complaint either before . . . a statement to that effect setting forth when and how the com-

plaint has been satisfied . . . Such a statement . . . shall show the amount of reparation agreed upon [and] shall contain the data called for in Appendix I(4), insofar as said form is applicable

The problem with the otherwise straightforward procedure which is contemplated by the rule is the provision requiring a showing of the manner in which the complaint was satisfied and the reference to the form in "Appendix I(4)." To begin with there is no Appendix I(4) to the Rules. There is however an Appendix II(4) which is a "Reparation Statement." This form seemed to fit the purposes of Rule 93 and was used here. As for the manner in which the complaint was satisfied, it was, strictly speaking, satisfied by the payment or the agreement to pay the overcharges which resulted from the error in assessing the freight charges on the shipments.

In deciding to proceed under Rule 93, both respondents satisfied themselves that the allegations of the complaint were valid by a review of the documentation which Abbott furnished in support of its claims. Quite early on in these proceedings both respondents had satisfied themselves that the complaints were valid and the ensuing months were consumed in preparing the statement called for in Rule 93. For example in the case of TMT Abbott had to supply the following information on some 300 or so shipments: "Claimant's Number; Date of Bill of Lading; Bill of Lading No.; Trailer No.; Date Charges Paid; Vessel; Voyage No.; Measurement; Rate; Amount Charged; Correct Amount and Reparation." While no one would question the legitimacy of the Commission's interest in insuring that a respondent's satisfaction of a complaint is valid and not an attempt to circumvent the requirements of the law, there nevertheless seems to be a real need to balance the regulatory concerns of the Commission with the burdens that concern places upon parties to proceedings who are for good and valid reasons seeking to avoid the time and expense of formal proceedings. A reasonable substitution for the procedure now required by Rule 93 might be a simple requirement that when a complaint is satisfied, the parties file a brief statement of the nature of the satisfaction coupled with a provision that the complainant hold open for inspection by the Commission all the documentation or materials supporting the claims made and affording the basis for the satisfaction of the complaint.¹

I have reviewed the submissions of the parties and I find that the requirements of Rule 93 have been met.

¹ As has been noted many times in the past, a complainant may at any time withdraw his complaint and may do so without giving reasons. Of course, the Commission can conduct its own investigation into the allegations of the complaint and the reasons for its withdrawal, but this is another matter outside the right of the complainant to withdraw his complaint.

The complaint against TMT sought \$91,358.46 in reparation and the complaint against PRMSA sought \$17,743.89. The parties' review of the documents resulted in the adjustment downward of these amounts to \$83,637.84 and \$16,925.00, respectively. PRMSA has paid Abbott but TMT felt that it could not make payment absent an order from the Commission authorizing it to do so.² It has, however, agreed to make payment when the order is issued. The complaint in 81-61 was a precautionary filing in case the motion to amend the complaint in No. 81-53 by substituting Abbott Laboratories for Abbott Hospitals as complainant was denied. The disposition here of No. 81-53 makes action upon the motion unnecessary and Docket No. 81-61 is hereby dismissed.

The complaint in Docket No. 81-52 having been satisfied is hereby dismissed.

Trailer Marine Transport is hereby ordered to pay to Abbott Laboratories the amount of \$83,637.84 and upon such payment the complaint is dismissed.

(S) JOHN E. COGRAVE
Administrative Law Judge

² Thus technically TMT has not "satisfied" the complaint. Its fear that it would be charged with rebating if it paid was of course unfounded.

FEDERAL MARITIME COMMISSION

SPECIAL DOCKET NO. 870

APPLICATION OF PACIFIC WESTBOUND CONFERENCE ON
BEHALF
OF NIPPON YUSEN KAISHA (NYK LINE) FOR THE BENEFIT
OF
THE KROGER COMPANY, BIRD IN HAND INTERNATIONAL
CORP.,
E. BOYD & ASSOCIATES, INC.

ORDER OF REMAND

May 27, 1982

The Commission determined to review the Initial Decision of Administrative Law Judge Charles E. Morgan, in which he granted Nippon Yusen Kaisha (NYK Line) permission to waive collection of \$4,838.16 of the freight charges applicable at the time of the shipment on nine containers of frozen chicken parts from points in Alabama, Arkansas and Georgia, to Kobe and Tokyo, Japan, under bills of lading dated October 1, and 2, 1981.

The Presiding Officer granted the waivers upon a finding that due to clerical error the Conference had failed to timely file in its tariff a reduction in the "bunker surcharge" and the "currency adjustment factor".¹ He also concluded that the grant of the waivers will not result in discrimination among shippers.

Pursuant to section 18(b)(3) of the Shipping Act, 1916, the Commission may grant a refund or a waiver,

. . . where it appears that there is an error in a tariff . . . due to inadvertence to file a new tariff and that such refund or waiver will not result in discrimination among shippers . . . 46 U.S.C. § 817(b)(3).

The present application merely states that no shipments of other shippers of the same or of a similar commodity moved on the same voyage on the same vessel. However, with the exception of outport arbitraries, or as provided in individual commodity items, the "bunker surcharge" applies to all cargo shipped to all points in the scope of the tariff. Likewise, the "currency adjustment factor" applies with a few

¹ The reductions were intended to go into effect on October 1, 1981, whereas the tariff setting forth the reduced charges was filed on October 7, 1981.

exceptions to all rates and charges applicable to ports in Japan.² Consequently, the reduction is not limited to shipments of frozen chicken parts but would appear to apply to all cargo (not otherwise exempt) carried under the Conference tariff between October 1 and October 7, 1981.

The application is silent on surcharges collected from shippers of other commodities, if any, which moved during that time and for the benefit of which no application for a refund or waiver has been filed. In the absence of such information, the conclusion that the grant of waivers will not result in discrimination among shippers finds no support in this record.

Consequently, the proceeding is remanded to the Presiding Officer to afford the Conference an opportunity to furnish additional information in this regard and take whatever steps are necessary to ensure that the grant of waivers will not result in discrimination among shippers.

THEREFORE, IT IS ORDERED, That the matter be and is hereby remanded to the Presiding Officer for further proceedings in accordance with the foregoing.

By the Commission.

(S) FRANCIS C. HURNEY
Secretary

² Excepted are diversion, demurrage or detention charges. PWC Motorbridge Tariff No. PWC-712, FMC No. 22, Rule 10.1.1.

FEDERAL MARITIME COMMISSION

46 C.F.R. 510

(GENERAL ORDER 4, REVISED; AMDT. 1;

DOCKET NO. 81-76)

LICENSING OF INDEPENDENT OCEAN FREIGHT FORWARDERS

June 1, 1982

ACTION: Final Rules

SUMMARY: This amends the Commission's independent ocean freight forwarder regulations to remove restrictions against affiliations between such forwarders and persons who have a beneficial interest in export shipments via oceangoing common carriers. These revisions are necessary to conform the regulations to amendments to the Shipping Act, 1916, made by the Omnibus Budget Reconciliation Act of 1981 (Public Law 97-35).

DATE: The changes contained herein will be effective June 7, 1982, except for the change to section 510.33(c) which will be effective September 7, 1982.

SUPPLEMENTARY INFORMATION: The Federal Maritime Commission's rules governing the licensing and operation of independent ocean freight forwarders are contained at 46 C.F.R. 510¹ and are commonly known as General Order 4, Revised. The definition of the term "independent ocean freight forwarder" and the conditions under which forwarders are licensed to operate are based on and subject to sections 1 and 44 of the Shipping Act, 1916 (the Act). As a result of amendments made by Public Law 97-35 to sections 1 and 44 of the Act,² the Commission, on December 28, 1981, proposed five revisions to its rules solely for the purpose of conforming its rules to the statutory amendments. Those five revisions are now being adopted by the Commission.

Section 1 of the Act has been amended by Public Law 97-35 to define a forwarder as follows:

¹ See 46 F.R. 24565, May 1, 1981.

² See section 1608 of Public Law 97-35, the Omnibus Budget Reconciliation Act of 1981, effective August 13, 1981.

The term "independent ocean freight forwarder" means a person that is carrying on the business of forwarding for a consideration who is not a shipper, consignee, seller, or purchaser of shipments to foreign countries.

Previously, the definition read:

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.* (emphasis added.)

Section 44 of the Act has been amended by adding new subsection (f):

(f) A forwarder may not receive compensation from a common carrier with respect to any shipment in which the forwarder has a beneficial interest or with respect to any shipment in which any holding company, subsidiary, affiliate, officer, director, agent, or executive of such forwarder has a beneficial interest.

The above-quoted changes to sections 1 and 44 of the Act are scheduled to remain in effect only until December 31, 1983. After that date the definition of an "independent ocean freight forwarder" will revert back to that in effect prior to August 13, 1981, the date of enactment of the amendments.

Comments on the Commission's proposed revisions to General Order 4 were received from the National Customs Brokers and Forwarders Association of America, Inc. (the Association), which represents over three hundred and fifty forwarders and/or customs brokers, and an individual forwarder, Bee International, Inc. of Jacksonville, Florida (Bee).

The Association states that although the proposed rule revisions comport with the changes made by Public Law 97-35, additional rules are required to permit effective supervision over exporter affiliated forwarders. Otherwise, the Association states, wholesale violations of the law will result. The Association suggests that forwarders affiliated with exporters be made to identify such affiliations on their stationery and billing forms so that a prospective client-exporter may know, before hiring such forwarder, that the forwarder is affiliated with a potential competitor. The Association also suggests that affiliated forwarders be made to certify semi-annually to the Commission (1) the name of each affiliated exporter, along with the names of each affiliate's officers, directors and shareholders; (2) the number of shipments handled by the forwarder for each of its affiliates, together with a copy of each bill of lading; and (3) that no compensation was received from

oceangoing common carriers on any such shipments. The Association also suggests that a forwarder who becomes affiliated with an exporter be made to advise the Commission in writing within ten days, setting forth the name of the exporter, its location, and the names of the exporter's officers, directors and shareholders.

Bee states that the proposed amendments could result in a loss of business and in illegal rebating, and sets forth examples of how illegal rebates could occur without detection by the Commission or by the ocean carriers. Bee concludes by stating that either it does not understand the new law and proposed rules, or, if it does, it does not understand why "the U.S. Government and the FMC" would allow such a situation. Whatever the merits of Bee's objections, they are clearly beyond the scope of this rulemaking proceeding.

The Association's suggestion would result in a substantial additional paperwork and reporting burden upon the ocean freight forwarder industry. In addition, the Commission cannot publish as a final rule the new regulations requested by the Association. Such regulations would have to be made the subject of a new proposed rulemaking proceeding so that comments could be received from all segments of the public.

The Commission does not wish to downplay the seriousness with which it views the Association's concern that surreptitious siphoning off of business will occur. However, section 20 of the Shipping Act, 1916, already prohibits forwarders from passing on to their shipper affiliates, here or in foreign countries, the confidential, proprietary information a forwarder acquires in its position of fiduciary for U.S. exporters. The Commission would not hesitate to bring the full weight of the law to bear upon any forwarder found to violate section 20. A finding that a shipper-affiliated forwarder has abused its fiduciary responsibility by improperly disclosing to its foreign or domestic affiliates any information which may be used to the detriment of U.S. exporters would subject the forwarder to possible revocation of its license and the imposition of appropriate civil penalties.

Pursuant to 5 U.S.C. 601 *et seq.*, the Commission certifies that the rule revisions adopted herein will not have a significant economic impact on a substantial number of small entities. The proposals do not require additional reports or records; and are based entirely on changes to the underlying law. The economic impact which will occur will occur as a direct result of the changes to the law.

List of subjects in 46 C.F.R. 510: Freight Forwarders

THEREFORE, pursuant to sections 18, 21, 43, and 44 of the Shipping Act, 1916 (46 U.S.C. 817, 820, 841a and 841b), and 5 U.S.C. 553, the following provisions of Title 46 of the Code of Federal Regulations are amended to read as follows:

1) Section 510.2(j):

(j) "independent ocean freight forwarder" refers to a person performing freight forwarding services for a consideration, either monetary or otherwise, who is not a shipper or consignee or seller or purchaser of property in commerce from the United States.

2) Section 510.12:

No person is eligible for a license who is a shipper, consignee, seller, or purchaser of shipments in commerce from the United States.

3) Section 510.32(a):

(a) *Prohibition.* No licensee shall act in the capacity of a shipper, consignee, seller, or purchaser of any shipment in commerce from the United States.

4) Section 510.33(c):

(c) *Form of certification.* Prior to receipt of compensation, the licensee shall file with the carrier, in addition to the anti-rebate certification required by section 510.31(h) of this part, a signed certification as set forth below on one copy of the relevant ocean bill of lading which indicates performance of at least two of the listed services in addition to arranging for space:

The undersigned hereby certifies that neither it nor any holding company, subsidiary, affiliate, officer, director, agent or executive of the undersigned has a beneficial interest in this shipment; that it is the holder of valid FMC License No. _____, issued by the Federal Maritime Commission and has, in addition to soliciting and securing the cargo specified herein or booking or otherwise arranging for space for such cargo, performed at least two (2) of the following services, as indicated:

- (1) Coordinated the movement of the cargo to shipside.
- (2) Prepared and processed the ocean bill of lading.
- (3) Prepared and processed dock receipts or delivery orders.
- (4) Prepared and processed consular documents or export declarations.
- (5) Paid the ocean freight charges.

A copy of such certificate shall be retained by the licensee pursuant to section 510.34 of this part.

5) Section 510.33 is amended by the addition of new paragraph (h):

(h) A freight forwarder may not receive compensation from an oceangoing common carrier with respect to any shipment in which the forwarder has a beneficial interest or with respect to any shipment in which any holding company, subsidiary, affiliate, officer, director, agent, or executive of such forwarder has a beneficial interest.

By the Commission.

(S) FRANCIS C. HURNEY
Secretary

FEDERAL MARITIME COMMISSION

DOCKET NO. 79-71

SAIPAN SHIPPING COMPANY, INC.

v.

ASIATIC INTERMODAL SEABRIDGE, S.A., CABRAS MARINE
CORP.,

MALAYAN TOWAGE & SALVAGE CO., CHINA-PACIFIC
INTERMODAL, LTD.,

CHINA-PACIFIC, S.A., TRANSPAC MARINE, S.A., PACIFIC
LOGISTICS, S.A.,

ISLAND NAVIGATION CO., LTD. AND OCEANIA LINE, INC.

NOTICE

June 4, 1982

Notice is given that no appeal has been taken to the April 26, 1982 dismissal of the complaint in this proceeding and that the time within which the Commission could determine to review has expired. No such determination has been made and accordingly, the dismissal has become administratively final.

(S) FRANCIS C. HURNEY
Secretary

FEDERAL MARITIME COMMISSION

DOCKET NO. 79-71

SAIPAN SHIPPING COMPANY, INC.

v.

ASIATIC INTERMODAL SEABRIDGE, S.A.,
CABRAS MARINE CORP.,
MALAYAN TOWAGE & SALVAGE CO.,
CHINA-PACIFIC INTERMODAL, LTD.,
CHINA-PACIFIC, S.A.,
TRANSPAC MARINE, S.A.,
PACIFIC LOGISTICS, S.A.,
ISLAND NAVIGATION CO., LTD. AND
OCEANIA LINE, INC.

COMPLAINT DISMISSED WITH PREJUDICE

Finalized June 4, 1982

By notice filed April 22, 1982, Saipan Shipping Co., Inc., the complainant, stated that it was withdrawing its complaint prior to Answer ¹ and requested that the proceeding be discontinued. I am orally advised by counsel for the respondents that the motion is unopposed.

The motion is granted and the complaint is ordered dismissed with prejudice.

(S) SEYMOUR GLANZER
Administrative Law Judge

¹ By order of September 27, 1979, no Answers were required to be filed unless and until further ordered.

FEDERAL MARITIME COMMISSION

DOCKET NO. 81-8
ROHM & HAAS COMPANY

v.

ITALIAN LINE

NOTICE

June 7, 1982

Notice is given that no appeal has been taken to the April 27, 1982 dismissal of the complaint in this proceeding and that the time within which the Commission could determine to review has expired. No such determination has been made and accordingly, the dismissal has become administratively final.

(S) FRANCIS C. HURNEY
Secretary

FEDERAL MARITIME COMMISSION

DOCKET NO. 81-8

ROHM AND HAAS COMPANY

v.

ITALIAN LINE

Complainant alleged that respondent overcharged it on two shipments of a product known as "Kerb," which complainant claims to have been a "herbicide," but which respondent rated otherwise. After several preliminary jurisdictional problems concerning complainant's standing to seek reparation were resolved, the parties began discovery and other prehearing activities which began to consume time and money unduly. Therefore, in order to avoid difficult and costly litigation, the parties agreed to settle on the basis of a \$21,000 payment instead of the original claim of \$25,492.48.

The settlement agreement comports with both general principles of law applicable to settlements and to the specific requirements established by the Commission in cases arising under section 18(b)(3) of the Shipping Act, 1916. It represents the considered judgment of the parties as to the value of the claim and the risks and expenses of continued litigation and is shown to be a bona fide attempt to resolve a controversy rather than to evade tariff law in a case in which there are genuine disputes of fact and critical facts necessary to resolve the disputes are not reasonably ascertainable.

William D. Outman II, Munford Page Hall II, and Albert J. Bartosic for complainant.

Stanley O. Sher, Anthony J. Ciccone, Jr., and John R. Attanasio for respondent.

SETTLEMENT APPROVED; COMPLAINT DISMISSED

Finalized June 7, 1982

NORMAN D. KLINE, Administrative Law Judge.

Complainant, Rohm and Haas Company, and respondent, Italian Line, have filed a joint motion requesting approval of a settlement agreement and dismissal of the complaint with prejudice. In support of their motion, the parties have furnished the text of their agreement,¹ a joint affidavit attesting to the *bona fides* of the settlement,² and have cited ample case law on the subject of settlements before the Commission. As more fully described below, I find that the settlement comports with applicable standards of law and accordingly grant the motion.

The case began with the filing of a complaint on January 26, 1981, by the above-named complainant, a manufacturer of chemicals whose business is located in Philadelphia, Pennsylvania. Complainant alleged that respondent, Italian Line, violated section 18(b)(3) of the Shipping

¹ The Agreement of Settlement and Mutual Release is attached as Appendix I.

² The Joint Affidavit in Support of Settlement Agreement is attached as Appendix II.

Act, 1916, by overcharging on two shipments of a product known as "Kerb," an alleged "wet cake herbicide" which respondent carried in late January and February of 1979 from Philadelphia and New York to Genoa, Italy. Complainant sought reparation in the amount of \$25,492.48 plus interest.

Before the case could proceed to decision on the merits, certain events occurred which served to prolong the preliminary phase of the proceeding. First, the parties entered into discussions seeking a possible settlement even before respondent's answer to the complaint was filed. When these discussions failed to produce an agreement, respondent filed its answer denying any violation of law and asserting that it had been precluded from rating the shipments as "herbicides," which complainant contended was the correct tariff description, because of the bill-of-lading description. Second, the pleadings revealed jurisdictional problems concerning complainant's standing to seek reparation since complainant's foreign affiliate paid the freight rather than complainant, the possibility that the first shipment and payment for it occurred beyond the two-year period of limitation set forth in section 22 of the Act, and the further possibility that complainant could not cure the standing problem by amending its complaint or otherwise obtaining standing without going beyond the two-year period. Accordingly, I instructed the parties to furnish appropriate materials in support of their respective positions on these matters. (See Order to Parties to Furnish Affidavits and Legal Memoranda on Jurisdictional Problems, March 31, 1981.) On June 1, 1981, in response to various legal memoranda and complainant's motion seeking permission to amend its complaint, I ruled that complainant ought to be allowed to cure the problem of standing by amending its complaint and that such amendment should not be precluded by the two-year period of limitation. Since previous Commission decisions seemed to hold that such amendments would be time barred, I granted leave to appeal. (See Motion to Amend Complaint to Allow Complainant to Appear, etc., served June 10, 1981.) On November 13, 1981, the Commission agreed that the problem of standing could be cured notwithstanding the two-year period and ordered complainant to obtain an assignment from its Italian subsidiary, which had paid the freight, within 60 days in order to proceed on the merits, *Rohm and Haas Company v. Italian Line*, 24 F.M.C. 429 (1981). On December 18, 1981, complainant filed an apparent assignment from its subsidiary, in response to the Commission's ruling.³ Thereafter an informal prehear-

³ The other problem cited in my rulings of June 1 concerning the closeness of the first shipment to the two-year period was treated by complainant which filed a document purporting to be a receipt for freight charges showing payment of freight on March 1, 1979, well within the two-year period prior to the filing of the complaint. (See letter dated June 8, 1981, from Mr. Bartosic to me, enclosing the receipt.)

ing conference was held in January, at which time an expedited schedule was established calling for complainant to serve its written case which would then undergo discovery to be conducted by respondent so as to conclude by March 26, with prehearing statements and a second prehearing conference scheduled for April 2 and April 12 respectively.

Before discovery had been completed, however, complainant sought a quick resolution of the controversy by filing a motion for summary judgment on the basis of the written case it had filed. This would have required a reply by respondent and a consideration of the state of the issues separating the parties, and, if denied, a resumption of the discovery schedule and prehearing schedule which had to be suspended following the filing of the motion. (See Change in Procedural Schedule, March 15, 1982.) By this time it had become evident that the proceeding was becoming too costly and time-consuming and the parties again attempted to reach a settlement. This time the discussions met with success, and the settlement agreement was filed together with supporting documents and authorities.

JUSTIFICATION FOR THE SETTLEMENT

The parties have persuasively shown in their joint motion that there is considerable justification for settlement of this case. As they state in their motion, the main issues in the case involve the proper identification of commodities which were shipped over three years ago, a determination of the applicable tariff rates, and proof as to whether certain alleged overcharges were actually paid by the foreign consignee. These are issues which the parties were unable to concede and which initial discovery was unable to resolve. It appeared quite likely, therefore, that further discovery would be necessary and that expert witnesses would have to testify on complicated chemical issues. At issue, furthermore, was the propriety of at least three different possible rates, the \$149.50 W rate for "herbicides" which complainant sought, a \$291.50 M rate for "Cargo, dangerous or hazardous, N.O.S." which respondent contended was the correct rate, and still a third rate of \$295.75 W for "toluene" which respondent applied to one shipment. Although complainant contended that the product shipped, namely, "Kerb wet cake," is a "herbicide" and submitted various documents which it believed would support its case, the bills of lading indicate that the product "contains toluene" and is a "flammable solid," among other things. Determining exactly what the "Kerb wet cake" is chemically and what tariff rate should have applied among the three suggested, and how the presence of "toluene" is to be treated in determining the correct tariff rate, is, as the parties have indicated, a difficult problem. Understandably, the parties have determined that resolution of such problems by full-blown litigation "would not only entail the wasteful expenditure of considerable additional funds, but could also possibly approach or

exceed the total amount for which reparations are claimed.” (Joint motion, p. 6.) Accordingly, the parties have agreed that complainant will release respondent from any and all claims arising under the shipments in controversy, and will take necessary action to have its complaint against respondent dismissed with prejudice provided that respondent pays to complainant the sum of \$21,000 in satisfaction of the complaint and the settlement is submitted to and approved by the appropriate governmental authorities.

EVALUATION OF THE SETTLEMENT UNDER APPLICABLE PRINCIPLES OF LAW

It is clear that the settlement comports with applicable principles of law. It is, of course, well established that both law and Commission policy “encourage settlements and engage in every presumption which favors a finding that they are fair, correct, and valid.” *Ellenville Handle Works, Inc. v. Far Eastern Shipping Co.*, 23 F.M.C. 707, 709 (ALJ, administratively final, February 25, 1981); *Old Ben Coal Company v. Sea-Land Service, Inc.*, 21 F.M.C. 505 (I.D. adopted by the Commission, December 29, 1978). Settlements are particularly justified when, as here, the parties are “faced with the uncertainty and expense of further litigation, including a potential evidentiary hearing on [a] commodity description.” *Celanese Corp. v. The Prudential Steamship Company*, 23 F.M.C. 1, 5 (ALJ, administratively final, July 2, 1980). There are now innumerable Commission proceedings in which the parties have settled their differences for amounts less than those originally sought in the complaints and without admissions of statutory violations. *Del Monte Corp. v. Matson Navigation Company*, 22 F.M.C. 364, 368-369 (ALJ, administratively final, December 27, 1979); *Ellenville Handle Works, Inc. v. Far Eastern Shipping Co.*, cited above, 23 F.M.C. at 710. These principles have been extended by the Commission into virtually every type of complaint case under the Shipping Act, including those involving alleged overcharges in violation of section 18(b)(3) of the Act, provided, however, that in the overcharge cases there is a showing that the settlement is *bona fide* and not a device for rebating. See *Organic Chemicals v. Atlantrafik Express Service*, 18 SRR 153a (1979); *Celanese Corporation, Inc. v. The Prudential Steamship Company*, cited above, 23 F.M.C. 1, 6.

In considering settlements which parties submit with requests that their cases before the Commission be dismissed, the Commission has followed the traditional view that the settlement deserves approval if it avoids wasteful litigation and if it appears that the parties have correctly made an economical judgment that continued litigation would cost more to each side regardless of who ultimately prevailed on the merits than the amount of money which complainant had agreed to accept and respondent had agreed to pay in exchange for a release. *Old Ben Coal*

Co., cited above, 21 F.M.C. at 510. Since this is a settlement fashioned by the parties in a proceeding involving the tariff-adherence requirements of section 18(b)(3) of the Shipping Act, 1916, however, the Commission exercises special care to assure itself that the settlement is a legitimate attempt to avoid unnecessarily costly and wasteful litigation rather than a device to sanction rebating. To be assured of the *bona fides* of such cases, therefore, the Commission requires three things: (1) submission of the signed agreement; (2) an affidavit setting forth the reasons for the settlement and attesting to the fact that it is a *bona fide* attempt by the parties to terminate their controversy and not a device to circumvent tariff law; and (3) a showing that the complaint on its face presents a genuine dispute and that the facts critical to the resolution of the dispute are not reasonably ascertainable. See *Organic Chemicals v. Atlantrafik Express Service*, cited above, 18 S.R.R. at 1539-1540; *Celanese Corporation, Inc. v. The Prudential Steamship Company*, cited above, 23 F.M.C. 1; *Tupperware Company v. Compania Sud-Americana de Vapores*, 24 F.M.C. 525 (1982). I find that the parties have shown that their settlement complies with both the general standards governing approvability of settlements as well as the particular conditions attached to settlements submitted in section 18(b)(3) cases.

The subject settlement appears to be reasonable and to represent the considered judgment of the parties. As indicated above, the issues are complicated and the events are relatively remote in time and continued litigation would entail further discovery, expert testimony, and an undue expenditure of funds compared to the amount of settlement. The amount of the settlement (\$21,000), furthermore, appears to fall within a zone of reasonableness and represents the considered opinion of the economic worth of the claim in consideration of the risks of litigation and even appears to have some basis in the tariff.⁴ Thus, the settlement comports with general principles of law applicable to all settlements. See *Old Ben Coal Co.*, cited above, 21 F.M.C. at 511-515.

The settlement, furthermore, also comports with the specific requirements established by the Commission in *Organic Chemical v. Atlantrafik Express Service*, cited above, 18 S.R.R. at 1539-1540, and such cases as *Celanese Corporation, Inc. v. The Prudential Steamship Company*, cited above, 23 F.M.C. 1, and *Tupperware Company v. Compania Sud-Ameri-*

⁴ As the parties state, the amount of the settlement represents a valid compromise since it approximates freight due under a general herbicide rate in the tariff which is lower than the "Toluene" and "N.O.S." rates originally applied by respondent while being somewhat higher than the "nonhazardous" herbicide rate sought by complainant. Basing a settlement amount on a compromise rate or commodity item published in the tariff which the product appears to approximate is a recognized method of deriving an amount for settlement purposes. Cf. *Maisena, S.A. v. Flota Mercante Grancolombiana S.A.*, 21 S.R.R. 322, 324 (A.L.J. administratively final, March 22, 1982). Parties are also permitted to waive interest. See *Interest in Reparation Proceedings*, 20 S.R.R. 1511, 1514 (1981) ("... [b]ecause interest is not part of the freight rate, it is appropriate that its treatment in settlement agreements be left to the parties").

cana de Vapores, cited above, 24 F.M.C. 525 (1982). Thus, the parties have submitted their signed agreement, have filed an affidavit attesting that the settlement is a *bona fide* attempt by the parties to terminate their controversy and not a device to obtain transportation at other than applicable tariff rates in contravention of law, and have shown that the facts critical to the resolution of the dispute are not reasonably ascertainable. As I have discussed above, the dispute centers on the nature of a product known as "Kerb," which may be a "herbicide" as some documents indicate but which may contain "toluene" and may be a "flammable solid," among other things, and could arguably be rated under at least three different tariff rates. Determination of the precise nature of the product would obviously entail considerable litigation expenses.

Accordingly, the settlement is approved and the complaint is dismissed with prejudice. Within twenty (20) days after date of service of the Commission's Notice rendering this ruling administratively final, the parties shall effectuate the terms of the settlement agreement and file an affidavit with the Commission attesting to the effectuation of their settlement.

(S) NORMAN D. KLINE
Administrative Law Judge

APPENDIX I
BEFORE THE FEDERAL MARITIME COMMISSION

ROHM & HAAS COMPANY,

Complainant

v.

DOCKET NO. 81-8

ITALIAN LINE,

Respondent

AGREEMENT OF SETTLEMENT
AND MUTUAL RELEASE

It is hereby agreed, by and between the undersigned, complainant Rohm & Haas Company (R&H) and respondent Italian Line (Italian Line), that the dispute between these parties as embodied in Docket No. 81-8 should be fully settled and resolved by mutual accord, on the following terms and conditions:

1. Italian Line shall pay to R&H the sum of \$21,000 in full satisfaction of R&H's complaint in Docket No. 81-8. Italian Line's obligations under this paragraph are, however, contingent upon the occurrence of the conditions discussed below.

2. R&H, in consideration said payment as provided in paragraph 1 above, hereby releases Italian Line from any and all claims arising out of the shipments which are the subject of the claim in Docket No. 81-8. R&H shall, in addition, take all necessary action to have its complaint against Italian Line in Docket No. 81-8 dismissed with prejudice to R&H, and shall refrain from further pursuing its claim in this or any future proceedings.

3. Neither R&H nor Italian Line, nor any successor in interest of either such party, shall initiate any new claim against the other party arising in connection with the complaint in Docket No. 81-8, except for enforcement of any provision of this Agreement.

4. It is understood and agreed that this Agreement Of Settlement And Mutual Release is in full accord and satisfaction of all the claims involved in Docket No. 81-8.

5. This Agreement shall be submitted for any necessary approval to the appropriate governmental authorities, and shall become effective and binding upon the parties when such approval is obtained.

6. This Agreement Of Settlement And Mutual Release constitutes the entire agreement between the parties.

ROHM & HAAS COMPANY

(S) BY: MUNFORD PAGE HALL, II
*Attorney for Complainant
Rohm & Haas Company*

Subscribed and sworn to before me
this 1st day of April, 1982.

C. Marie Moore
Notary Public
My Commission Expires: Jan. 31, 1985

ITALIAN LINE

(S) BY: ANTHONY J. CICCONE, JR.
*Attorney for Respondent
Italian Line*

Subscribed and sworn to before me
this 5th day of April, 1982.

Rosalie A. Daniels
Notary Public
My Commission Expires: October 14, 1986

APPENDIX II
BEFORE THE FEDERAL MARITIME COMMISSION

ROHM & HAAS COMPANY,

Complainant

v.

DOCKET NO. 81-8

ITALIAN LINE,

Respondent

JOINT AFFIDAVIT IN SUPPORT
OF SETTLEMENT AGREEMENT

We, the undersigned, on behalf of complainant Rohm & Haas Company (R&H) and respondent Italian Line (Italian Line), and being each first severally sworn, depose and say for and on behalf of our respective parties:

1. The claim involved in Docket No. 81-8 arises under Sections 22 and 18(b)(3) of the 1916 Shipping Act (46 U.S.C. § 821, § 817), and presents a genuine dispute, the facts critical to the resolution of which are not readily ascertainable.

2. The parties to Docket No. 81-8 have entered into the accompanying Agreement Of Settlement And Mutual Release (Settlement Agreement) which, upon approval by the Commission, will conclusively resolve their dispute.

3. The accompanying Settlement Agreement was entered into after full and thorough consideration of all the material circumstances involved herein including, among other things, the estimated cost of further litigating the issues herein, the possibility to each party of an unfavorable decision on the merits after further litigation, and the desirability of maintaining amicable relations between the parties.

4. The accompanying Settlement Agreement is a fair and reasonable commercial settlement of the dispute in this case which will avoid the need for further extensive, costly and economically unjustified litigation.

5. The accompanying Settlement Agreement is a *bona fide* attempt by the parties to terminate this controversy in a commercially reasonable manner, and is not a device to obtain transportation at other than the lawfully applicable rates and charges or otherwise circumvent the requirements of the 1916 Shipping Act, the 1933 Intercoastal Shipping Act, or any other applicable law.

WHEREFORE, for all the foregoing reasons, the parties respectfully request Commission approval of their settlement, and dismissal of the proceeding herein, in accordance with the terms of the accompanying Settlement Agreement.

ROHM & HAAS COMPANY

(S) BY: ALBERT J. BARTOSIC
Regulatory Counsel

Subscribed and sworn to before me
this 1st day of April, 1982.

C. Marie Moore
Notary Public
My Commission Expires: Jan. 31, 1985

ITALIAN LINE

(S) BY: LODOVICO TERRANOVA
*Equipment and Operations
Manager*

Subscribed and sworn to before me
this 12th day of April, 1982.

Gustav Brand
Notary Public
My Commission Expires: March 30, 1984

FEDERAL MARITIME COMMISSION

(46 C.F.R. PART 510)

(GENERAL ORDER 4, REVISED: DOCKET 80-13)
LICENSING OF INDEPENDENT OCEAN FREIGHT
FORWARDERS

June 8, 1982

ACTION: Final Rule

SUMMARY: The effect of this action is to continue to allow vessel operating common carriers and their agents to receive freight forwarder compensation on shipments with respect to which they performed both common carrier and freight forwarding functions. It amends a proposal adopted by the Commission, but not made effective, which would have prohibited the receipt of such compensation.

DATE: Section 510.33(g), as revised herein, will be effective July 14, 1982.

SUPPLEMENTARY INFORMATION: The Commission instituted this proposed rulemaking proceeding on March 17, 1980 (45 F.R. 17029) to revise General Order 4 (46 C.F.R. 510), which governs the licensing and operations of independent ocean freight forwarders (forwarders). One of the proposed revisions was the substitution of a new rule for original section 510.22(c). Insofar as is relevant here, section 510.22(c) prohibited the receipt of compensation¹ by a forwarder who also acted as, or who was related to a person who acted as, a nonvessel operating common carrier (NVO) on the same shipment.

In pertinent part, section 510.22(c) read as follows:

A nonvessel operating common carrier by water or person related thereto . . . may collect compensation under section 44(e) when, and only when, the following certification is made on the "line copy" of the ocean carrier's bill of lading, in addition to all other certifications required by section 44 of the Shipping Act, 1916, and this part: "The undersigned certifies that neither it, nor any related person, has issued a bill of

¹ The term "compensation", as used in the Commission's forwarder regulations, means the payment by a water common carrier to a forwarder. Such payment is prohibited by section 44(e) of the Shipping Act, 1916, unless the forwarder performs certain functions that the common carrier otherwise would have to perform itself.

lading covering ocean transportation or otherwise undertaken common carrier responsibility for the ocean transportation of the shipment covered by this bill of lading." Whenever a person acts in the capacity of a nonvessel operating common carrier by water as to any shipment he shall not be entitled to collect compensation under section 44(e) nor shall a common carrier by water pay such compensation to a nonvessel operating common carrier for such shipment.

The proposed revision of section 510.22(c) initially was designated as new section 510.33(i). This proposed new rule would have expanded the prohibition in section 510.22(c) by also prohibiting the receipt of compensation by a forwarder who acted as a vessel operating common carrier, or agent of such carrier, on the same shipment.

In its final version, published by the Commission on May 1, 1981 (46 F.R. 24565), with a scheduled effective date of October 1, 1981, section 510.33(i) was redesignated as section 510.33(g) and read as follows:

(g) *Licensed oceangoing common carriers; compensation.* An oceangoing common carrier, agent or person related thereto, acting as an independent ocean freight forwarder, may collect compensation when, and only when, the following certification is made on the "line copy" of the underlying carrier's bill of lading, in addition to all other certifications required by this part:

The undersigned certifies that neither it, nor any related person, has issued a bill of lading covering the ocean transportation of the shipment covered by this bill of lading or otherwise undertaken common carrier responsibility therefor.

Whenever a person acts in the capacity of an oceangoing common carrier or agent thereof as to any shipment, such person shall not be entitled to collect compensation nor shall any underlying carrier pay such compensation to such oceangoing common carrier or agent thereof for such shipment.

On May 27, 1981, a Petition for Clarification and Reconsideration was filed on behalf of five forwarders operating in Florida, North Carolina, South Carolina and Georgia. As a result of this petition, on July 14, 1981, the Commission stayed the effective date of section 510.33(g) as to vessel operating common carriers and agents, and gave further notice of proposed rulemaking so that the merits of the expanded prohibition could be explored in full.

Subsequently, comments were submitted by the following:

1. Freehill, Hogan and Mahar, Attorneys for Associated Latin American Freight Conferences;
2. Independent Freight Forwarders and Customs Brokers Association of Savannah, Inc.;

3. Senator Jesse Helms of North Carolina;
4. Congressman Walter B. Jones of North Carolina;
5. National Customs Brokers and Forwarders Association of America, Inc.; and
6. Kominers, Fort, Schlefer and Boyer, Attorneys for the five original forwarder/petitioners in Florida, North Carolina, South Carolina and Georgia.

The position taken by each commentator is summarized below:

Associated Latin American Freight Conferences

The Conferences favor section 510.33(g) as adopted in the final rules. They state that in instances where a forwarder is controlled by a carrier, the forwarder would not be acting in the typical arm's-length fashion, but more like an "in-house" sales and booking department. They raise the question of whether such a forwarder/agent actually was performing the statutorily required services to be eligible to receive compensation, i.e., it could be argued that the carrier already was providing the services for itself and thus was barred by law from paying compensation for such services.

Independent Freight Forwarders and Customs Brokers Association of Savannah, Inc.

The Association favors section 510.33(g) and argues that carriers and their agents should not be licensed in the first place. The Association also requests a rule which would make carriers pay compensation promptly.

Senator Jesse Helms

Senator Helms objects to section 510.33(g). He states that if there is no basis for denying licenses to forwarder/agents, there is no apparent basis for denying them the right to collect compensation. He maintains that the effect of the rule will be anti-competitive because forwarder/agents will be forced to choose between the ship's agent business and freight forwarding business. Such a choice, he states, would seriously affect ports where there is insufficient business to justify separate freight forwarding and ship's agency business. Senator Helms also states that he understands there are serious legal impediments to the rule.

Congressman Walter B. Jones

Congressman Jones objects to section 510.33(g) because of its restriction on compensation to forwarder/agents. He feels the rule would severely jeopardize the livelihood of small-port forwarders who combine their forwarding business with ship agency business, and believes that the rule may be contrary to the intent of Congress.

National Customs Brokers and Forwarders Association of America, Inc.

The Association supports section 510.33(g) and maintains that the rule will prevent forwarder/agents from receiving double payment for substantially the same services, i.e., an agency commission and forwarder compensation, thus dissipating carrier revenue. The Association also points out that Congress has prohibited a carrier from paying compensation to a forwarder who has not performed certain functions specified in the Shipping Act, 1916—functions which the carrier must otherwise perform itself. The question is, in the case of a person who acts as both a forwarder and an agent, who actually is performing such functions—the forwarder or the agent? Further, if the forwarder and carrier are represented by the same person, there is no motivation for such person to ensure that the statutory prerequisites for the payment of compensation have been met. Such conflict of interest extends even more obviously to a forwarder/agent attempting to service the opposing interests of the shipper and carrier at the same time. The Association also states that section 510.33(g) will serve to correct the present anti-competitive situation in small ports where nonagent forwarders find it difficult to compete with forwarder/agents. It is difficult for nonagent forwarders to compete because forwarder/agents receive double payment from the carrier and are able to use such higher revenue to underquote nonagent forwarders when soliciting export shippers.

Florida, North Carolina, South Carolina and Georgia Forwarders

The five Florida, North Carolina, South Carolina and Georgia forwarders mentioned above object to section 510.33(g) because it restricts their “right” to collect compensation when and if they choose to act as agents. They state that Congress, in the 1959-1961 period, deliberately refused to give the Commission power to deny licenses to carriers or agents or to restrict their right to compensation. Thus, they state that the restriction in section 510.33(g) would violate a forwarder’s right to compensation under section 44(e) of the Shipping Act, 1916 (Act), and also would violate section 44(d) of the Act and section 9(b) of the Administrative Procedure Act by restricting a license without affording a hearing to the licensee. Further, they state that fifteen years of Commission files disclosed no basis for the “concern” expressed in the March, 1980 notice of proposed rulemaking. In addition, these forwarders argue that the Commission ignores the fact that forwarder/agents are entitled to dual compensation (i.e., forwarder compensation and agency commissions or fees) because they perform dual functions. Finally, these five forwarders argue that, for a number of procedural reasons, due process has been denied. They request oral argument.

After giving full consideration to the above summarized comments, the Commission has decided against adopting the proposed change to the previous rule (section 510.22(c) of General Order 4) concerning the

receipt of compensation. Thus, a vessel operating common carrier or its agent, who also functions as a licensed ocean freight forwarder on the same shipment, may continue to receive compensation. Licensed nonvessel operating common carriers by water and forwarders related thereto will not be permitted to receive compensation. In short, all parties will be left as they were under previous section 510.22(c). After reconsidering all of the arguments pro and con, the Commission sees no reason to alter the status quo concerning this issue.

Pursuant to the Regulatory Flexibility Act (5 U.S.C. 601 *et seq.*), the Commission certifies that this action will not have a significant economic impact on a substantial number of small entities within the meaning of the said Act. This action will not require forwarders or any other persons to submit reports or maintain records. Since it is a decision against adopting a new rule, it will result in no regulatory burden of any type on any person.

List of subjects in 46 C.F.R. 510: Freight Forwarders and Common Carriers.

Therefore, pursuant to sections 43 and 44 of the Shipping Act, 1916 (46 U.S.C. 841a and 841b), and 5 U.S.C. 553, section 510.33(g) of Title 46, Code of Federal Regulations, is amended to read as follows:

(g) *Licensed oceangoing common carriers; compensation.* A nonvessel operating common carrier by water or person related thereto licensed under this part, may collect compensation when, and only when, the following certification is made on the "line copy" of the underlying carrier's bill of lading, in addition to all other certifications required by this part:

The undersigned certifies that neither it nor any related person has issued a bill of lading or otherwise undertaken common carrier responsibility as a nonvessel operating common carrier for the ocean transportation of the shipment covered by this bill of lading.

Whenever a person acts in the capacity of a nonvessel operating common carrier by water as to any shipment such person shall not collect compensation, nor shall any underlying carrier pay compensation to such person for such shipment.

By the Commission.

(S) FRANCIS C. HURNEY
Secretary

FEDERAL MARITIME COMMISSION

DOCKET NO. 79-59

STUTE INTERNATIONAL, INC.

INDEPENDENT OCEAN FREIGHT FORWARDER APPLICATION

ORDER ON REOPENING

June 9, 1982

The Commission reopened this proceeding by Order on Remand served February 12, 1982, to determine whether Stute International, Inc. qualifies for a license as an independent ocean freight forwarder (IOFF) under the current statutory scheme.¹ Previously, the Commission had denied Stute's application for failure to meet the standard of independence required for licensing under former law.² In accordance with the Order on Remand, Stute has filed an affidavit updating its original application together with a memorandum of law addressing the impact of the Budget Act amendments on its eligibility for a freight forwarder license. The Commission's Bureau of Hearings and Field Operations (Hearing Counsel) has filed a Reply urging that Stute's renewed license application be granted.

BACKGROUND

This proceeding was instituted on June 4, 1979, to determine whether Stute met the independence requirement under the Shipping Act, 1916 and whether Stute was otherwise qualified to carry on the business of forwarding. In an Initial Decision served October 14, 1980, Chief Administrative Law Judge John E. Cogrove concluded that Stute failed to meet the statutory standard of independence because of a connection, through Stute's parent company, with a consignee of goods from the United States.³ Although this holding with regard to independence was

¹ The Omnibus Budget Reconciliation Act of 1981, Pub. L. No. 97-35, 95 Stat. 752 (August 13, 1981) (Budget Act) amended section 1 of the Shipping Act, 1916 (46 U.S.C. § 801) to provide that:

The term "independent ocean freight forwarder" means a person that is carrying on the business of forwarding for a consideration who is not a shipper, consignee, seller, or purchaser of shipments to foreign countries.

² *Stute International, Inc. - Independent Ocean Freight Forwarder Application*, 23 F.M.C. 654 (1981). The definition of an IOFF in effect at the time of the Commission's decision provided that:

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.

³ *Stute International, Inc. - Independent Ocean Freight Forwarder Application*, 23 F.M.C. 656 (I.D. 1980). The Initial Decision and the Appendix thereto set forth the stipulated facts regarding these con-

Continued

dispositive, the Presiding Officer also addressed the question of Stute's fitness and concluded that if Stute's intercorporate connection to a consignee were not so close as to bar licensing, then the activities of that consignee would have no bearing on its fitness.

In its Order Adopting Initial Decision served February 5, 1981, the Commission agreed that a person subject to a shipper's legal right to control, whether exercised or not, lacked the independence required for licensing under the law in effect at that time.⁴ The Commission accordingly denied Stute's application. Stute thereupon filed a petition for review of the Commission's Order with the United States Court of Appeals for the Second Circuit.

Subsequent to the Commission's denial of Stute's application and to the filing of the appeal, the statutory definition of an IOFF was amended to eliminate the prohibition against a shipper or consignee connection. The Commission, therefore, sought a voluntary remand of Stute's appeal which was granted by the Court on October 20, 1981. This proceeding was then reopened to reconsider the denial of Stute's application.

POSITIONS OF THE PARTIES ON REMAND

A. Stute

The affidavit of Hans J. Hottenrott, Vice President and Director of Stute, filed pursuant to the Commission's Order on Remand, indicates certain changes in Kloeckner's holdings, including acquisitions, mergers and sales or dissolutions of subsidiary companies, and changes of personnel.⁵ However, Stute's method of doing business, and its relationship to its parent, Verkehers, to Kloeckner, and to Chemie remain unchanged.

Stute's position is that the Budget Act amendments remove the impediment to licensing under former law. Stute points out that the change in the statutory definition of an IOFF deletes that language which required that an IOFF not have any beneficial interest in shipments nor directly or indirectly control or be controlled by a shipper or consignee or by any person having a beneficial interest in a shipment.

porate relationships. Briefly, Stute, a Delaware corporation engaged in the import-export business in the United States, is a wholly-owned subsidiary of Stute Verkehers GmbH (Verkehers), a German freight forwarder with worldwide operations. Verkehers, in turn, is wholly-owned by Kloeckner & Co. (Kloeckner), a multinational holding and trading company based in Germany. Among more than 100 companies in which it has a significant interest, Kloeckner owns a 98% interest in Chemie-Mineralien K.G. (Chemie), a consignee of shipments from the United States. Stute's affidavit filed on reopening states: "The facts set forth in Judge *Cogrove's* decision and in the stipulation relating to the relationship among Stute, Kloeckner & Co., Chemie-Mineralien and Stute Verkehers, and the manner in which those various entities conduct business remain unchanged."

⁴ *Stute International, Inc. - Independent Ocean Freight Forwarder Application*, 23 F.M.C. at 654.

⁵ As a result of these changes, Stute advises that, through the holdings of Kloeckner, it is now *both* shipper and consignee connected as interpreted under the statute prior to amendment.

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APPLICATION

Stute argues that the effect of the statutory changes is to allow the granting of a freight forwarder license to a person who is shipper or consignee connected or who indirectly controls or is controlled by a shipper or consignee or who has a beneficial interest in shipments to foreign countries. The amended statute is said now only to prohibit the issuance of a license to a person who is a shipper, consignee, seller, or purchaser of shipments to foreign countries. Neither Stute nor its parent allegedly acts as a shipper or consignee; both are engaged solely in the freight traffic business. Stute further argues that Congress intended for the Commission to license persons such as Stute, who are shipper or consignee connected, in order to gain experience so as to assess the enforceability of the new freight forwarder provisions.⁶

Finally, Stute argues that the issue of fitness has been mooted by the Budget Act amendments. Congress has determined that shipper or consignee connections do not constitute a barrier to licensing. Therefore, according to Stute, Chemie's involvement in shipments in the foreign commerce of the United States on which it received rebates should have no bearing on its fitness as a freight forwarder.

B. Hearing Counsel

Hearing Counsel concurs with Stute's conclusion that the recent amendment of section 1 of the Shipping Act removes the obstacle which previously prevented Stute from qualifying as an IOFF. It states that Stute is not otherwise a shipper or consignee or seller or purchaser of shipments to foreign countries and is in all respects fit, willing and able properly to carry on the business of forwarding. Hearing Counsel accordingly urges that Stute's application be granted.

DISCUSSION

The issue before the Commission is whether the 1981 freight forwarder amendments remove the legal barrier under former law to licensing Stute as an independent ocean freight forwarder. In a recent decision addressing the impact of the Budget Act amendments, the Commission held that shipper connections no longer bar licensing as an IOFF. *Universal Transcontinental Corporation and J. S. Stass Co., Division of Universal Transcontinental Corporation - Independent Ocean Freight Forwarder License No. 394-R*, 24 F.M.C. 911 (1982). In *Universal Transcontinental* a licensed freight forwarder was a subsidiary of a holding company which also owned an export shipper. The Commission ruled that under the new definition of independence such an intercorporate connection does not in itself present a barrier to licensing. The same result must obtain here.

⁶ Conference Report, Omnibus Budget Reconciliation Act of 1981 (Book 2), H.R. Rep. No. 97-208, 97th Cong., 1st Sess. 911 (1981).

The fact that Stute is both shipper and consignee connected through a holding company does not preclude licensing as a freight forwarder under the new statutory scheme. The new statute only prohibits issuance of a license to a shipper, consignee, seller or purchaser of shipments to foreign countries. The record in this proceeding reveals that neither Stute nor its parent, Verkehers, is any of these.

Given the fact that Stute's relationship to Chemie no longer bars licensing, the only issue that remains to be resolved is whether Stute is otherwise "fit" to be licensed. This issue was raised as a result of the fact that Chemie had accepted rebates during the period 1973-74. Although the Presiding Officer's finding that Stute was shipper-connected obviated the need to address the fitness issue, he nevertheless determined that if the Commission were to disagree with him on this point and find that Stute met the independence standard, then Chemie's conduct could not be imputed to Stute for the purpose of rendering Stute unfit for licensing. This determination was not excepted to by Hearing Counsel, and it was, in effect, concurred in by the Commission as part of the adoption of the Initial Decision. It remains dispositive of the question of Stute's fitness. Accordingly, Stute is found to be otherwise qualified to carry on the business of forwarding and its application is approved, subject to its complying with all relevant procedural regulations.

THEREFORE, IT IS ORDERED, That the application of Stute International, Inc. for a license as an independent ocean freight forwarder is approved; and

IT IS FURTHER ORDERED, That this proceeding is discontinued.

By the Commission.

(S) FRANCIS C. HURNEY
Secretary

FEDERAL MARITIME COMMISSION

46 C.F.R. PART 536

GENERAL ORDER 13, AMENDMENT NO. 11; DOCKET NO.
81-50

PER CONTAINER RATES - TARIFF FILING
REGULATIONS APPLICABLE TO CARRIERS AND
CONFERENCES

IN THE FOREIGN COMMERCE OF THE UNITED STATES

June 9, 1982

ACTION: Final Rule

SUMMARY: This prescribes the form and manner governing the establishment of per-container/trailer rates to ensure the proper application of such rates.

DATE: The Final Rules were published in the Federal Register of June 14, 1982 (47 FR 25532) to become effective on August 13, 1982, but on July 29, 1982 (47 FR 32714) and again on October 14, 1982 (47 FR 45883) the Commission postponed the effective date, and finally discontinued the proceeding on April 27, 1984 (49 FR 18138).

SUPPLEMENTARY INFORMATION:

On August 28, 1981 the Commission published a Notice of Proposed Rulemaking in the *Federal Register* (46 F.R. 43474) which proposed two alternative rules to govern the establishment of per-container/trailer rates. The first would require the publication of the size and capacity specifications of containers and trailers upon which per-container/trailer rates are based and would require that the rate vary directly with the capacity. The second alternative would not require a specific relationship between the capacity of the container/trailer and the rate charged (although carriers would certainly be free to establish such a relationship), but rather it would permit the carrier to establish categories of containers and to charge the same rate for any container or trailer falling within the category, e.g., 20-foot dry van, 40-foot reefer, etc.

Comments to the Notice of Proposed Rulemaking were submitted by or on behalf of eight shippers,¹ three carriers,² four other organizations and associations³ and forty-five conferences.⁴ These comments are addressed below.

I. *Definitions*

Several commentators argued that the definitions governing the terms used in the per-container/trailer rate rule should appear in the rule itself rather than in that section of Part 536 establishing tariff filing definitions generally. The Commission agrees. While there are advantages in having all the definitions in one place, because the terms defined here pertain only to per-container/trailer rates, the definitions will be relocated to section 536.12.

Several comments were received regarding the definition of "capacity." However, because the term is not otherwise used in the final rule adopted, there is no need for this definition and it will be deleted.

One commentator suggested that the definition of containers be expanded to include "any receptacle used for the storage of shipments during transportation." The Commission agrees that a more expansive definition is necessary but is of the opinion that the word "receptacle" is too vague. Accordingly, the definition will be modified to include

¹ Union Carbide Company, RCA Corporation, E. I. du Pont de Nemours & Co., Emerson Electric Co., General Electric Company, Military Sealift Command, Airco Carbon, Rohm and Haas.

² Compagnie Maritime d'Affretement, United States Lines, Inc., Sea-Land Service, Inc.

³ Houston Port Bureau, Inc., Tobacco Association of United States, California Association of Port Authorities, Motor Vehicle Manufacturers Association.

⁴ Lillick, McHose & Charles for Pacific-Straits Conference, Pacific Indonesian Conference, Malaysia-Pacific Rate Agreement - Lillick, McHose & Charles for Trans-Pacific American Flag Berth Operators - Lillick, McHose & Charles for Pacific Westbound Conference - Far East Conference, Graham & James for North Europe-U.S. Pacific Freight Conference, Pacific Australia-New Zealand Conference, Pacific Coast European Conference, Freehill, Hogan & Mahar for Atlantic & Gulf/Panama Canal Zone, Colon and Panama City Conference, Atlantic & Gulf/West Coast of South America Conference, East Coast Colombia Conference, Southeastern Caribbean Conference, United States Atlantic & Gulf-Jamaica Conference, United States Atlantic & Gulf-Santo Domingo Conference, United States Atlantic & Gulf Venezuela Conference, West Coast South America Northbound Conference, United States Atlantic & Gulf-Haiti Conference, United States Atlantic & Gulf Ecuador Freight Conference, Warren & Associates for Trans-Pacific Freight Conference of Japan/Korea, Japan/Korea-Atlantic and Gulf Freight Conference, Warren & Associates for Philippines North America Conference, Billig, Sher & Jones, P.C. for Australia-Eastern U.S.A. Shipping Conference, Greece/U.S. Atlantic Rate Agreement, Iberian/U.S. North Atlantic Westbound Freight Conference, Marseilles North Atlantic U.S.A. Freight Conference, Med-Gulf Conference, Mediterranean-North Pacific Coast Freight Conference, North Atlantic Mediterranean Freight Conference, U.S. Atlantic & Gulf/Australian-New Zealand Conference, U.S. North Atlantic Spain Rate Agreement, U.S. South Atlantic/Spanish, Portuguese, Moroccan and Mediterranean Rate Agreement, The West Coast of Italy, Sicilian and Adriatic Ports/North Atlantic Range Conference (WINAC), Burlington Underwood & Lord for Inter-American Freight Conference, Howard A. Levy for the North European Conferences consisting of North Atlantic United Kingdom Freight Conference, North Atlantic French Atlantic Freight Conference, North Atlantic Continental Freight Conference, North Atlantic Baltic Freight Conference, Scandinavia Baltic/U.S. North Atlantic Westbound Freight Conference, Continental North Atlantic Westbound Freight Conference, North Atlantic Westbound Freight Association, United Kingdom & U.S.A. Gulf Westbound Rate Agreement, Continental-U.S. Gulf Freight Association, Gulf-United Kingdom Conference, Gulf-European Freight Association.

examples of those sorts of containers that are encompassed in the definition.

Many conferences contended that the definition of "mixed shipments" should be limited to CY/CY shipments. While such a limitation has merit, the Commission has concluded that any limitation should be made on a commercial basis by the conference or carrier rather than imposed by rulemaking.

The definition of "shipment" in the proposed rule concluded with the phrase "for delivery to one *or more* destination location." Several commentators opposed the rule's application to more than one delivery port or point. They pointed out that the words "or more" in the definition of "shipment" might be read as allowing "per-container/trailer" rates to be quoted for *less* than containerload ("LCL") shipments. There is merit to this contention. If "per-container/trailer" rates are to be applied to a *portion* of a container/trailer load at each destination port, confusion could arise as to how much of the container/trailer is occupied by the cargo. This would be in essence a return to a weight/measurement system and is inconsistent with the concept of per-container/trailer rates. Allowing per-container/trailer rates to be quoted to multiple destinations would defeat a principal advantage of per-container/trailer rates to shippers and carriers, which is the ability to calculate transportation rates on the basis of a uniform and interchangeable cargo unit, the container/trailer. Therefore, the words "or more" have been deleted from the final rule. Moreover, because the "shipment" provision imposes a limitation on the publication of per-container/trailer rates and is not merely a definition in any event, it has been included as a filing requirement in section 536.12(b)(1).

At the suggestion of one commentator, the word "freight" has been changed to "cargo" in the definition of "trailer" to make it conform to other sections of the Commission's tariff filing rules embodied in Part 536.

II. *Tariff Filing Requirements*

Most commentators preferred what has been termed the second alternative, *i.e.* permit the establishment of categories of containers/trailers. Although the first alternative is more precise, the Commission is of the opinion that the objective of the rulemaking can be accomplished by adopting the second alternative. Accordingly, it has incorporated it into the final rule.

The second alternative requires the carrier to limit the application of the per-container/trailer rate to a given category of equipment. The types of containers falling within the category must be clearly described. For example, a per-container/trailer rate which, by its terms, is limited to standard 40-foot dry vans may not be applied to a 40-foot high cube container. However, a carrier may provide a formula for the use of an alternate container/trailer where equipment in the specified

category is unavailable. Absent such a formula, weight and measure commodity rates must be applied to shipments moving in containers/trailers which do not fall within the category of equipment specified by the per-container/trailer rate item.

Likewise when there is no specific provision for a given mixture of cargo, the weight or measurement rate for each commodity shall apply. Several commentators suggested, as an alternative, that tariffs with mixed shipment rates be required to contain a residual rating formula for mixtures not specifically itemized in the tariff. However, it is unclear how rates established by a residual formula could be applied so as to ensure that they would not alternate or conflict with individual commodity rates found in the tariff. Absent a clear application of rates, the potential for abuse is significant. Accordingly, the suggestion has not been adopted. This decision does not prevent the carrier from meeting the needs of the shippers it serves. The Commission is not prescribing the terms of any mixing provision. If a shipper cannot or does not meet the requirements for a published rate, it can request the carrier to publish a rate with a mixture requirement which it can meet.

It has been suggested that the requirement that the mixed shipment rates specify "limitations as to ports or points of destination" be deleted because the port range served is published in a general section of a tariff and, as a result, would be applicable to mixed shipments as well as to other shipments. Section 536.12(b)(1) limits the application of per-container/trailer rates to shipments moving between a single origin point or port and a single destination point or port within the range served. Per-container/trailer rate items need not identify these ports or points by name.

Several other non-substantive changes have been made to clarify the intent of section 536.12(b)(1) establishing the per-container/trailer rate filing requirements. The number of examples in the rule has been expanded to more clearly indicate what information should be included when categorizing a container or trailer.

Some commentators are concerned that by this rule the Commission is encouraging the establishment of per-container/trailer rates while others fear that the rule will hamper the development of this type of rates. It is the Commission's intention neither to promote nor discourage this form of ratemaking. The Commission's only interest is providing a meaningful form and manner by which per-container/trailer rates may be lawfully established. The decision whether to establish such rates remains with the carriers and conferences. Nor does the Commission intend by this rule to limit the categories of containers/trailers for which the rule format would apply. Carriers are not only free to develop innovative and simplified rate and tariff structures, but are encouraged to do so.

A number of commentators argue that the rule should not require a mixed shipment per-container/trailer rate item to specify the commodities to which the rate applies. The commentators were particularly concerned over the effect of the rule on shipments by non-vessel operating common carriers and containerloads of odd lots of cargo tendered as a consolidated container shipment. The requirement to identify the commodities which are subject to a per-container/trailer rate is designed to prevent mixed shipment per-container/trailer rates from duplicating or conflicting with any FAK (Freight All Kinds) and Cargo N.O.S. (Not Otherwise Specified) rates which may be published in the same tariff. FAK and Cargo N.O.S. rates present unique problems and potential duplications and conflicts. Cargo N.O.S. is an all-encompassing description which is utilized to provide a rate for a given commodity when no specific rate for that commodity appears in the tariff. An FAK rate is as the name implies, a description utilized to rate "All Kinds" of freight. Without some qualification it would duplicate or conflict with a Cargo N.O.S. rate. To permit both FAK and Cargo N.O.S. rates in the same tariff, carriers usually qualify the FAK description in order to distinguish it from the Cargo N.O.S. rate. Likewise, mixed shipment per-container/trailer rates must be distinguished from FAK and Cargo N.O.S. rates. However, the requirement to distinguish mixed shipment per-container/trailer rates from FAK rates should not be construed to require any particular limitation or qualification on FAK or Cargo N.O.S. rates. Nor is it intended to limit the flexibility of carriers in designing tariff provisions to serve the needs of the U.S. foreign commerce.

Carriers and conferences will be provided 60 days after its publication in the *Federal Register* to bring their tariffs into conformity with this rule.

The Commission finds that this rule is exempt from the requirements of the Regulatory Flexibility Act (5 U.S.C. 601). Section 601(2) of that Act excepts from its coverage any "rule of particular applicability relating to such rates. . . ." As this rule clearly relates to rates and practices, the Regulatory Flexibility Act requirements are determined to be inapplicable.

Information collection requirements contained in this regulation (section 536.12(b)(1), (2) and (3)) have been approved by the Office of Management and Budget under the provisions of the Paperwork Reduction Act of 1980 (P.L. 96-511) and have been assigned OMB control number 3072.0036.

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

Therefore, pursuant to 5 U.S.C. 533 and sections 18(b), 22, and 43 of the Shipping Act, 1916 (46 U.S.C. 817(b), 821 and 941(a)), 46 C.F.R.

Part 536 is amended by adding a new section, 536.12 reading as follows:

§ 536.12 Tariffs publishing per-container and/or per-trailer rates

(a) *Definitions.* The following definitions shall apply for purposes of this section.

- (1) *Container.* A van, flatrack, open top trailer, or other similar trailer body on or into which cargo is loaded and transported without chassis aboard ocean vessels.
- (2) *Mixed Shipment.* A shipment consisting of more than one commodity; articles described under more than one class or commodity rate item in a tariff.
- (3) *Per-Container Rate.* Rates and/or charges on shipments transported in containers or trailers and rated on the basis of the category of the container or trailer.
- (4) *Trailer.* A van, flatrack, open top trailer, or other similar trailer body on or into which cargo is loaded and transported complete with chassis aboard ocean vessels.

(b) *Tariff Filing Requirements.*

- (1) Tariffs which publish rates and/or charges on shipments transported in containers or trailers and rated on the basis of the container or trailer shall state a rate for each category of carrier designated container or trailer to which such rate applies, e.g., 20-foot dry van container, 40-foot refrigerated trailer, 40-foot hi-cube van container, 40-foot dry van container 9'6" high, 20-foot dry van container 9 feet high, etc. Per-container/trailer rates shall only apply to cargo received from one shipper at one origin location, consigned to one consignee, carried on one voyage, on one bill of lading for delivery to one destination location.
- (2) Tariffs which publish rates for mixed shipments shall contain a governing rule or provide reference to a separate publication which shall clearly define the application of such rates. The tariff shall also provide that whenever there is a mixing of cargoes in a container/trailer for which there is no specific rate item permitting and indicating a rate for that mixture, the weight or measurement rate for each commodity shall apply.
- (3) A mixed shipment rate item shall list therein all articles or merchandise which may be shipped under the item. Any restrictions on the application of the rate item shall be explained. Each commodity contained in mixed shipment rate item shall be listed in the tariff's commodity index or cross-referenced in the body of the tariff. A mixed shipment rate item shall specify any conditions which apply, e.g.:

(i) Type of service offered, whether CY/CY or CY/CFS, etc.;

(ii) Limitation in the number of commodities allowed or required per bill of lading and the percentage of the total shipment that one commodity may not exceed;

Approved by the Office of Management under OMB control number 3072-0036.

By the Commission.

(S) FRANCIS C. HURNEY
Secretary

FEDERAL MARITIME COMMISSION

DOCKET NO. 82-4

BELCO PETROLEUM CORPORATION

v.

LYKES BROS. STEAMSHIP CO., INC.

PARTIAL ADOPTION OF INITIAL DECISION

June 14, 1982

This proceeding is before the Commission upon its determination to review the Initial Decision of Administrative Law Judge William Beasley Harris awarding reparation without interest to Belco Petroleum Corporation for violation by Lykes Bros. Steamship Co., Inc. of section 18(b)(3) of the Shipping Act, 1916 (46 U.S.C. § 817).

In cases involving the misrating of cargo and arising under section 18(b)(3), the Commission has determined to grant interest on awards of reparations, to accrue from the date of payment of freight charges to the date reparations are paid. See 46 C.F.R. § 502.253. Thus, the Commission shall grant interest on the Presiding Officer's award of reparations in this proceeding.

THEREFORE, IT IS ORDERED, That the Initial Decision is adopted except as indicated; and

IT IS FURTHER ORDERED, That Lykes Bros. Steamship Co., Inc. pay reparations in the amount of \$15,984.08 to Belco Petroleum Corporation, with simple interest at 12.69 percent from the date of payment of the freight to the date on which reparations are paid; and

IT IS FURTHER ORDERED, That this proceeding is discontinued.

By the Commission.

(S) FRANCIS C. HURNEY
Secretary

FEDERAL MARITIME COMMISSION

DOCKET NO. 82-4

BELCO PETROLEUM CORPORATION

v.

LYKES BROS. STEAMSHIP CO., INC.

Reparation awarded without interest in this instance.

Shipment of proprietary material and equipment to Talara, Peru, by industrial contract shipper under a tariff with more than one tariff item applicable to the commodity shipped is entitled to the freight charge under that tariff item producing the least cost to the shipper.

Robert S. Groydah, Accounting Manager, Belco Petroleum Corporation, for Complainant.

David W. Gunther, Manager, Traffic Advisory Services, Lykes Bros. Steamship Co., Inc., for Respondent.

INITIAL DECISION ¹ OF WILLIAM BEASLEY HARRIS, ADMINISTRATIVE LAW JUDGE

Partially Adopted June 14, 1982

This is a proceeding under shortened procedure without oral hearing pursuant to Rule 181 (46 C.F.R. 502.181) of the Commission's Rules of Practice and Procedure.

The complaint covers a shipment of proprietary material and equipment made from the Port of Houston, Texas, aboard Lykes' vessel *Gulf Merchant* to the complainant's oil well facilities at Talara, Peru, under Bill of Lading No. 3 dated January 15, 1980. Based on the bill of lading descriptions, the rates and charges billed were \$58,908.41. The complainant asserts the bill should have been \$42,924.33, a difference of \$15,984.08, which complainant says is an overcharge in violation of section 18(b)(3) of the Shipping Act, 1916, entitling recovery by complainant with interest.

BACKGROUND

The complaint in this proceeding was served January 12, 1982. Notice of the filing of the complaint and assignment of the Presiding

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

Administrative Law Judge was published in the *Federal Register*, Vol. 47, No. 13, Wednesday, January 20, 1982, pp. 2925-2926.

The Director of the Commission's Office of Energy and Environmental Impact advised in a memo dated January 22, 1982, that the OEEI has examined this Docket No. 82-4 and has determined that section 547.4(a)(22) of the Commission's "Procedures for Environmental Analysis" applies; that no environmental analysis needs to be undertaken nor environmental documents prepared in connection with this docket.

In a motion served February 1, 1982 (received February 2, 1982), the respondent requested an extension of time for twenty (20) days following February 1, 1982, within which to file answer to the complaint herein, including the ability to file such answer without agreement to the conduct of this proceeding pursuant to the shortened procedure provided in Rules 181 to 187 of the Commission's Rules of Practice and Procedure.

On February 15, 1982, respondent served (received February 17, 1982) Interrogatories and Request for Production of Documents to the complainant.

Respondent's answer to the complaint in this proceeding was received February 17, 1982, in which it was stated, among other things, that the respondent does not consent to the shortened procedure provided in Rules 181 to 187 of the Commission's Rules of Practice and Procedure.

The Presiding Administrative Law Judge by notice served February 23, 1982, set a prehearing conference to commence Tuesday, March 16, 1982.

On March 15, 1982, Mr. Gunther of the respondent telephoned the Presiding Judge relative to amending respondent's answer. The Presiding Judge requested Mr. Gunther to submit his request in writing. In a letter dated March 15, 1982 (received March 17, 1982), the respondent stated, among other things, it requested permission to amend its answer by striking Articles I and IX thereof and inserting in their place new Articles I and IX, concurring and agreeing to the conduct of this proceeding pursuant to the shortened procedure provided in Rules 181 to 187 of the Commission's Rules of Practice and Procedure. The other articles of the answer remain unchanged. The answer, as so amended, now constitutes respondent's answering memorandum. The respondent also withdrew the propounded interrogatories and request for production of documents. The respondent objects to any award of interest should reparation be granted.

Upon review of the record and materials submitted herein, the Presiding Judge finds the following:

FACTS

The complainant is a corporation whose principal business is the exploration for and production of crude petroleum and natural gas. Operations are conducted in the United States and abroad. Complainant's principal place of business is New York, New York, the address of which is One Dag Hammarskjold Plaza, New York, New York 10017.

Complainant has extensive petroleum production facilities at Talara, Peru, which are maintained by Belco Petroleum Corporation of Peru, a wholly owned subsidiary of Belco Petroleum Corporation.

The respondent is a common carrier engaged in transportation by water between ports in the United States and ports in Peru and as such is subject to the provisions of the Shipping Act, 1916, as amended.

The principal United States business office for Lykes Bros. Steamship Co., Inc., is 300 Poydras Street, Lykes Center, New Orleans, Louisiana 70130.

Respondent is a member of the Atlantic & Gulf/West Coast of South America Conference. Said Conference publishes the Atlantic & Gulf/West Coast of South America Conference S.B. SA-13 Freight Tariff F.M.C. No. 2. Respondent participates in the tariff.

Complainant is an industrial contract shipper with the Conference under Contract No. 10361 in effect since September 9, 1965. Complainant has shipped to Talara, Peru, under Tariff Item 1050, which provides an Industrial Contract Rate Schedule covering cargo said to be of a proprietary nature. Complainant's bill of lading No. 3 herein was claused as follows:

The above described cargo is proprietary, not for resale, and in all other respects forwarded in conformity with the provisions of Conference Tariff Item 1050.

The complainant alleged and the respondent admitted that under the designation "Special and Project Rates," Tariff Page 360, as revised, a "project rate" is provided for in Item 1036A as follows:

Talara Oilwell and Production Project

Shipments of proprietary material and equipment to Talara or Paita will be assessed base rate of \$132.00 W/M plus all additional charges. Heavy lift charges as per tariff scale will be applicable on the weight basis (2,000 lbs.) Extra length charges will be applicable as per tariff scale W/M as cargo is freighted. Bills of lading shall be claused as set forth in Rule 50.

That Rule 50 above mentioned, reads in part as follows:

In order to identify the cargo which is covered by this tariff rule, it is understood and agreed shipper will arrange to have the following notation placed on each Bill of Lading:

The Shipper shown in this Bill of Lading certifies that the cargo described hereon is forwarded pursuant to the terms and conditions of tariff Item No. _____ and that he is aware that the Shipping Act of 1916 declared it to be a violation of law, punishable by a penalty, for a shipper to utilize an unfair device or means to obtain transportation at less than the applicable rates.

Further, it is understood and agreed that the shipper shall submit a freighted copy of all such Bills of Lading or Bill of Lading and due bill to the Conference Chairman on a timely and confidential basis.

The bill of lading descriptions are as follows:

No. of Pkgs.	Description	Gross Weight	Measurement
27 Boxes	Parts for oil and gas field well drilling machines	156,953#	6,510 cf
23 Bdles	Parts for oil and gas field well drilling machines	262,452#	4,021 cf
1 Box	Asphalt cutback (Flam. Liq. 900° F. Pkg. 37)	140#	6 cf
1 Box	Batteries, Potassium Hydroxide, Dry Solid (corrosive label Pkg. No. 44)	3,870#	123 cf
52 Pkgs		423,415#	10,660 cf

The 23 bundles described above as "Parts for oil and gas field well drilling machines" actually, as explained by respondent, were continuous weld integral joint steel tubing. Integral joint signifies that the joint is designed as a part of the pipe or tubing rather than as a separate piece. "Asphalt cutback" is in essence a "freight of all kinds rate," which requires no classification.

Based on the prior bill of lading descriptions above, rates and charges were billed as follows:

	W/M	Rate	Amount
Ocean Freight	18,694 lbs.	\$161.00/2000	\$ 1,504.87
Ocean Freight	6,191 cft	161.00/40	24,918.78
Ocean Freight	262,425 lbs.	161.00/20	21,127.39
Ocean Freight	6 cft	110.00/40	15.67
		Less 5%	
Heavy Lift	10,895 lbs.	6.20/2000	33.77
Heavy Lift	255,640 lbs.	6.20/2000	792.48
Ocean Freight	123 cft	161.00/40	495.08
B/S	6,320 cft	9.00/40	1,422.00
B/S	281,146 lbs.	9.00/2000	1,265.00
PCS		15%	7,333.21
Total Freight			\$58,908.41

The Schedule B commodity number shown on the Vinson Supply Company Customer's Order No. and Requisition No. E-11-7856-79-A dated 12/19/79 is in error. The appropriate number should be 610.3035. The corresponding description is iron or steel welded oil well tubing.

DISCUSSION

Complainant contends the applicable tariff is conflicting and ambiguous and that both Items 1036A and 1050 apply to this shipment. Item 1050 applies to steel joints for steel tubing rated as steel pipe straight, not over 8" I.D., not bell and spigot or flanged. The balance of cargo should be rated in accordance with Item 1036A. In view of this, rates and charges should have been billed as follows:

	W/M	Rate	Amount
Ocean Freight	262,452 lbs.	92.00/2000	\$12,072.79
Ocean Freight	18,694 lbs.	132.00/2000	1,233.80
Ocean Freight	6,320 cft	132.00/40	20,856.00
Heavy Lift	10,895 lbs.	6.20/2000	33.77
Heavy Lift	255,640 lbs.	6.20/2000	792.48
Subtotal			\$34,988.84
Port Congestion		15%	5,248.33
S/C			
B/S	281,146 lbs.	9.00/2000	1,265.16
B/S	6,320 cft	9.00/40	1,422.00
Total Freight			\$42,924.33

The charges billed (\$58,908.41) versus charges suggested (\$42,924.33) represents a difference of \$15,984.08 (overcharge).

By reason of the facts and arguments stated in the foregoing paragraphs, complainant asserts it has been subjected to the payment of unjust and unreasonable charges in violation of section 18(b)(3) of the Shipping Act, 1916, as amended, to its damage in the sum of \$15,984.08, with interest.

The respondent contends that the bill of lading was properly rated as submitted based on the bill of lading descriptions and clausings furnished by the freight forwarder as agent of the complainant. Respondent also contends the tariff rates are presented in the tariff in a clear and easily understood fashion. Respondent argues that misdescribing the commodities involved and clausings the bill of lading incorrectly for purposes of rate application arise from initial errors by complainant and/or complainant's agent freight forwarder, thus the respondent objects to and deems inappropriate and invalid any claim for interest.

Complainant contends that despite failure to clause the shipment as provided for in Tariff Rule 50, it also qualifies for rates in Item 1036A by virtue of the fact that it has operating oil wells at Talara, Peru. The

complainant asserts that this issue was previously decided in favor of complainant in Docket No. 80-46. *Belco Petroleum Corp. v. Lykes Bros. Steamship Co., Inc., and Peruvian State Line*, 23 F.M.C. 1003 (1981), Order Adopting Initial Decision, 23 F.M.C. 1001 (1981).

In the Docket No. 80-46 *Belco* case, the Presiding Administrative Law Judge observes that there the complainant alleged it traditionally made its shipments of oil well supplies and equipment under Item 1050, which provided an Industrial Contract Rate Schedule covering cargo of a proprietary nature. The clause was amended in 1978 by adding a "project rate" for cargo of a proprietary nature under Item 1036A. Nevertheless, complainant continued to annotate its bills of lading according to the terms of Item 1050 instead of Item 1036A. The Commission's Chief Administrative Law Judge, John E. Cogrove, in his opinion in Docket No. 80-46, stated, the sole issue presented was whether the absence from the bill of ladings of that specific clause required by Item 1036A precluded the complainant from obtaining the lower rates provided for in that term. The respondents did not dispute the fact that the shipments in question were proprietary and the bills of lading show that the shipments were to Talara. He held, since the essential facts are clear and undisputed, *i.e.*, the cargo was proprietary and was destined for Talara, the complainant had been overcharged in violation of section 18(b)(3). Reparation was awarded. In its Order Adopting the Initial Decision, 23 F.M.C. 1001 (June 30, 1981), the Commission determined that the Presiding Officer's ultimate findings and conclusions are correct. The Initial Decision was adopted with the modification addressed to the Presiding Officer not having included interest in the reparation awarded. Interest on the amount of reparation awarded should have been included as an element of damages. The Commission modified the award to include interest at the rate of 12% per annum.

The Presiding Administrative Law Judge takes official notice that since the Docket No. 80-46 *Belco* case, *supra*, there have been, besides the Docket No. 82-4, other Dockets, *i.e.*, Nos. 81-56, 81-67 and 82-5 in which this Judge presided. Docket Nos. 81-56 and 81-67 were settled and dismissed January 19, 1982 (administratively final February 25, 1982). Docket No. 82-5 was settled and dismissed April 12, 1982, subject to approval by the Commission as provided in the Commission's Rules of Practice and Procedure. Each Docket, No. 81-56, 81-67 and 82-5 involved providing for shipment to Talara, Peru, under Conference tariff Item 1050 and 1036A of proprietary material as does this Docket No. 82-4.

The respondent has raised the question of whether there is sufficient evidence of record in this proceeding for a decision. In this case, as in the Docket No. 80-46 *Belco* case, *supra*, the respondent did not dispute the fact that the shipment in question was proprietary, and the bill of lading shows that the shipment was to Talara. The Presiding Adminis-

trative Law Judge *finds* there is sufficient evidence of record for decision and *concludes* since the essential facts are clear and undisputed, i.e., the cargo was proprietary and was destined for Talara, the complainant has been overcharged in violation of section 18(b)(3). The complainant is entitled to reparation from the respondent in the amount of \$15,984.08, and as hereinafter explained, without interest.

The respondent in its March 15, 1982, amended answer, constituting its answering memorandum, asserted among other things that it was content to rely on the presiding officer's authority under Rule 184 to insure that there will be sufficient evidence of record for a decision. Rule 184 provides that "within fifteen (15) days after the date of service of the answering memorandum prescribed in § 502.183 . . . each complainant may file a memorandum in reply. . . . This will close the record for decision unless the presiding officer determines that the record is insufficient and orders the submission of additional evidentiary materials." The Presiding Administrative Law Judge, as indicated above, accepted the closed record for decision.

Reparation and interest on reparation are matters within the discretion of the Commission. In this instance, upon consideration of the record herein, and the official notice taken of the settlement of the other dockets named herein dealing with the same subject, the Presiding Administrative Law Judge deems that demands of fairness, reasonableness, as well as the serving of justice, in his discretion, warrant denying, in this instance, interest on reparation. He *finds* and *concludes* interest on reparation should be denied.

Wherefore, for the reasons given, it is *ordered*, subject to review by the Commission as provided in the Commission's Rules of Practice and Procedure:

(A) The respondent, Lykes Bros. Steamship Co., Inc., shall pay reparation in the amount of \$15,984.08, without interest, to the complainant, Belco Petroleum Corporation.

(B) The parties, upon complying with this decision, shall notify the Commission in writing with the details thereof.

(C) This proceeding is discontinued.

(S) WILLIAM BEASLEY HARRIS
Administrative Law Judge

FEDERAL MARITIME COMMISSION

DOCKET NO. 72-35

PACIFIC WESTBOUND CONFERENCE - INVESTIGATION
OF RATES, RULES AND PRACTICES PERTAINING TO THE
MOVEMENT OF WASTEPAPER AND WOODPULP FROM
UNITED STATES

WEST COAST PORTS TO PORTS IN JAPAN, THE
PHILIPPINES,
TAIWAN, KOREA, SOUTH VIETNAM AND THAILAND

ORDER

June 15, 1982

On January 11, 1982, the Commission served a notice in the above-captioned proceeding soliciting the parties' views as to whether any further administrative proceedings were necessary in the wake of the decision by the United States Court of Appeals in *National Association of Recycling Industries, Inc. v. FMC*, 658 F.2d 816 (D.C. Cir. 1980). Responses to the Commission's notice were filed by the National Association of Recycling Industries, Inc. (NARI) and the Pacific Westbound Conference (PWC).

NARI stated that a controversy still existed between itself and PWC concerning PWC's wastepaper rates. However, NARI further stated that it intended to file an antitrust suit against PWC in U.S. District Court, and that the controversy between itself and PWC would be resolved through that suit. NARI thus concluded that this Commission proceeding should be terminated.

PWC urged in its response that this proceeding should remain open, also pointing out that there is a present controversy between itself and NARI concerning its wastepaper rates.

Since the parties' responses were filed, NARI has brought an anti-trust action against PWC and its member lines in U.S. District Court in Los Angeles. *National Association of Recycling Industries, Inc. v. American Mail Line, Ltd., et al.*, C.D. Ca. Civ. No. 82-0895-LTL. The case is based on allegations that PWC's ratemaking practices were and continue to be unlawful under the Shipping Act, 1916 (46 U.S.C. 801 *et seq.*) In their answer to NARI's complaint, the PWC lines have moved for dismissal of the case on the ground that the complaint fails to state a claim upon which relief can be granted. The motion is presently scheduled for hearing on July 6, 1982. If the District Court should decline to

dismiss the case, the PWC lines have asked as alternative relief that further proceedings be stayed pending referral to the Commission of NARI's allegations concerning PWC's rates.

Thus, NARI's antitrust action against PWC raises the possibility that the District Court might refer certain issues to the Commission for resolution under the Shipping Act. Because those issues might be directly related to the subject matter of this investigation, it is appropriate that further proceedings herein be held in abeyance until such time as the District Court rules on PWC's motion and the scope of any such proceedings can be accurately defined.

THEREFORE, IT IS ORDERED, That further proceedings in this Docket are stayed until further notice from the Commission.

By the Commission.

(S) FRANCIS C. HURNEY
Secretary

FEDERAL MARITIME COMMISSION

DOCKET NOS. 81-30 AND 81-31
THE BOSTON SHIPPING ASSOCIATION

v.

NEW YORK SHIPPING ASSOCIATION, INC., ET AL.

ORDER ADOPTING INITIAL DECISION

June 15, 1982

These consolidated proceedings were initiated on April 21, 1981 upon the complaints of the Boston Shipping Association, Inc. (BSA) against the New York Shipping Association, Inc. (NYSA).¹ On June 17, 1981, BSA filed amended complaints in both dockets naming as additional respondents the International Longshoremen's Association, AFL-CIO (ILA), the Council of North Atlantic Shipping Associations (CONASA), the West Gulf Maritime Association (WGMA), the Mobile Steamship Association, Inc. (MSSA), and the South East Florida Employers Port Association, Inc. (SEFEPA). The complaints allege that Respondents violated sections 15, 16, 17 and 18, Shipping Act, 1916 (46 U.S.C. §§ 814-817), section 8 of the Merchant Marine Act, 1920 (46 U.S.C. § 867), as well as section 205 of the Merchant Marine Act, 1936 (46 U.S.C. § 1115) by implementing Rule 10 of certain "Master Contracts"² between the ILA and the various employer groups in an unjustly discriminatory and unfair manner.

On February 12, 1982, Administrative Law Judge Joseph N. Ingolia issued an Initial Decision: (1) denying Respondents' motions to dismiss and motion for summary judgment; (2) finding that Complainant had failed to meet its burden of proving that Rule 10 is unlawful as alleged; and (3) denying the Complainant's request for reparations and assessment adjustments. Complainant filed Exceptions to the Initial Decision to which NYSA replied. NYSA also filed cross-exceptions to the Initial Decision with its Reply.

¹ The complaint in Docket No. 81-30 was filed pursuant to section 4 of the Maritime Labor Agreements Act (MLAA), Public Law 96-325 (94 Stat. 1021), which amended section 15, Shipping Act, 1916 (46 U.S.C. § 814). The complaint in Docket No. 81-31 was filed pursuant to section 22, Shipping Act, 1916 (46 U.S.C. § 821).

² The "Master Contracts" at issue provide for assessments called "Container Royalty Payments." Under Rule 10 of these "Master Contracts":

The Container Royalty Payments shall be payable only once within the continental United States. They shall be paid in the ILA port where the container is first handled by ILA longshore labor at longshore rates.

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ASSOCIATION, ET AL.

BACKGROUND

Between 1960 and 1980, the ILA and the various multi-employer bargaining units, including BSA, negotiated certain master contracts requiring oceangoing common carriers to pay container royalties for the benefit of eligible ILA members. These royalties are assessed on full shipper loads (FSL) beneficially owned by a single shipper or consignee and loaded or unloaded by the owners' employees at the owners' places of business.³ The container royalties have, since their inception, only been assessed and payable at the port where the container is first handled by ILA longshore labor at longshore rates.⁴ The essence of BSA complaints is that the container royalties are administered unlawfully because Rule 10 permits the assessment to benefit the port of transshipment rather than the port of destination.

INITIAL DECISION

The Presiding Officer found that BSA had failed to sustain its burden of proving Rule 10 unlawful. He noted that the evidence of record did not support Complainant's allegation that Rule 10 is maintained solely as a result of NYSA's domination of the ILA negotiations. He reasoned that although the Port of New York, the largest Atlantic Coast port, was influential in the ILA negotiations, the other port associations, including BSA, were not bound to accept NYSA's negotiating position. It was noted that NYSA itself withdrew from CONASA in 1977 when it could not persuade CONASA to accept its position in negotiations with the ILA.

The Presiding Officer also explained that even if the record supported BSA's "domination" theory, this alone would not render the "first port rule" unlawful because BSA had not presented any evidence demonstrating that the rule was unlawful. He found that BSA failed to support its contention that the "first port rule" has caused the assessment of the "Boston Dollar" to continue. This was deemed to be particularly significant because the "Boston Dollar" assessment was initiated in 1971 before the inauguration of the feeder service which transships Boston cargoes from New York. The Presiding Officer further determined that BSA had failed to present any evidence to demonstrate what funds are necessary to maintain the actuarial soundness of the BSA-ILA Pension Fund.

BSA was also found to have failed to establish that the "first port rule" has put it at a competitive disadvantage. In this regard, the

³ There are three master contract container royalty assessments levied against FSL cargoes. These assessments were imposed by the 1960, 1971 and 1977 ILA Master Contracts. BSA levies an additional container royalty assessment on FSL cargoes. This assessment, which is referred to as the Boston Dollar, was negotiated in connection with the 1968 local BSA/ILA labor contract.

⁴ This "first port" rule was initially codified in the 1971 ILA Master Contract.

Presiding Officer pointed out that BSA had not presented any evidence comparing the Port of Boston's overall labor costs, including the "Boston Dollar" assessment, with the labor costs of competing ports, nor was there evidence adduced to support BSA's argument that Boston's decrease in cargo volume is attributable to the diversion of cargo to other ports because of the "first port rule." Moreover, there was no evidence presented which would indicate that Boston's competitor ports were enjoying increased tonnage corresponding to Boston's decrease.

Based on his finding that the Complainant had failed to sustain his burden of proof, the Presiding Officer concluded that Rule 10 does not violate the Shipping Act, 1916, the Merchant Marine Act, 1920 or the Merchant Marine Act, 1936, as alleged, and accordingly denied the relief requested.

POSITIONS OF THE PARTIES

BSA

BSA excepts to the Presiding Officer's finding that it has failed to sustain its burden of proof. It views its burden as requiring it only to present evidence that indicates "to some degree" that Rule 10 is unlawful, and not to prove "that it suffered some quantifiable injury or damage." BSA maintains that the Commission has a responsibility in these complaint proceedings to protect the public interest and the commerce of the United States by ensuring that the contracts at issue are the fairest that can be devised. BSA argues that the Presiding Officer erred by failing to apply the Commission's regulatory powers to the issues raised in these proceedings.

BSA also challenges the Presiding Officer's refusal to find that NYSA has dominated the ILA's negotiations. BSA points out that the Port of Boston is dwarfed by the Port of New York in size, significance, and economic bargaining power. NYSA's dominance is alleged to be significant because the "first port rule" became an accepted practice under NYSA's influence ten years before container traffic began to move to Boston. BSA insists it does not have the economic power to defy NYSA with respect to the "first port rule" by negotiating a different arrangement with the ILA.

BSA contends that the "first port rule" is discriminatory because it undermines the parties' objectives in initiating the container royalty in the first instance. Because the royalties are designed to protect the longshoremen who have lost job opportunities, BSA believes that the assessment should benefit longshoremen at the port of destination rather than the port of transshipment.

BSA advises that because the container royalty funds are administered locally within each port area, its members may have to raise

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additional funds, "if the royalty payments received in the Port of Boston are insufficient to support the fringe benefit programs involved." This would allegedly cause BSA members to pass these additional costs onto users of the port and thereby make Boston less competitive.

BSA concludes that it has presented sufficient evidence for the Presiding Officer to have found that Rule 10 is unjustly discriminatory and unfair and therefore detrimental to the commerce of the United States.

NYSA

NYSA generally supports the Presiding Officer's findings and conclusions that BSA has failed to prove shipping statute violations.⁵ NYSA submits that BSA failed to establish that:

- (1) Boston's pension funds are currently financially unsound;
- (2) Container royalties allegedly lost to New York have caused this fiscal plight;
- (3) The deficiency has required the imposition of additional assessments;
- (4) The added cost has made Boston uncompetitive;
- (5) This competitive disadvantage has induced a diversion of Boston cargo to other ports; and
- (6) The abolition of the "first port rule" would remedy these deficiencies.

DISCUSSION

Upon review of the entire record in this proceeding, the Commission concludes that the Presiding Officer's disposition of BSA's complaints is well reasoned and supportable in both law and fact. The Commission also concludes that the Presiding Officer properly denied the Respondent's various preliminary motions, although the discussion of the merits of these preliminary motions ranged unnecessarily beyond the stated basis for their denial. Accordingly, the Commission will adopt the Presiding Officer's denial of Respondent's motions only to the extent it is based on a finding that his ultimate disposition of the substantive issues in these proceedings rendered it unnecessary for him to dispose of the Respondent's motions on the merits.

⁵ However, NYSA filed "cross-exceptions" with its Reply Brief in the event the Commission determines that the Presiding Officer disposed of its Motion for Summary Judgment on the merits rather than procedural grounds. Exceptions in these proceedings were due on March 1, 1982. NYSA's "Cross-Exceptions" were filed on March 16, 1982. These exceptions are therefore untimely and will be denied.

Complaint proceedings initiated pursuant to either section 22 or section 15 of the Shipping Act, 1916 (as amended by the MLAA) are governed by section 556 of the Administrative Procedures Act (5 U.S.C. § 556). Section 556 and the Commission's Rules of Practice and Procedure⁶ provide that the burden of proof shall be on the proponent of a rule or order. Because BSA has proposed that Rule 10 is unlawful and should be disapproved, it has the burden of so demonstrating in these consolidated proceedings.⁷ The Commission as a quasi-judicial body does not have any role in complaint proceedings other than that of decision maker. As the trier of fact, the Commission, upon review of the evidence in these proceedings and BSA's exceptions, agrees with the Presiding Officer's finding that BSA has failed to sustain its burden of proving that Rule 10 is unlawful.

BSA failed to demonstrate that Rule 10 causes injury to Boston shipping interests under sections 16 or 17 of the Shipping Act, 1916. Although BSA argued that the "first port" rule could place it at a competitive disadvantage because of increased labor costs at Boston, BSA failed to present any evidence comparing its overall labor cost, including the "Boston Dollar", with the labor cost of competing ports.⁸ Nor did BSA present any evidence which would tie the decreasing cargo volumes in the Port of Boston to increased labor cost flowing from the "first port" rule. Finally, although BSA alleges that it has lost container royalties, this loss is admitted to be a "direct result of the barge feeder service" rather than Rule 10 of the ILA Master contracts. In short, BSA has not cited any evidence which would support its allegations that the operation of Rule 10 is unfair and unjustly discriminatory.

THEREFORE, IT IS ORDERED, That the Boston Shipping Association's Exceptions in these proceedings are denied.

IT IS FURTHER ORDERED, That NYSA's "Cross-Exceptions" are denied as being untimely.

⁶ 46 C.F.R. § 502.155.

⁷ *Atchison T. S.F. Ry. v. Wichita Board of Trade*, 412 U.S. 800 (1973); *Prince Mfg. Co. v. United States*, 437 F.Supp. 1041 (1977).

⁸ The speculative nature of BSA's arguments is indicated by the following statement in its Exceptions:

If the royalty payments received in the Port of Boston are insufficient . . . then the members of BSA must raise the necessary funds . . . from other sources. Such activity, of course, would undoubtedly cause the BSA members to pass these charges on to the users of the Port, thereby making it less competitive. (Emphasis added).

The Commission must decide cases on the evidence of record and the reasonable deductions to be drawn therefrom. It may not adjudicate disputes arising under the Shipping Act on the basis of speculative possibilities. *Agreement No. 9932*, 16 F.M.C. 293 (1973); *Alcoa S.S. Co., Inc. v. Cia Anonima Venezolana*, 7 F.M.C. 345 (1962); *West Coast Line Inc. v. Grace Line*, 3 F.M.B. 586 (1951).

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ASSOCIATION, ET AL.

IT IS FURTHER ORDERED, That the Initial Decision in these proceedings is adopted to the extent indicated above.

FINALLY, IT IS ORDERED, That these proceedings are discontinued.

By the Commission.*

(S) FRANCIS C. HURNEY
Secretary

*Vice Chairman Moakley did not participate in these proceedings.

FEDERAL MARITIME COMMISSION

DOCKET NOS. 81-30 AND 81-31
THE BOSTON SHIPPING ASSOCIATION, INC.

v.

NEW YORK SHIPPING ASSOCIATION, INC., ET AL.

1. Motion for Summary Judgment and to Dismiss the Complaints will be denied where there are facts in dispute in the record and where a decision on the merits is warranted.
2. Where a provision in a collectively bargained labor agreement is unobjectionable on its face, it does not violate the shipping laws where it requires a container royalty to be collected on cargo at the "first port" the cargo is handled by ILA labor, even if the cargo is transhipped to another port, and where the purpose of the provision is to protect union members against the effects of containerization.
3. Where a provision in a collectively bargained labor agreement is alleged to have violated sections 15, 16, 17 and 18 of the Shipping Act, 1916, section 8 of the Merchant Marine Act of 1920, and section 205 of the Merchant Marine Act of 1936, and where said provision is alleged to be unjustly discriminatory as between carriers, shippers and ports and to operate to the detriment of the commerce of the United States, the burden of proof is on the Complainant, and where the Complainant fails to adduce specific facts setting forth the exact nature of the discriminatory practice and its adverse impact on competition and/or the commerce of the United States, his burden has not been met and his claims for relief must be denied.

Allan van Gestel and Robert P. Wasson, Jr., for Complainant, The Boston Shipping Association, Inc.

C. Peter Lambos, Donato Caruso and Peter C. Lambos for Respondent New York Shipping Association, Inc.

Rodney Earl Walton for Respondent Southeast Florida Employers Port Association, Inc.

William K. Thomas and Frank McRight for Respondent Mobile Steamship Association, Inc.

Francis A. Scanlan and A. Adjorte Duer for Respondent Council of North Atlantic Shipping Associations.

Ernest L. Mathews and Thomas W. Gleason for Respondent International Longshoremen's Association, AFL-CIO.

James Patrick Cooney for Respondent West Gulf Maritime Association, Inc.

BOSTON SHIPPING ASSOCIATION V. NEW YORK SHIPPING 1111
ASSOCIATION, ET AL.

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

Adopted June 15, 1982

BACKGROUND INFORMATION

These consolidated cases ² began with the filing of a Complaint pursuant to the Maritime Labor Agreements Act of 1980 (MLAA), Public Law 96-325,³ and the filing of a Complaint pursuant to the provisions of section 22 of the Shipping Act of 1916 (46 U.S.C. 821).⁴ The original Complaints, which were filed by The Boston Shipping Association (BSA), named the New York Shipping Association, Inc. (NYSA), as Respondent. On May 22, 1981, NYSA filed its Answer raising several Affirmative Defenses which will be discussed later. On June 17, 1981, BSA filed Amended Complaints in both cases.⁵

The substantive issues raised in both the Original and the Amended Complaints are the same. However, in the Amended Complaints, additional Respondents were added, namely, the International Longshoremen's Association, AFL-CIO (ILA), the Council of North Atlantic Shipping Associations (CONASA), the West Gulf Maritime Association, Inc. (WGMA), the Mobile Steamship Association, Inc. (MSSA), and the Southeast Florida Employer's Port Association, Inc. (SEFEPA). All of the Respondents answered the Amended Complaints, asserting similar affirmative defenses which will be discussed later. In addition to the Answers, most of the Respondents filed Motions to Dismiss the Amended Complaints. Also, Motions for Summary Judgment have been filed.

On October 13, 1981, these cases were set down for hearing. At that time the parties agreed that the cases would be submitted without the need to take oral testimony. BSA and NYSA submitted an agreed stipulation of facts, which is somewhat limited and incomplete when related to the issues involved, and various documents were placed in the evidentiary record. The exhibits submitted by the parties will be referred to throughout this decision as follows:

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

² These cases were consolidated for hearing and briefing by Order served June 7, 1981.

³ Docket No. 81-30.

⁴ Docket No. 81-31.

⁵ Under Public Law 96-325 (section 15 of the Shipping Act, 1916), the Commission must issue its decision in these cases within one year of the filing of the Complaint, as amended. The Commission's Rules of Practice and Procedure (46 C.F.R. 502) require that the Initial Decision must be issued on or before February 16, 1982.

JOINT EXHIBIT	-	JX
BSA EXHIBIT	-	BX
CONASA EXHIBIT	-	CX
NYSA EXHIBIT	-	NX

FINDINGS OF FACT

The facts found below are drawn from the joint stipulation of facts submitted by the parties, and from the various exhibits contained in the record. References to various paragraphs of the joint stipulation of facts will be prefaced by the letters "SF."

1. Complainant, The Boston Shipping Association, Inc. ("BSA"), is a non-profit corporation, organized under the laws of the Commonwealth of Massachusetts and having its usual and principal place of business at 223 Lewis Wharf, Boston, Massachusetts 02110. At all times material hereto BSA is, and has been, a multi-employer bargaining association and is, and has been, the employer or management negotiating representative for all collectively bargained, longshore, labor-management agreements affecting the Port of Boston, and is, and has been, the administrator of all fringe benefit funds collected pursuant to such agreements. BSA's membership is comprised of twenty-five (25) commercial firms including contracting stevedores and deep water lines, as well as the Massachusetts Port Authority, a public instrumentality of the Commonwealth of Massachusetts, charged with the responsibility of promoting, developing and protecting the waterborne commerce of the Port of Boston. BSA's membership owns or operates virtually all maritime facilities in the Port of Boston which are regularly used in the foreign and intercoastal trade. (SF, par. 1.)

2. The Respondent, New York Shipping Association, Inc. ("NYSA"), is a New York corporation having its usual place of business at 80 Broad Street, New York, New York. It is and has been the negotiating representative for employers of the International Longshoremen's Association members in the geographic area subject to the jurisdiction of the Port Authority of New York and New Jersey ("Port of New York"). Its membership is comprised of approximately one hundred thirty (130) steamship carriers, both American flag and foreign flag, serving the ocean commerce of the United States (SF, par. 2.)

3. The Respondent, International Longshoremen's Association, AFL-CIO ("ILA"), has its principal place of business at 17 Battery Place, New York, New York 10004. It is the certified collective bargaining representative for units of employees comprising virtually all of the more than eighty thousand (80,000) persons employed as longshoremen, carloaders, clerks, checkers, timekeepers and in related crafts in the various ports on the Atlantic and Gulf coasts from Portland, Maine, to and including Brownsville, Texas. (SF, par. 3.)

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ASSOCIATION, ET AL.

4. The Respondent, Council of North Atlantic Shipping Associations, Inc. ("CONASA"), is a corporation having its principal place of business at Suite 600, Lafayette Building, Philadelphia, Pennsylvania 19106. It is an association of shipping associations. Among its members is the BSA. It is a multi-employer bargaining association which, at all times material hereto, is, and has been, the employer or management negotiating representative for the ports of its members in connection with the Master Contracts between itself, various employer representatives on the Atlantic and Gulf coasts, and the ILA. (SF, par. 4.)

5. The Respondents, West Gulf Maritime Association, Inc. ("WGMA"), a corporation whose principal place of business is Suite 600, 2616 South Loop West, Houston, Texas 77054; Mobile Steamship Association, Inc. ("MSSA"), a corporation whose principal place of business is at Post Office Box 1077, Mobile, Alabama 36601; and Southeast Florida Employers Port Association, Inc. ("SEFEPA"), a corporation whose principal place of business is at 1177 South American Way, Miami, Florida 33132, are all multi-employer bargaining associations similar to BSA and were and are, at all times material hereto, the employers or management negotiating representatives for the port they represent in connection with the Master Contracts. (SF, par. 5.)

6. NYSA, CONASA, WGMA, MSSA, SEFEPA and the ILA are, in their representative capacities, parties and signatories to the Master Contract in effect starting October 1, 1980 (SF, par. 6.)

7. NYSA, CONASA, and the ILA were each, in their representative capacities, parties and signatories to the Master Contract in effect from October 1, 1977, to September 30, 1980. (SF, par. 7.)

8. The Master Contracts between the ILA and the various employer representatives on the Atlantic and Gulf coasts, including BSA and NYSA, govern certain matters affecting all ILA Ports from Portland, Maine, to and including Brownsville, Texas. (SF, par. 8.)

9. With the exception of the Job Security Program ("JSP") established in the Master Contracts, fringe benefit funds are collected, handled, managed and administered on a separate basis within each port area without any allocation to other port areas. (SF, par. 9.)

10. Since 1971, CONASA has acted on behalf of its members as a multi-employer bargaining representative in negotiating master contracts with the ILA covering certain terms and conditions of employment of longshore labor, including container royalties. The constituent members of CONASA include the local multi-employer port associations in five major ports on the North Atlantic Coast of the United States, *i.e.*, Boston, Providence, Philadelphia, Baltimore and Hampton Roads. NYSA was a member of CONASA until October 22, 1977. Each of these local associations has basically the same structure, type of membership and functions as NYSA. Complainant BSA is one of the constituent members of CONASA. (SF, par. 10.)

11. Respondent WGMA is a not-for-profit board of trade incorporated under the laws of Texas. WGMA functions on behalf of its members as the multi-employer bargaining association in the negotiation and administration of labor agreements covering ten ports from Lake Charles, Louisiana, to Brownsville, Texas. (SF, par. 11.)

12. Respondent MSSA is an Alabama not-for-profit membership corporation which acts as the multi-employer bargaining representative for the longshore industry in the port of Mobile. (SF, par. 12.)

13. Respondent SEFEPA is a multi-employer bargaining association which represents shipping employers in the ports of Miami and Port Everglades, Florida. (SF, par. 13.)

14. ILA, on behalf of its constituent divisions, local unions and individual members, has negotiated and entered into master and local collective bargaining agreements with CONASA, NYSA, BSA and the other multi-employer bargaining associations in this case covering the terms and conditions of employment of these dock employees. (SF, par. 13.)

15. For many decades, bargaining on the Atlantic and Gulf Coasts commenced with negotiations between the ILA and NYSA in the Port of New York. After agreement had been reached with NYSA, the ILA would then bargain with other ports which generally adopted the master terms of the labor agreement negotiated in New York. In 1956 the ILA demanded bargaining on a coast-wide basis. After a lengthy strike that year, the employer associations in the other major North Atlantic ports permitted NYSA to negotiate a master contract on behalf of all North Atlantic ports with respect to certain specific master issues. In 1956, and each of the succeeding collective bargaining periods, including the one ending September 30, 1971, master contracts covering the specified bargaining items were entered into by NYSA with the ILA for and on behalf of itself and the other North Atlantic employer associations, including BSA. Local issues, however, were negotiated separately between each port association and the ILA locals in the individual ports. (SF, par. 15; NX 8 at 6, 53-54.)

16. Prior to the negotiation of the 1971 master longshore contract, CONASA was organized. On November 16, 1971, CONASA and ILA formalized the scope of their consensual multi-employer bargaining unit in a memorandum of agreement signed by each member of CONASA, including BSA. This agreement reads in pertinent part as follows:

ILA and CONASA agree to act as the collective bargaining representatives for their constituent locals and members, as referred to above, on the seven master contract items which are as follows:

- A. Wages
- B. Hours

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- C. Contributions to the Welfare Plans
(but not the benefits)
- D. Contributions to Pension Plans
(but not the benefits)
- E. Term of the Agreement
- F. Containerization [which includes
the Rules on Containers]
- G. Lash

All other terms and conditions of employment are local items which will be negotiated locally by each of the above port associations and their ILA locals in each respective port.

The resulting 1971-1974 CONASA-ILA master labor contract was then generally adopted in other South Atlantic and Gulf ports. In the Port of Boston, the 1971 Master Contract (NX 2) was incorporated into the local BSA-ILA collective bargaining agreement (SF, par. 16; NX 9 at 32-36, 53-55, 60-61, 90-94, 105-108).

17. After the formation of CONASA, the ILA continued to advocate "national" bargaining on a Maine to Texas basis. The structure of bargaining that prevailed in 1971 remained in effect during the 1974 longshore negotiations. Again, the Master Contract was embodied into the local labor contract in Boston. However, during the 1977 negotiations, a selective coastwide ILA strike against automated steamship carriers led to the formation of a new multi-employer bargaining unit comprised of steamship carriers ("Carriers") operating in the thirty-four (34) major ports on the Atlantic and Gulf Coasts. The multi-carrier unit and the ILA negotiated the collectively bargained JSP Program to assure the fiscal integrity of pension, welfare and Guaranteed Annual Income ("GAI") trust funds in the covered ports. (SF, par. 17; NX 10 at 39-51, 76-78, 85-87, 128-140, 155-156, 158-160.)

18. Differences arose between NYSA and other CONASA members concerning this new bargaining format. As a result, NYSA withdrew from CONASA on October 22, 1977. The resulting 1977 Master Contract with ILA was negotiated by NYSA, CONASA, and the Carriers. This labor accord, which included the JSP agreement negotiated by the Carriers, was thereafter adopted in the individual labor agreements negotiated in other Atlantic and Gulf Coast ports. (SF, par. 18.)

19. In the 1980 longshore labor negotiations, for the first time a "national" bargaining format prevailed. NYSA, CONASA, WGMA, MSSA, SEFEPa and the Carriers negotiated with the ILA on the master bargaining subjects. Representatives of the New Orleans Steamship Association and the South Atlantic Employers' Negotiating Committee, the other major multi-employer associations in the longshore industry on the Atlantic and Gulf coasts, attended some of the bargain-

ing sessions as observers. The 1980 Master Contract ensued. It constitutes the first longshore labor contract binding all shipping employers and employer associations within the East and Gulf coast areas, direct employer and Carrier management group. The 1980 Master Contract (NX 5) was incorporated into the local labor agreement in the Port of Boston. (SF, par. 19; NX 12 at 33-47, 71-73, 79-82, 96-103.)

20. The Port of New York by virtue of its size and prominence has always been the bellweather in longshore labor negotiations. Prior to the formation of CONASA, NYSA was the bargaining spokesman for the entire North Atlantic range. However, the settlement of the master terms in the Port of New York was not binding in other ports. BSA expressly limited the scope of NYSA's bargaining authority by insisting that the New York settlement would not be binding until expressly adopted in a local Boston labor contract. (BX 24 at 2.) In 1968, both Boston and Philadelphia refused to endorse NYSA's bargaining position. (BX 5 at 11.) In fact, BSA revoked NYSA's bargaining authority when the ILA demanded that GAI be negotiated as a master subject. (BX 5 at 11.)

21. From the formation of CONASA in 1971 until NYSA's resignation in 1977, NYSA was assigned 40 percent of the vote. (NX 49 at 13.) After NYSA resigned, the other members of CONASA reaffirmed CONASA's sole and exclusive authority as their bargaining agent. They expressly admonished that neither NYSA nor the Carriers could negotiate a master contract on their behalf. (BX 27.)

22. The members of CONASA selected NYSA's president, James J. Dickman, as CONASA's president and chief negotiator. BSA was disappointed with Mr. Dickman's conduct of the bargaining in 1971, 1974 and 1977, but it never made any attempt to resign from CONASA or to replace Mr. Dickman as chief negotiator. (NX 49 at 26-29.)

23. In the negotiations of every master contract, all management representatives participated in the bargaining. They were appointed to committees which met with their union counterparts in isolated groups. (NX 48 at 68.) Every representative was kept fully informed of the union's positions and demands. (NX 48 at 69-70.) Every management position was formulated after extensive discussions in which all management representatives took part. (NX 50 at 36-37.) Containerization, the principal bargaining issue, was discussed among management representatives "around the negotiating table." (NX48 at 222.) Management's position on money items was arrived at by formal voting. (NX 48 at 74.) Once the management groups were able to reach a meeting of the minds, then their united position was transmitted to Thomas W. Gleason, the ILA's chief negotiator, by a management team composed of Mr. Dickman and a representative of CONASA, which at times was Arthur Lane, the president of BSA. (NX 48 (Vol. 2) at 94; NX49 at 17-18; NX 50 at 37-38.) If any major port association or group of port

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associations objected to a management proposal, it would not be transmitted to the ILA, but would go "back to the drawing board." (NX 48 at 84.)

24. Although the bargaining format has gravitated toward a national bargaining unit, each local port association retains its right to bargain individually. New Orleans Steamship Association and South Atlantic Employers' Negotiating Committee have declined to negotiate or execute a master contract. (NX 48 at 31-32.) In 1977, when NYSA was unable to convince the other CONASA members to endorse the Carrier Group and its negotiation of JSP as a master contract item, NYSA resigned and reverted to independent bargaining status. (JX 1 at 4, 7; NX 47 at 6; BX 5 at 3, 17; NX 50 at 38-39.) After NYSA's withdrawal from CONASA, the other members reaffirmed the bargaining authority of CONASA and refused to surrender their negotiating rights to NYSA even on a limited basis. (BX 16 (12/6/79 Minutes at 2.)

25. At no time was any port required to adopt the terms of the New York contract. Although since 1968 GAI in New York has been provided on a 2,080 hours per year basis, a substantially lower level has prevailed in Boston: 1,400 hours per year during the 1974-77 contract and 1,700 hours per year during the 1977-80 agreement. (BX 5 at 15, 18.)

26. During the past three decades, the longshore industry has experienced an industrial revolution during which new and highly innovative methods of cargo handling have been introduced and increasingly implemented. During this period, large metal containers, having dimensions as large as 40' X 8' X 8', have been replacing the traditional piece-by-piece and carton-by-carton loading and unloading work performed by longshoremen on the piers. Now many tons of cargo in one metal container can be loaded on a vessel as a single block unit. This innovative process, known as containerization, and other forms of automation, while increasing work productivity, have produced, during the period from the 1950's to the present, a drastic and constant decline in jobs and work opportunities of longshoremen. (SF, par. 20.)

27. Automation has been the single most troublesome issue in longshore labor relations since its advent in the 1950's. It has caused the ILA from the very beginning to insist at the bargaining table that the industry protect its members from this technological job displacement caused by containerization and other forms of mechanization. The result was a bitter conflict in labor relations marked by ILA grievances, strikes and other forms of labor unrest in almost every year from 1958 to the present time. (SF, par. 21.)

28. The principal subject of bargaining from 1959 to the present has been the protection of longshoremen displaced by automation. During each of the major collective bargaining negotiations from 1959 to the present, the ILA has argued that a container was part of the hold of

the ship and should be loaded piece-by-piece and package-by-package, as had been done traditionally, and that the carriers were trying to take that part of the work from ILA's dockworker members. The shipping employers, on the other hand, sought the use of all kinds and sizes of containers without any restrictions. (SF, par. 22.)

29. The first collective agreement on the issue of containerization was reached in 1959 in the Port of New York. The compromise reached in 1959 was set forth in section 8 of the 1959 Memorandum of Settlement as follows:

(a) Any employer shall have the right to use any and all type [sic] of containers without restriction or stripping by the union.

(b) The parties shall negotiate for two weeks after the ratification of this agreement, and if no agreement is reached, shall submit to arbitration in the manner described in paragraph 13 below, the question of what should be paid on containers which are loaded or unloaded away from the pier by non-ILA labor, such submission to be within 30 days thereafter.

(c) Any work performed in connection with the loading and discharging of containers for employer members of the NYSA which is performed in the Port of Greater New York whether on piers or terminals controlled by them, or whether through direct contracting out, shall be performed by ILA labor at longshore rates.

This compromise permitted shipping employers to use all types and sizes of containers and to transport full shipper load ("FSL") containers⁶ without prior handling of their contents by longshoremen (Section 8(a)), subject only to the payment of a royalty, the amount of which was to be fixed by an arbitrator's award (Section 8(b)). However, less than containerload and consolidated cargo originating in or destined to a point within the area of the Port of Greater New York, which historically arrived at the piers piece-by-piece, was to be stuffed and stripped at the piers by longshoremen in order to preserve their traditional dock work (Section 8(c)). (SF, par. 23.)

30. After a lengthy arbitration on the container royalty question, an award was issued on November 21, 1960, fixing the amount of the royalty at 35 cents per long ton on conventional ships, 70 cents per long ton on partially automated ships, and \$1.00 per long ton on fully automated ships. This arbitration award is known as the "Stein Award." Virtually the same container royalty agreement and arbitration award was subsequently adopted in all ports from Maine to Texas. In 1968, a similar container royalty agreement was adopted in the local

⁶ An FSL container is a full container load of goods beneficially owned by a single shipper or consignee which has its own employees load or unload the container at its own place of business. *NLRB v. Int'l Longshoremen's Ass'n*, 447 U.S. 490, 497.

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labor contract negotiated by BSA and the ILA, and has in all subsequent local Boston contracts to date. (SF, par. 24; NX 9 at 60; NX 10 at 84; NX 11 at 78-79; NX 12 at 78-79.)

31. The amount of this First Container Royalty, which is paid by steamship carriers on FSL containers loaded or unloaded away from the piers by non-longshore labor, was later doubled in a subsequent labor contract, effective May 1, 1977 (the second dollar of the First Container Royalties). In the 1971-74 CONASA-ILA master contract, a Second Container Royalty was adopted to be used to defray the costs of fringe benefits. (SF, par. 25.)

32. The award (Stein Award) did not address any issue relating to the use of the royalties. The award expressly noted that any resolution of that issue was reserved for later negotiation by the parties. (NX 7 (Opinion at 6).) The First Container Royalties have been distributed in cash to the longshoremen and distribution of container royalty allowances among ILA members has been embodied in the master contracts. The 1980 Master Contract, as incorporated in the local Boston labor agreement, expressly provides that the First Container Royalties (both the 1960 and 1977 dollars) must be used to provide supplemental cash payments each year to eligible longshoremen. (NX 5 at 3, 10; NX 12 at 46.) Since its inception in 1971, the ILA has agreed to contribute its Second Container Royalty (the 1971 dollar) to defray the costs of its members' fringe benefits. (JX 1 at 11; NX 2 at 2; NX 50 at 33-34.)

33. The Container Royalty Program in the Port of New York is administered by the NYSA-ILA Container Royalty Fund ("CRF"), a joint labor-management trust fund, jointly administered on a port-wide basis by trustees equally selected by NYSA and ILA and established pursuant to the provisions of Section 302 of the Labor Management Relations Act ("LMRA"), 29 U.S.C. § 186. All container royalties paid in the Port of New York are transmitted by the steamship carriers directly to the CRF. The CRF annually pays a supplemental cash benefit to all eligible longshore employees attributable to the first container royalty collections. Amounts representing collections of the second container royalty are transferred by the CRF to the NYSA-ILA Fringe Benefits Escrow Fund, an LMRA § 302 joint labor-management trust fund. In addition to the second container royalty, it collects and holds fringe benefit tonnage and excepted commodity man-hour assessments imposed upon steamship carriers pursuant to the provisions of the collectively bargained NYSA-ILA tonnage assessment. The Escrow Fund transfers these tonnage and man-hour assessments, as well as the second container royalty payments, and any income earned thereon, to the joint labor-management fringe benefit trust funds, including welfare, GAI, vacation and holiday and medical and clinical services funds, as monies are required to meet the costs incurred by these funds. They in

turn directly dispense fringe benefits to longshoremen and their dependents. (SF, par. 26.)

34. The Container Royalty Program in the Port of Boston is administered unilaterally by BSA. All container royalties paid in the Port of Boston are transmitted either by the steamship carriers or their agents or stevedores to BSA, which pays supplemental cash benefits to those longshore employees selected by the ILA locals in Boston attributable to the second (1977) dollar of the First Container Royalty. Amounts representing collections of the first (1960) dollar of the First Container Royalty and of the Second (1971) Container Royalty are transferred by BSA to the BSA-ILA Pension Fund. (SF, par. 27.)

35. In the Port of Boston, BSA transmits to the ILA International (a) ten percent (10%) of the first dollar of the First Container Royalty BSA collects, and (b) ten percent (10%) of the supplemental cash income BSA disburses attributable to the second dollar of the First Container Royalty. (SF, par. 28.)

36. From the outset of the Container Royalty Program, it has been the prevailing rule that the royalty should be paid only once. It was also the routine custom and practice from the 1960's to impose the royalty only once in the port where the shipment was first handled by longshoremen working under a collective bargaining agreement which contained a container royalty provision. This "first port" rule was codified in the 1971-74 CONASA-ILA Master Contract and has remained intact in all subsequent master labor contracts as part of Rule 10 of the Rules on Containers. (SF, par. 29.)

37. BSA has incorporated Rule 10 in every local longshore collective bargaining agreement in the Port of Boston since 1971 to date. During this period, BSA has applied the "first port" rule in the Port of Boston: it has collected the royalties on every container handled first in the Port of Boston even though that container may have later been rehandled in another port. BSA never objected to the first port rule in either the 1971, 1974 or 1977 Master Contract negotiations. (SF, par. 30; NX 48 (Vol. 2) at 75-77; NX 49 at 36-37.)

38. Prior to the 1980 longshore negotiations, a meeting was held in Atlanta, Georgia, among representatives of NYSA, CONASA (including BSA), WGMA, MSSA, SEFEPA and other employer associations to formulate bargaining strategy. At that meeting, Arthur Lane, President of BSA, questioned the "first port" rule. He was told that this issue was one which should be considered in the first instance by CONASA. (SF, par. 31.)

39. BSA endeavored to have CONASA seek a change in or to request the ILA to negotiate a change in the first port rule. BSA's proposal with respect to Rule 10 was voted on by the members of CONASA and was rejected. (SF, par. 32.)

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40. Since at least 1971, the BSA-ILA Pension Fund has been financed by:

- (a) man-hour assessments imposed on all ILA man-hours at the rates set forth in the Master Contract;
- (b) collections of the Pension Royalty imposed at the rate of \$1 (the "Boston Dollar") per short ton on house-to-house containerized cargo as prescribed in the local Boston labor contract (JX 1 at 14; NX 9 at 42, 100; NX 10 at 59-60, 147-48; NX 11 at 55-56, 140; NX 12 at 55; NX 34 at 44; NX 48 at 102-05, 118, 121, 123; NX 48 (Vol. 2) at 35; NX 49 at 47;⁷ and,
- (c) contributions at the union's direction of amounts collected by BSA attributable to the first (1960) dollar of the First Container Royalty and the 1971 Second Container Royalty (NX 48 at 182-83, 186, 188; NX 48 (Vol. 2) at 31).

41. Although the Master Contract, as embodied in the local Boston labor agreement, requires that both the first (1960) and second (1977) dollar of the First Container Royalty be used exclusively for supplemental cash distributions (NX 5 at 3, 10; NX 12 at 46), BSA takes the position that its transfer of the first dollar of the First Container Royalty to the BSA-ILA Pension Fund complies with these contractual provisions. BSA contends that, in effect, the first dollar of the First Container Royalty is paid to Boston longshoremen, who then voluntarily contribute this payment to their Pension Fund. (BX 7; BX 9 at 8; BX 10 at 1; BX 11 at 2; NX 48 at 176, 178, 182-83, 200-01, 209; NX 49 at 41.)

42. Any increase in container royalty collections in the Port of Boston by reason of a modification of the "first port" rule would inure to the benefit of Boston longshore employees, either in the form of increased pension or health and welfare benefits or direct cash payments. (SF, par. 34.)

43. Since at least 1971, health and welfare benefits in the Port of Boston have been financed by a man-hour assessment on all ILA man-hours at rates set forth in the master contract. (NX 9 at 43, 101; NX 10 at 60, 148-49; NX 11 at 57, 141; NX 12 at 56; NX 48 (Vol. 2) at 36.)

44. Since at least 1971, vacation and holiday payments in the Port of Boston have been financed by a man-hour assessment on all ILA man-hours at rates unilaterally established by BSA. (NX 48 (Vol. 2) at 40-41.)

45. Since at least 1968, GAI in the Port of Boston has been financed by a tonnage assessment upon every long ton of cargo discharged or loaded in the Port of Boston at rates unilaterally established by BSA

⁷ The Boston Dollar is not applied to "containerized cargo which has been or will be transhipped at another United States East Coast Port moving to or from Puerto Rico or in the domestic and/or intercoastal trade." (NX 9 at 42; NX 10 at 59-60; NX 11 at 55-56; NX 12 at 55.)

pursuant to a formula filed with the Federal Maritime Commission. (NX 10 at 68, 116; NX 11 at 64-65, 109; NX 12 at 64; NX 48 at 133-37; NX 48 (Vol. 2) at 39.) The GAI tonnage assessment rates have fluctuated. In the fiscal year ending September 30, 1980, a rate of \$.10 per ton was in effect, a reduction from the prior year's rate of \$.50 per ton. (BX 32 at 3; NX 34 at 53; *compare* NX 20 at 2 *with* NX 19 at 2.) In the fiscal year ending September 30, 1981, the GAI assessment rate was increased twice: to \$.50 per ton, effective October 1, 1980, and then to \$1.00 per ton, effective March 15, 1981. (BX 32 at 3.)

46. Feeder services have existed between the Ports of New York and Boston since the early 1970's. (JX 1 at 15; NX 35 at 16.) A barge feeder service operated by McAllister Lighterage Line, Inc., between New York and Boston has been in operation since 1976. (JX 1 at 15; NX 35 at 16-17.) Feeder services between Boston and Canadian ports were recently inaugurated. (JX 1 at 15; NX 48 at 55.) Feeder services also operate between other ports on the East Coast. (NX 48 at 163-64.)

47. Since 1972, container traffic in the Port of Boston has increased sixfold. (NX 27 at 4; NX 48 at 114.) Although Boston has traditionally been an import port (NX 48 at 172), the major increase in the volume of containerized cargo moving through the port in recent years has involved export rather than import cargo. From 1974 through 1980, total container tonnage increased by 18.6% from 678,948 tons in 1974 to 805,224 tons in 1980. (NX 14 at 2.) Export tonnage accounted for a 25.9% increase from 291,421 tons in 1974 to 366,880 tons in 1980 compared to only a 13.1% increase for import tonnage (387,527 tons in 1974 to 438,344 tons in 1980). (NX 14 at 2.)

48. In 1980, overall tonnage in the port of Boston increased by 4% to 898,262 tons (NX 13 at 1.)⁸ Boston handled more high-valued cargo than any other port on the East Coast. (NX 13 at 1.) New cargo business was provided by the inauguration of a feeder service between Boston and Canada. (NX 13 at 1.)

49. During the nine-month period from October 1, 1980, to June 30, 1981, cargo volumes in the port declined. During this period, 457,056.79 container tons were moved, a decrease of 95,383.21 tons, or 17.2%, from the container tonnage moved in the comparable nine-month period of the prior year (552,440 tons) (*compare* NX 23 at 1 *with* NX 23 at 2). The decrease was more pronounced for breakbulk cargo and for pier-to-pier container movements, neither of which is subject to either container royalties or the Boston Dollar. The volume of break-

⁸ These statistics compiled and published by the Massachusetts Port Authority are corroborated by BSA's own figures (*compare* NX 22 at 1 *with* NX 21 at 1). The BSA data show a 5% increase in general cargo tonnages in the fiscal year ending September 30, 1980 (752,751.66 tons in fiscal 1979 compared to 796,297.98 tons in fiscal 1980). BSA's statistics also demonstrate an even larger increase, 6%, in house-to-house container tonnage, which is subject to both the container royalties and the Boston Dollar (from 463,013.61 tons in fiscal 1979 to 495,226.09 tons in fiscal 1980).

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bulk cargo declined by 59% from 27,896 tons in the 1979/80 period to 11,425 tons in 1980/81 period (*compare NX 23 at 1 with NX 23 at 2*). Pier-to-pier tonnage decreased by 27.9% from 42,759.66 tons in the 1979/80 period to 30,828.21 tons in the corresponding 1980/81 nine-month period (*compare NX 23 at 1 with NX 23 at 2*). Import house-to-house barge traffic, which is subject to both the container royalties and the Boston Dollar, decreased by 10% from 121,108.69 tons in the 1979/80 period to 108,877.81 tons in the corresponding 1980/81 period (*compare NX 23 at 1 with NX 23 at 2*).

50. Recently, the Massachusetts Port Authority ("Massport") has expended millions of dollars for the construction of new container facilities in the port to accommodate the expected cargo volume increases. (NX 27 at 5, 13; NX 48 at 146.) A new container terminal at Castle Island became operational this year. (NX 27 at 6; NX 48 at 111.) Massport expects to invest more than \$100 million in port construction in the 1980's and 1990's which will include the development of a second new container terminal at the South Boston Naval Annex scheduled for use in the 1990's. (NX 13 at 1; NX 27 at 6, 13.)

51. Container royalties collected in the Port of Boston in the contract year ending September 30, 1981, exceeded by more than 29.8% the container royalties collected in the contract year ending September 30, 1978—from \$946,461 in contract year 1978 to \$1,228,582.77 in contract year 1981 (*compare NX 16 at 2 with BX 32 at 1-2*).

52. All pension, health, welfare, GAI and vacation and holiday benefits, prescribed in the BSA-ILA labor contracts from 1971 to date, have been paid in full. (NX 16; NX 19; NX 20; NX 48 (Vol. 2) at 61., NX 49 at 92, 100-01; BX 32.) Pension benefits in the Port of Boston have been increased on three occasions since 1971, the latest being in the 1980 contract year. (NX 49 at 92-93, 102-03.)

53. Over the four-year period beginning October 1, 1977, and ending September 30, 1981, the fund balances of the Pension, Health & Welfare, GAI, Container Royalty, and Supplemental First Container Royalty Funds in the Port of Boston have increased (*compare NX 16 at 2 with BX 32*). The Pension Fund experienced a 79.5% increase of \$8,369,418 in its fund balance over this period (\$10,527,229 as of October 1, 1977, compared to \$18,896,647 as of September 30, 1981) (*compare NX 16 at 2 with BX 32 at 4*). Only part of this increase was attributable to the Boston Dollar. During this four-year period, the Boston Dollar provided \$2,550,462.20 to the Pension Fund.

54. In recent years and to an increasing extent, carrier members of NYSA which utilize and ship containerized cargo to the Port of Boston have changed their method of operation by first delivering containerized cargo to the Port of New York and then transshipping that cargo to the Port of Boston by barge or similar vessel. Such cargo is consequently "first handled by ILA longshore labor, at longshore rates," in

the Port of New York even though it is actually destined for the Port of Boston. (NX 21 and 22; NX 35; Answer to Interr. No. 19; NX 48 at 149-157; II-70 - II-79; NX 49 at 36-43.)

55. During the period, from October 1, 1980 (the effective date of the 1980 Master Contract), through June 30, 1981 (the latest month for which actual figures are available), the amount of container royalty revenue paid in the Port of New York on cargo transshipped to Boston amounted to Three Hundred Twenty-Six Thousand, Six Hundred Thirty-Three Dollars and Forty-Three Cents (\$326,633.43), or approximately Thirty-Six Thousand Dollars (\$36,000) per month (NX 23 at 1, line "inbound-barge" multiplied by \$3 container royalty).

56. During the period from May 1, 1979, through September 30, 1980, the amount of container royalty revenue paid in the Port of New York on cargo transshipped to Boston amounted to Six Hundred Thirty-Eight Thousand, Five Hundred Sixty-Five Dollars and Fifty-Seven Cents (\$638,565.57) (NX 23 at 1, line "inbound-barge" multiplied by \$3 container royalty).

57. By letters dated May 12, 1978, and September 19, 1978, NYSA filed with the Commission all master and local New York longshore contracts. (NX 28; NX 29.) The transmittal letters contained the reservation that in the opinion of NYSA the agreements were not subject to § 15 or any other provision of the shipping laws. (NX 28 at 2; NX 29 at 1.) On October 20, 1980, NYSA filed with the Commission the master and local agreements for the period October 1, 1980, through September 30, 1983 (NX 30), noting, however, that with the exception of the JSP agreement and the NYSA-ILA tonnage assessment agreement, no other portion of either the master or local labor agreements was required to be filed for § 15 approval under the Maritime Labor Agreements Act ("MLAA"). (NX 30 at 2.)

58. The 1977 and 1980 Master Contract agreements contain the three assessments previously described as "container royalty payments." Within the Master Contracts under the heading "Management-ILA Rules On Containers," at Rule 10, it is provided in pertinent part that:

The two Container Royalty payments, effective in 1960 and 1977 respectively, shall be continued and shall be used exclusively for supplemental cash payments to employees covered by the Management Agreements, and for no other purpose. The remaining royalty payment effective in 1971, also shall be continued and shall be used for fringe benefit purposes only, other than supplemental cash benefits, which purposes are to be determined locally on a port to port basis. The Container Royalty payments shall be payable only once in the continental United States. They shall be paid in that ILA port where the container is first handled by ILA longshore labor at longshore rates. Containers originating at a foreign port which are transshipped at a United States port for ultimate destination to

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another foreign port ("foreign-sea-to-foreign-sea containers") are exempt from the payment of container royalties. Container royalty payments shall be assessed against all containers moving across the continental United States by rail or truck in the foreign-to-foreign "LAND-BRIDGE" system.

Management and the Carriers agree that the payment of Container Royalties as provided in their agreements is of the essence of this agreement and if for any reason during the term of this agreement such payments cannot be made in their present form, then Management and the Carrier shall provide by some other form of assessment for the payment of equivalent amounts to be used for the same purposes as said Container Royalties are presently used. (NX 5.)

59. On August 8, 1980, the Maritime Labor Agreements Act ("MLAA"), P.L. 96-325, 94 Stat. 1021 (codified in 46 U.S.C. §§ 801, 814 and 841(c)), was signed into law. It provides in pertinent part that:

The term "maritime labor agreement" means any collective bargaining agreement between an employer subject to this Act, or group of such employers and a labor organization representing employees in the maritime or stevedoring industry, or any agreement preparatory to such a collective bargaining agreement among members of a multiemployer bargaining group, or any agreement specifically implementing provisions of such a collective bargaining agreement or providing for the formation, financing, or administration of a multiemployer bargaining group.⁹

Every common carrier by water, or other person subject to this Act, shall file immediately with the Commission a true copy, or, if oral, a true and complete memorandum, of every agreement with another such carrier or other person subject to this Act, or modification or cancellation thereof, to which it may be a party or conform in whole or in part, fixing or regulating transportation rates or fares; giving or receiving special rates, accommodations, or other special privileges or advantages; controlling, regulating, preventing, or destroying competition; pooling or apportioning earnings, losses, or traffic; allotting ports or restricting or otherwise regulating the number and character of sailings between ports; limiting or regulating in any way the volume or character of freight or passenger traffic to be carried; or in any manner providing for an exclusive, preferential, or cooperative working arrange-

⁹ Public Law 96-325 (94 Stat. 1021) amended sections 1, 15 and 45 of the Shipping Act, 1916, with respect to collective bargaining agreements. Section 6 of Public Law 96-325 (94 Stat. 1022) provides: SEC. 6. The changes made to existing laws by the provisions of this Act shall not affect any claims for reparation, if any, based upon conduct occurring prior to the date of enactment of this Act or formal Commission proceedings commenced prior to the date of enactment of this Act.

ment. The term "agreement" in this section includes understandings, conferences, and other arrangements, but does not include maritime labor agreements or any provisions of such agreements, unless such provisions provide for an assessment agreement described in the fifth paragraph of this section.

Assessment agreements, whether part of a collective bargaining agreement or negotiated separately, to the extent they provide for the funding of collectively bargained fringe benefit obligations on other than a uniform man-hour basis, regardless of the cargo handled or type of vessel or equipment utilized, shall be deemed approved upon filing with the Commission. The Commission shall thereafter, upon complaint filed within 2 years of the date of filing of the agreement, disapprove, cancel or modify any such agreement, or charge or assessment pursuant thereto, that it finds, after notice and hearing, to be unjustly discriminatory or unfair as between carriers, shippers, or ports, or to operate to the detriment of the commerce of the United States. The Commission shall issue its final decision in any such complaint proceeding within 1 year of the date of filing of the complaint. To the extent that any assessment or charge is found, in such a complaint proceeding, to be unjustly discriminatory or unfair as between carriers, shippers, or ports, the Commission shall remedy the unjust discrimination or unfairness for the period of time between the filing of the complaint and the final decision by means of assessment adjustments. Such adjustments shall be implemented by prospective credits or debits to future assessments or charges, except in the case of a complainant who has ceased activities subject to the assessment or charge, in which case reparation may be awarded. To the extent that any provision of this paragraph conflicts with the language of section 22 or any other section of this Act, or of the Intercoastal Shipping Act, 1933, the provisions of this paragraph shall control in any matter involving assessment agreements described herein.

The provisions of this Act and of the Intercoastal Shipping Act, 1933, shall not apply to maritime labor agreements and all provisions of such agreements except to the extent that such provisions provide for the funding of collectively bargained fringe benefit obligations on other than a uniform man-hour basis, regardless of the cargo handled or type of vessel or equipment utilized. Notwithstanding the preceding sentence, nothing in this section shall be construed as providing an exemption from the provisions of this Act or of the Intercoastal Shipping Act, 1933, for any rates, charges, regulations, or practices of a common carrier by water or other person subject to this Act which are required to be set forth in a tariff, whether or not such rates, charges, regulations, or practices

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arise out of, or are otherwise related to a maritime labor agreement. [Footnote omitted.]

60. The MLAA originated on the House side of the Congress. As originally drafted, it provided an absolute exemption for all labor agreements from any provisions of the Shipping Act and related laws. When it reached the Senate side of the Congress, a "compromise" bill was ultimately approved. It exempted all labor agreements except those assessment agreements described above (par. 59), and those involving the tariff requirements set forth above. (BX 2-4.)

ULTIMATE FINDINGS OF FACT

61. Rule 10 in the Master Contracts is unobjectionable on its face and does not violate any provisions of the shipping laws.

62. The fact that Rule 10 allows New York longshoremen to receive certain monies on cargo ultimately destined for Boston, rather than Boston longshoremen, does not violate any provisions of the shipping laws.

63. The record fails to establish that Rule 10 has caused assessment of the "Boston Dollar" to continue, that the assessment of the "Boston Dollar" is necessary to allow continued funding of the BSA-ILA provision plan, and that the "Boston Dollar" causes cargo to be diverted from Boston to other ports.

64. The record contains insufficient facts to sustain the Complainant's burden of proof.

DISCUSSION AND CONCLUSIONS

These consolidated cases arise from the filing of two complaints. One (Docket No. 81-30), as amended, is brought under the Maritime Labor Agreements Act of 1980 (MLAA) and relates to a collectively bargained agreement entered into between negotiating representatives of Atlantic and Gulf Ports and the ILA in a "Master Contract" covering the period from October 1, 1980, through September 30, 1983. It asks in pertinent part that the Respondents "cease and desist from the aforesaid violations," and that the "Commission order to be established and put in force such assessment adjustments as are necessary to remedy the unjust discrimination or unfairness between the Port of Boston and the Port of New York herein complained of."¹⁰ The second complaint (Docket No. 81-31), as amended, is brought under section 22 of the Shipping Act of 1916, 46 U.S.C. § 821, and relates to a "Master Contract" between the ILA and NYSA and CONASA for the period October 1, 1977, through September 30, 1980. It asks, in pertinent part,

¹⁰ In its reply to SEFEPA's Motion to Dismiss, BSA specifically states it is a request to the Commission to "invalidate Rule 10."

that "the Commission order the Respondent N.Y.S.A. to pay to the Complainant by way of reparation for the unlawful charges hereinabove described the sum of Six Hundred Thirty-Eight Thousand, Five Hundred Sixty-Five and 57/100 (\$638,565.57) Dollars, together with interest thereon, or such other sum as the Commission may determine to be proper as an award of reparation to remedy the unjust discrimination or unfairness between the Port of Boston and the Port of New York herein complained of."

In answering the Amended Complaints in the consolidated cases NYSA and the other Respondents raised as many as eight affirmative defenses in asking that the Complaints be dismissed. They are as follows:

1. The Commission lacks subject matter jurisdiction to entertain the amended complaint since the Master Contract is a maritime labor agreement exempt from regulation under the Act by virtue of the doctrine of labor exemption.
2. The Commission lacks jurisdiction to entertain the amended complaint since Respondent NYSA is not a person subject to the Act.
3. The Boston Shipping Association, Inc. ("BSA") is bound to the terms and provisions of the collectively bargained multi-employer Master Contract which was negotiated on its behalf by its representative, Respondent Council of North Atlantic Shipping Associations ("CONASA"). BSA's failure to resign from CONASA, withdraw from the multi-employer unit or otherwise disassociate itself from the Master Contract constitutes a waiver of any right BSA might have had to challenge the Master Contract. This collectively bargained accord constitutes a full and irrevocable settlement of the issues raised in the amended complaint.
4. Under the circumstances of this case, it would be inequitable and would not further the purposes of the Act to grant reparations or any other relief.
5. The amended complaint fails to state a claim on which relief may be granted.
6. The amended complaint is barred by the Statute of Limitations.
7. The amended complaint is barred by laches.
8. Complainant, BSA lacks standing to bring this action.

Further, SEFEPA raised three additional affirmative defenses stating:

1. The Amended Complaint fails to state a claim upon which relief can be granted because, among other reasons, (1) there is no relief requested against S.E.F.E.P.A., and (2) there is no privity between S.E.F.E.P.A. and the Complainant [sic].
2. The Complainant [sic] lacks standing to bring this action against S.E.F.E.P.A.

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3. The Commission lacks subject matter jurisdiction over this claim as it relates to S.E.F.E.P.A.

In addition to the affirmative defenses and the Motions to Dismiss the Complaints, NYSA has filed a Motion For Summary Judgment. It bases its motion on five of the affirmative defenses set forth in its Answer to the Amended Complaint as follows:

1. The challenged maritime labor agreement is exempt from shipping law challenge (NYSA's Answers to Amended Complaints, 1st Aff. Def.);
2. NYSA is not a person against whom reparations may be imposed (*Id.*, 2nd Aff. Def.);
3. The collectively bargained labor contract at issue constitutes a full waiver, accord and settlement (*Id.*, 3rd Aff. Def.);
4. The complaints are time barred (*Id.*, 6th and 7th Aff. Defs.); and
5. BSA has no standing to recover reparations in this case (*Id.*, 8th Aff. Def.).

As to the preliminary motions, it should be noted at the outset that given the nature of the consolidated cases, and the record being made in them, we were reluctant to rule on the Motions to Dismiss the Complaints and the Motion For Summary Judgment. It was clear that, while the interpretation and application of a new statute was involved, there were material facts in dispute as to each of the preliminary issues raised. It was equally clear that once the case was fully submitted, resolution of the issues on the merits would be both possible and practicable. For these reasons and within the ambit of the Commission's holding in *Pouch Terminal Inc. v. The Port Authority of New York and New Jersey, Agreement No. T-2880 As Amended*, Docket Nos. 74-35, 74-42, served 3/14/75, 14 S.R.R. 1567, we have until now declined to rule on the various preliminary motions. In *Pouch*, the Commission reversed a ruling which denied the Respondent's motions to dismiss because of lack of jurisdiction. It properly and succinctly stated:

. . . it is our opinion that the rulings . . . on the Port Authority's motion to dismiss was not only improvident but also premature at this stage of the proceeding. Uncertainties . . . and the question of section 15 jurisdiction should be resolved at a full hearing. Further, we find that a separate evidentiary hearing on jurisdiction would serve no regulatory purpose but might well cause unnecessary delays.

The Commission's perceptions in *Pouch* are equally applicable here. Even further, it is our view in light of the record before us, that the parties and the Commission will best be served by a decision on the merits. The issues raised on the merits overlap both factually and legally with many issues raised in the preliminary motions and the

decision on the merits makes rulings on the preliminary matters raised unnecessary.

With this background then, let us now consider the Motion For Summary Judgment,¹¹ as well as the motions to dismiss the complaints. As to the latter, it should be noted generally that according to applicable principles of law, motions to dismiss are to be construed against the moving party and in the light most favorable to the complainant. Movants for dismissal must accept facts alleged by the complainant as true for purposes of ruling on the motion, and the motion will not be granted unless it appears beyond doubt that complainant can prove no set of facts in support of his claim which would entitle him to relief. *Conley v. Gibson*, 355 U.S. 41 (1957); *Schenley Industries Inc. v. N. J. Wine & Spirit Whole. Ass'n*, 272 F. Supp. 872, 875-876 (D.N.J., 1967); *Continental Collieries v. Shober*, 130 F.2d 631, 635 (10 Cir., 1942); *Dewitt Motor Company v. Chrysler Motor Corporation*, 391 F.2d 912 (6 Cir., 1968). Further, motions to dismiss are granted sparingly in order to make sure that a complainant is not improperly denied an opportunity to prove his case and have his claim adjudicated on the merits. 5 Wright & Miller, *Federal Practice and Procedure*, § 1357, p. 598; *Hospital Building Company v. Trustees of Rex Hospital*, 511 F.2d 678, 680 (4 Cir., 1975). And finally, even if it appears unlikely that a complainant can prove his case, he is nevertheless entitled to try. *Continental Collieries, supra*.

As to the Motion For Summary Judgment, it is fundamental that a party seeking summary judgment must demonstrate the absence of genuine issues of material facts. *Poller v. Columbia Broadcasting System, Inc.*, 368 U.S. 464 (1962); *Isbrandtsen Co., Inc. v. State Marine Corp. of Delaware*, 4 FMB 511, 513 (1954), citing *Welling v. Fairmont Creamery Co.*, 139 F.2d 318 (8th Cir., 1943). It is also fundamental that in considering motions for summary judgment, courts will construe materials submitted by movants in the light most favorable to the parties opposing the motion. *Dewitt Motor Company, supra*. Also, argument can be made that the Commission does not have authority to decide such motions in the first instance based on the holding in *Isbrandtsen* (4 FMC 511), *supra*.¹²

In applying the above principles and considerations to the instant case, it is clear that the Motions to Dismiss the Complaints and the Motion for Summary Judgment must be denied. In its Motion for

¹¹ The arguments presented by NYSA are similar to or have been adopted by other Respondents in presenting their affirmative defenses and motions to dismiss the complaints. Unless it is otherwise stated, the treatment of the NYSA arguments will also be applicable to the defenses raised and the motions made by the other Respondents.

¹² One law review article implies that a summary judgment procedure is lacking in the Commission's rules except for show cause proceedings. *Gellhorn & Robinson*, Summary Judgment in Administrative Adjudication, 84 Harv. L. Rev. 612, n. 51 (1971).

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Summary Judgment, NYSA asserts that the “challenged maritime labor agreement is exempt from shipping law challenge” and that, therefore, the Commission has no jurisdiction over the agreement. NYSA predicates its case for summary judgment on the assertion that “The material facts germane to the adjudication of NYSA’s affirmative defenses are well established and undisputed.” It cites the testimony of James J. Dickman and Thomas W. Gleason as establishing those “undisputed” facts. While the cited testimony is informative and compelling, it is hardly undisputed. There are clear differences in the facts testified to by the witnesses and those advanced by the Complainant. They disagree as to whether or not the Rule 10 assessment was to fund fringe benefits. They differ on whether or not NYSA “dominated” the labor negotiations; on whether or not Rule 10 is “the only sound, fair, and workable rule”; on whether or not it equitably apportions the container royalty equally between dockworkers; on whether or not Rule 10 discriminates against the Port of Boston. In short, there are many factual differences which defeat the preliminary motions on the basis of the labor exemption and jurisdiction. Further, even if facts were not in dispute, the legal arguments made to support the motions either under the statutory exemption provided by the MLAA or the nonstatutory exemption set forth in *United Stevedoring Corp. v. Boston Shipping Ass’n (BSA)*, 16 FMC 7 (report on remand, 1972), are far from conclusive. Certainly, they are too important and too susceptible of varying interpretations to be disposed of by summary judgment or motions to dismiss.

As to the other preliminary matters raised by the Respondents (NYSA is not a person against whom reparations may be imposed; BSA has waived its rights with respect to Rule 10; the Complaints are barred by the statute of limitations; BSA has no standing; it would be inequitable to grant relief; the Complaints fail to state a claim on which relief may be granted; the Complaints are barred by laches; certain Respondents are improperly joined because there is no relief requested specifically from them or privity to them or jurisdiction over them)—all of these issues are such that they either were not fully developed factually at the time they were made or they were legally insufficient. In any event, it is our view that they need not be addressed individually and at length at this time. The decision on the merits will finally dispose of the ultimate issues involved and will make any long dissertation on the preliminary motions unnecessary. In addition, as will be evident in latter portions of this decision, some of the issues discussed in arriving at a decision on the merits would necessarily have been discussed and decided in ruling on the motions.

As to the determination on the merits of the issues involved, we have already noted the precise nature of each of the Complaints. At this point, it would be well to recall that Docket No. 81-31 involves a

Master Contract that was effective from October 1, 1977, through and including September 30, 1980, and that it does not involve a contract or any conduct executed or engaged in prior to the enactment of the MLAA,¹³ and therefore the claim for reparation is governed by prior law. In Docket No. 81-30, the Complaint is brought specifically under the MLAA and seeks "assessment adjustments" under that Act and revocation of Rule 10. It involves a Master Contract that is effective from October 1, 1980, through September 30, 1983.

In its original brief, the Complainant allocates 45 of the 50 pages in its brief to refuting the affirmative defenses raised by the Respondents. We have already indicated we intend to deny all the preliminary motions and move on to the merits. However, the question of jurisdiction does cut across the issues raised on the merits so that some discussion of that issue is warranted. In its briefs, NYSA asserts generally that, "The first port rule is entitled to the labor exemption of the shipping laws." It seeks to support that argument by establishing that the first port rule is not an "assessment agreement" within the meaning of the MLAA because it is not "an assessment mechanism or formula" and does not allocate or apportion costs among shipping employers—"the essential element of an assessment agreement" (emphasis supplied). It cites language from the Senate Committee Report on the MLAA as well as certain case law to support its view.¹⁴ NYSA also argues that the first port rule does not fund fringe benefits. It states "Container royalties are not fringe benefits" and that "the distribution of the royalties to the union members does not convert the royalty into a fringe benefit." It argues that "the supplemental income payments attributable to the 1960 dollar and the 1977 dollar of the First Container Royalty" are "an intraunion distribution of the royalties or licensing fees collected by the ILA." As to the 1971 Second Container Royalty dollar, it states that its use "to defray fringe benefit costs does not convert the royalty into a fringe benefit funding mechanism." In its original brief, NYSA then argues that even under the nonstatutory exemption set forth in *United Stevedoring Corp. v. Boston Shipping Ass'n (BSA)*, *supra*, the first port rule is exempt from Commission jurisdiction. It states that MLAA's statutory exemption is a codification of the preexisting nonstatutory exemption.¹⁵

¹³ Under section 6 of Public Law 96-325 (*supra*, fn. 9), the reparations requested in the Complaint would not be governed by the provisions of the MLAA, and prior law would govern. Since Docket No. 81-31 was begun after enactment of the MLAA, a question does arise as to whether or not relief requested other than reparations comes within the ambit of the MLAA or prior law. It is not necessary to make a determination on the issue in these cases.

¹⁴ See page 11 of NYSA's Brief in Support of Summary Judgment and page 36 of NYSA's original brief.

¹⁵ The four guidelines patterned after the "nonstatutory labor exemption" from the antitrust laws are:

Continued

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The BSA, in its original brief, argues that the Commission does have jurisdiction over the Master Contracts at issue. It cites *Volkswagenwerk, supra*, and *Federal Maritime Commission v. Pacific Maritime Association*, 435 U.S. 40 (1978), in support of its position. The Complainant asserts that, "The only question therefore is whether the Maritime Labor Agreements Act of 1980 ('MLAA of 1980') amended then existing law to remove Commission jurisdiction over maritime labor agreements."¹⁶ As to whether or not the agreements involved were assessment agreements, BSA cites *Volkswagenwerk, supra*, and *New York Shipping Ass'n v. Federal Maritime Commission*, 495 F.2d 1215 (2d cir.) *cert. denied*, 419 U.S. 964 (1974). It alleges that the latter case involves the 1971 assessment agreement and that it was incorporated in the actual maritime labor agreement.

With respect to fringe benefits, BSA rejects NYSA's distinction between the "container royalty" fund and "other fringe benefit funds" administered in the Port of New York. It cites the language of the agreements involved, the purpose of the agreements (to offset the effects of technological job displacement caused by containerization), and the language of the Senate Report to the MLAA in support of its views.

At this point, we think the overlap between the jurisdictional aspect of the issues involved and their disposition on a merit basis is clear. It is equally clear that even when one rejects the jurisdictional arguments and proceeds to the merits, the resolution of issues does not become any easier. For example, as to the question of whether or not Rule 10 comes under the definition of an "assessment agreement" as used in the MLAA, one is hard-pressed to accept NYSA's argument that Rule 10 was not an assessment agreement because it is not a "formula" that allocates costs between shipping employers. The language of the MLAA that amended the Shipping Act, 1916, suggests otherwise.¹⁷ It provides that, "assessment agreements, *whether part of a collective bargaining agreement or negotiated separately*, are subject to Commission jurisdiction, if they are to fund fringe benefits on other than a man-hour basis" (section 15, paragraph 5). In defining a maritime labor agreement which would include a nonexempt assessment agreement, the MLAA does not limit agreements to those between shipping employers (FF, par. 59).

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- (1) the agreement was bargained in good faith;
 - (2) the matter is a mandatory subject of bargaining;
 - (3) the agreement does not impose terms on entities outside the collective bargaining group;
 - (4) the union is acting purely in its own self-interest and not in conspiracy with management.

¹⁶ This statement seems to ignore the fact that at least insofar as Docket No. 81-31 is concerned, the MLAA would not apply to reparations and perhaps to certain other aspects of the relief requested.

¹⁷ See also the Senate Report No. 96-854 on the MLAA (BX 4, page 4507).

As to the argument that the agreement was not to fund fringe benefits, once again NYSA's position is not easy to accept. The express language of the Master Contract, after discussing the 1960 and 1977 container royalties, states, "The remaining royalty payment effective in 1971, also shall be continued and shall be used for fringe benefit purposes only, other than the supplemental cash benefit . . ." (emphasis supplied). No matter how NYSA seeks to obviate this language by separating the language used in the agreement itself and its signatories from the direct payment of fringe benefits, certainly as to the 1971 royalty payment at least, the payments were used to fund fringe benefits.

As we move from the specifics of these cases to the MLAA generally, the issues become even more beclouded. When H.R. 6613, which ultimately became the MLAA, was originally passed by the House of Representatives, it exempted *all* "collective bargaining agreements and agreements preparatory thereto" from all Shipping Act regulation (Senate hearings, BX 4, page 4503). This meant that not only were such agreements exempt from section 15, but that they were exempt from all other sections of the Shipping Act. (See the colloquy between Vice-Chairman Moakley and Mr. Seifert, BX 2, page 14.) However, on June 4, 1980, the Merchant Marine Subcommittee of the Senate Committee on Commerce, Science held hearings where witnesses testified the House bill went "beyond what was necessary to assure free and unfettered collective bargaining, and that it stripped the FMC of jurisdiction to assure equal treatment of shippers, cargo, and localities, and to prevent abuses made possible by one concerted activity of carriers and others." On June 16, the Senate Committee released a staff draft of an amendment in the nature of a substitute to H.R. 6613. After comments of interested parties, the amendment was adopted and ultimately enacted into law. Instead of exempting all maritime labor agreements, it exempted all such agreements *except* for agreements or arrangements for the funding of collectively bargained fringe benefits on other than a uniform, full man-hour basis arrived at without regard to the cargo handled. The MLAA also made it clear that the exemption granted would not affect the ability of the Commission to exercise authority over matters which are properly the subject of tariffs required to be filed with the agency whether or not those matters arise out of a maritime labor agreement.¹⁸

So here, whatever the original intent of Congress may have been, it ultimately rejected the idea that *all* maritime labor agreements were exempt from the shipping laws, simply because they were part of a

¹⁸ None of the parties herein have even raised, much less discussed, the issues involved in the light of the tariff requirement set forth in the second sentence of the new section 45 of the Shipping Act, 1916. While the decision on the merits will make such discussion unnecessary, it would be pertinent to the Respondents' preliminary motions considering the burden of proof that is theirs.

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labor agreement. It engrafted certain exceptions and qualifications in the MLAA which beg clarification and definition. It did not, as NYSA alleges, "codify" the preexisting nonstatutory exemption set forth in *United Stevedoring Corp. v. BSA, supra*. Whether or not and to what extent BSA is still applicable to maritime labor agreements, there is nothing in the MLAA which could lead one to conclude that it "codifies" the BSA exemption.

Finally, we come to the ultimate question presented in these cases. Assuming that all preliminary matters are resolved in the Complainant's favor and assuming further that Rule 10 of the Master Contract involved here is an assessment agreement for the funding of collectively bargained fringe benefits on other than a uniform, full man-hour basis—how does the agreement violate any of the shipping laws cited by the Complainant? We think the evidentiary record and legal argument fails to establish any violation whatsoever, and that the Complainant has failed to sustain his burden of proof.¹⁹ In its original brief, BSA offers no real legal argument, nor does it cite one case in support of any specific assertion of any shipping law violation. Practically all of its arguments are concerned with preliminary matters. As to facts, it requests findings of 12 facts. It asks that NYSA be found to have "dominated" the various employer negotiating representatives and to have effectively controlled the course of negotiations leading to the formation of Master Contracts with the ILA. It then notes that in recent years, transshipments of cargo destined for Boston have been made from New York and that the cargo was "first handled" by New York longshoremen who received the container royalty. BSA then sets forth the "amount of container royalty revenue diverted to New York and lost to the Port of Boston." It asks that we find that the application of Rule 10 to the transshipped cargo forced BSA "to continue collection of an additional assessment on cargo moving through the Port of Boston (the Boston dollar) in order to maintain the actuarial soundness of fringe benefit funds that it administers." BSA then concludes that Rule 10 assessments are therefore "unjustly discriminatory and unfair as between carriers, shippers and ports, operate to the detriment of the commerce of the United States and violate Section 15, 16, 17 and 18 of the Shipping Act as amended 46 U.S.C. §§ 814-817, Section 8 of the Merchant Marine Act of 1920 as amended, 46 U.S.C. §§ 867, and Section 205 of the Merchant Marine Act of 1936 as amended, 46 U.S.C. §§ 1115."

We think the pivotal facts requested by the Complainant are unsupported in the record. The record hardly supports the view that NYSA

¹⁹ *West Gulf Maritime Ass'n v. Port of Boston Authority*, Docket No. 75-21, slip op. at 8 (FMC, 1978); *Household Goods Forwarders Ass'n v. American Export Lines*, 20 FMC 496 (1978); *In re States Steamship Co.*, 5 FMB 304 (1957).

was as "dominant" as BSA suggests. Since New York is the largest U.S. port, certainly NYSA is a leader and its actions are often followed. However, the evidence is clear and we have found as fact that others were free to adopt or depart from NYSA's position and they often did (FF, pars. 20-25). NYSA itself withdrew from CONASA in 1977 when it could not bring CONASA members around to its point of view. So here, BSA is incorrect in its description of NYSA. Even if it were correct, however, that fact would add little to its case. This is so because NYSA "domination," standing alone, is unavailing and there is nothing in the record to even suggest that NYSA did anything improper during the negotiation of the Master Contracts involved. BSA suggests that "Rule 10 is particularly subject to NYSA's domination because the ILA is indifferent as to the competitive position among employers as long as the various fringe benefit funds are being funded" (Complainant's original brief, page 38). We find nothing in the record to support such an assumption. Indeed, the opposite seems true.

As to the BSA assertion that the application of Rule 10 causes the continuation of the "Boston Dollar" assessment to maintain the actuarial soundness of the BSA-ILA Pension Fund, once again facts are wanting. BSA makes no real attempt to factually demonstrate that the claimed unavailability of funds causes continuation of the "Boston Dollar." Such a showing would seem essential to BSA's argument since the "Boston Dollar" was initiated in 1971, many years prior to the expansion of the feeder service. Further, it presents no evidence as to what monies would be necessary to maintain "actuarial soundness," or evidence that present revenues are lacking, or that Rule 10 container royalties paid to New York on import feeder cargo would meet any shortage, or that if the above container royalties were paid to Boston, the assessment of the "Boston Dollar" would be discontinued.²⁰ Once again, even if BSA did factually support its argument, a question would still remain as to whether or not the viability of the BSA-ILA pension fund is a proper maritime issue requiring FMC consideration.

As to BSA's assertion that the continuation of the "Boston Dollar" places the Port of Boston at a competitive disadvantage, once again BSA has failed in its burden. There are no factual comparisons with competing ports, such as overall labor costs, so that it is impossible to determine whether or not Boston is at a competitive disadvantage. There is no conclusive testimonial evidence from carriers, shippers or other competent witnesses that the additional "Boston Dollar" is a significant competitive factor.

²⁰ The evidence shows that BSA-ILA fringe benefit funds and particularly the pension fund are healthy and have enjoyed increases in fund balances. Even without the "Boston Dollar," the pension fund has increased 55 percent in the past four years (FF par. 53).

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Finally, as to the claim that competitive disadvantage causes a diversion of cargo from Boston to other competing ports, the record again is devoid of persuasive facts supporting such a claim. While BSA presents evidence showing a decrease in Boston cargo volume in the fiscal year ending September 30, 1981, there is no factual development to show that the decrease is attributable solely and exclusively to the diversion of cargo to other ports. There is no showing that while Boston's volume was decreasing, other competing ports were enjoying corresponding increases. Indeed, there is no showing that the decrease was not the result of factors completely unrelated to cost induced diversion, such as the effect of minibridge on East Coast ports (BX 5 at 16), the effect of the growing Canadian service provided by CAST (NX 48 at 170), or other factors, such as general recessionary conditions in the maritime industry and the proliferation of intermodal tariffs.

From all of the above, we believe the picture presented in these cases is clear. The history of the labor negotiations involved is undisputed. The record is replete with statements describing their origin and evolution. It is also undisputed that Rule 10 was the result of ILA's concern regarding the effect containerization would have on its members. The rule sprung from legitimate labor negotiations, which initially resulted in arbitration and advanced to the point where the rule was included in progressive and far-reaching labor negotiations on a national scale. At its inception in 1961 and well into the 1970's, no one complained about the rule. The requirement that the assessment it made be paid in the "first port" where ILA labor handled the cargo was accepted by all as a reasonable method of collection. Indeed, local ports, and in particular Boston, included it in their local labor contracts. It was not until the transshipment service in New York began to grow that BSA realized the implications and effect of Rule 10. It meant that cargo destined for Boston but transshipped from New York would generate a Rule 10 payment to New York and not Boston. As the transshipment service grew, BSA saw the disadvantage Rule 10 worked against Boston. In seeking to redress that disadvantage by invoking the shipping laws, BSA has failed in its burden, as we have already noted. It asks that Rule 10 be modified so that the port of destination be determinative of where the assessment is paid rather than the first port, and that it be allowed reparations or given relief under the MLAA for amounts "diverted" from Boston to New York as a result of Rule 10.

One need only consider the effect of granting the relief BSA requests to know that it is unwarranted. Were we to change Rule 10 as BSA suggests, what would be accomplished? Certainly, BSA would have more money to fund fringe benefit programs, but what would be the effect on other ports? If the transshipment service is a viable service in the industry—and there is no showing that it is not—why is it any fairer to give Boston longshoremen the Rule 10 dollar than New York longshoremen? The latter must handle the cargo off the vessel and onto

the barge, so should they not be recompensed? Further, if Rule 10 were changed to accommodate Boston, what would be the effect on other ports who do not want the change? Would the new rule apply to all other ports or would there be a different rule on a port-to-port basis? Since the real cause of BSA's complaint is the effect of import feeder services, any attempt by the Commission to modify the first port rule to accommodate the Port of Boston would necessarily involve the Commission on a continuing basis. If external conditions changed in Boston or other ports, the rule would have to be revised, perhaps even returned to its original posture.

It seems clear to us that on this record BSA cannot sustain its position because Rule 10 simply does not constitute an unjustified competitive practice. While it may contain "the potential for interport discrimination," as the Complainant suggests (Complainant's Reply Brief, page 6)—that fact standing alone, its extent undefined, is hardly sufficient reason for us to intrude on the provision of a labor agreement, unobjectionable on its face, where the alleged injury is both factually and legally insufficient to establish any violation of the shipping laws.

In view of the above, we hold that Rule 10, as set forth in the Master Contracts in Docket Nos. 81-30 and 81-31, respectively, does not operate so as to violate sections 15, 16, 17 and 18 of the Shipping Act, 1916, section 8 of the Merchant Marine Act, 1920, and section 205 of the Merchant Marine Act of 1936. Therefore, the relief requested in both consolidated proceedings under the MLAA and section 22 of the Shipping Act is hereby denied. It is further held that all preliminary motions of the Respondents, including Motions For Summary Judgment and the Motion to Dismiss the Complaint are hereby denied.²¹

(S) JOSEPH N. INGOLIA

Administrative Law Judge

²¹ We believe we would be remiss if, before closing, we did not make certain comments which, although not absolutely necessary to the decision made here, nevertheless may be of aid to these parties and others who may be similarly situated in the future. A reading of the history of MLAA given to the Congress by various witnesses indicates that neither the unions affected nor the Commission believes provisions of labor contracts ought generally to be subject to section 15 of the Shipping Act. As to other shipping law provisions (sections 15, 16 and 17, for example), witnesses disagreed and the MLAA was enacted with something less than an absolute exemption. On the basis of a reading of the record, we would suggest that where, as here, an issue is presented which does not involve a complicated assessment formula between carriers or types of cargo, but rather a simple, definitive, one-time assessment on all cargo, and where the issue is really a dispute between union interests in different ports—the parties themselves might well be able to negotiate the issue out of the labor agreement. This is so especially where that agreement is the result of nationwide bargaining. Such action would insure that the Commission would not need to become involved and would avoid the kind of result which, while deciding the rights of the litigants, does not finally dispose of the problem. Here, for example, the Complainant lost because it failed in its burden. However, should it perfect its case, the issue would again arise. We believe it might have been better for all concerned if the parties could have jointly assessed the effect of Rule 10 in an atmosphere of negotiation and cooperation, marshalled the facts, and reached an accommodation if one were warranted.

FEDERAL MARITIME COMMISSION

INFORMAL DOCKET NO. 1120(I)
SINGER PRODUCTS CO., INC.

v.

DELTA STEAMSHIP LINES, INC.

ORDER ON RECONSIDERATION

June 24, 1982

This proceeding is before the Commission upon receipt of a letter dated April 13, 1982 from Singer Products Co., Inc. constituting in effect a request for reconsideration of the Commission's April 7, 1982 Order reversing the Settlement Officer's award of reparations. In support of its request, Singer submits copies of documents already in the record.

Rule 261 of the Commission's Rules of Practice and Procedure provides that a petition for reconsideration will be summarily rejected unless it

- (1) specifies that there has been a change in material fact or in applicable law, which change has occurred after issuance of the decision or order;
- (2) identifies a substantive error in material fact contained in the decision or order; or
- (3) addresses a finding, conclusion or other matter upon which the party has not previously had the opportunity to comment or which was not addressed in the briefs or arguments of any party.

46 C.F.R. 502.261(a). Singer's petition is merely a reargument and resubmission of evidence which the Commission has already concluded is inadequate. Because it fails to meet any of the criteria of Rule 261, Singer's request must be rejected.*

* Singer does allege a factual error in that the Commission noted at page 5 of its Order that there was an inconsistency in Singer's submissions: the packing slips refer to 78 pallets but the packing list indicates 77. The confusion derives from the fact that, intending to submit packing slips in Informal Docket No. 1120(I), Singer supplied packing slips for Informal Docket No. 1126(I), the latter involving 78 pallets. This error was reinforced in Singer's cover letter specifying that the slips cover "the 78 Pallets in question." Thus, the alleged "error" in the Commission's Order was of Singer's own making. The matter now having been clarified, however, we find that the "error" in question is of minor significance, is not critical to the disposition of this proceeding, and does not constitute a substantive error in material fact within the meaning of 46 C.F.R. 502.261 (a)(2).

THEREFORE, IT IS ORDERED, That the Petition for Reconsideration of Singer Products Co., Inc. is denied; and
IT IS FURTHER ORDERED, That this proceeding is discontinued.

By the Commission.**

(S) FRANCIS C. HURNEY
Secretary

Commissioner Richard J. Daschbach's separate opinion.

I am not participating because I do not believe that the Commission should review the decisions of Settlement Officers in informal docket proceedings. Under Subpart S of the Commission's Rules of Practice and Procedure (46 C.F.R. 502.301), parties consent to waive the rights and obligations associated with normal adjudicatory proceedings for the express purpose of receiving prompt consideration of a small claim. Commission review precludes the inexpensive and expeditious handling of small claims which is the foundation of the informal docket process. The Settlement Officer's decisions in informal dockets do not have precedential value. Commission review therefore imposes unnecessary expense and delay in an arbitration process designed to settle minor commercial disputes in a prompt and responsive manner.

** Commissioner James V. Day did not participate. Commissioner Daschbach's separate opinion is attached.

FEDERAL MARITIME COMMISSION

INFORMAL DOCKET NO. 1126(1)

SINGER PRODUCTS CO., INC.

v.

DELTA STEAMSHIP LINES, INC.

ORDER ON RECONSIDERATION

June 24, 1982

This proceeding is before the Commission upon receipt of a letter dated May 5, 1982 from Singer Products Co., Inc. constituting in effect a request for reconsideration of the Commission's April 27, 1982 Order reversing the Settlement Officer's partial award of reparations. In support of its request, Singer submits copies of several documents either already in the record or imparting information already considered by the Settlement Officer and the Commission.

Rule 261 of the Commission's Rules of Practice and Procedure provides that a petition for reconsideration will be summarily rejected unless it

- (1) specifies that there has been a change in material fact or in applicable law, which change has occurred after issuance of the decision or order;
- (2) identifies a substantive error in material fact contained in the decision or order; or
- (3) addresses a finding, conclusion or other matter upon which the party has not previously had the opportunity to comment or which was not addressed in the briefs or arguments of any party.

46 C.F.R. 502.261(a). Singer's petition is merely a reargument and resubmission of evidence which the Commission has already concluded is inadequate. Because it fails to meet any of the criteria of Rule 261, Singer's request must be rejected.*

THEREFORE, IT IS ORDERED, That the Petition for Reconsideration of Singer Products Co., Inc. is denied; and

* Singer also objects for the first time to the Settlement Officer's decision not to award all the reparations sought in Singer's original complaint. If Singer intends its letter to constitute a petition for reconsideration of the Settlement Officer's February 8, 1982 decision, then it must be denied as untimely. See 46 C.F.R. 502.261(a).

IT IS FURTHER ORDERED, That this proceeding is discontinued.

By the Commission.**

(S) FRANCIS C. HURNEY
Secretary

Commissioner Richard J. Daschbach's separate opinion.

I am not participating because I do not believe that the Commission should review the decisions of Settlement Officers in informal docket proceedings. Under Subpart S of the Commission's Rules of Practice and Procedure (46 C.F.R. 502.301), parties consent to waive the rights and obligations associated with normal adjudicatory proceedings for the express purpose of receiving prompt consideration of a small claim. Commission review precludes the inexpensive and expeditious handling of small claims which is the foundation of the informal docket process. The Settlement Officer's decisions in informal dockets do not have precedential value. Commission review therefore imposes unnecessary expense and delay in an arbitration process designed to settle minor commercial disputes in a prompt and responsive manner.

** Commissioner Richard J. Daschbach's separate opinion is attached.